



Date and Time: Wednesday, September 27, 2023 1:47:00 PM CST

Job Number: 206716383

Documents (100)

1. [Level I Sportswear, Inc. v. Chaikin, 1983 U.S. Dist. LEXIS 19799](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

2. [Barry Wright Corp. v. Pacific Scientific Corp., 555 F. Supp. 1264](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

3. [General Business Systems v. North American Philips Corp., 699 F.2d 965](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

4. [Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

5. [JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc., 698 F.2d 1011](#)

Client/Matter: -None-

Search Terms: "antitrust law"



Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

6. [Nesglo, Inc. v. Chase Manhattan Bank, N.A., 562 F. Supp. 1029](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

7. [Lee v. Cercoa, 433 So. 2d 1](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

8. [Suburban Restoration Co. v. ACMAT Corp., 700 F.2d 98](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

9. [Honolulu v. Hawaii Newspaper Agency, Inc., 559 F. Supp. 1021](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

10. [Transamerica Computer Co. v. International Business Machines Corp., 698 F.2d 1377](#)

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, 1978 to Dec 31, 2022
11. <u>Hallie v. Eau Claire, 700 F.2d 376</u>	
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, 1978 to Dec 31, 2022
12. <u>Associated General Contractors v. Cal. State Council of Carpenters, 459 U.S. 519</u>	
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, 1978 to Dec 31, 2022
13. <u>Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534</u>	
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, 1978 to Dec 31, 2022
14. <u>Danou v. Kroger Co., 557 F. Supp. 1266</u>	
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, 1978 to Dec 31, 2022
15. <u>Konik v. Champlain Valley Physicians Hosp. Medical Ctr., 561 F. Supp. 700</u>	
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, 1978 to Dec 31, 2022

16. [Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

17. [Tom Lazio Fish Co. v. Castle & Cooke, Inc., 557 F. Supp. 559](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

18. [Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau, 701 F.2d 1276](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

19. [DEAK-PERERA HAWAII, INC. v. DOT, 1983 U.S. Dist. LEXIS 18754](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

20. [People v. Automotive Service Councils, Inc., 123 Mich. App. 774](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

21. [Laker Airways, Ltd. v. Pan American World Airways, 559 F. Supp. 1124](#)



Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

22. [Lease Lights, Inc. v. Public Service Co., 701 F.2d 794](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

23. [Rural Electric Co. v. Cheyenne Light, Fuel & Power Co., 602 F. Supp. 105](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

24. [Bostick Oil Co. v. Michelin Tire Corp., Commercial Div., 702 F.2d 1207](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

25. [L.A. Draper & Son, Inc. v. Wheelabrator-Frye, Inc., 560 F. Supp. 1138](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

26. [Affiliated Capital Corp. v. Houston, 700 F.2d 226](#)

Client/Matter: -None-

Search Terms: "antitrust law"



Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

27. [Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc., 704 F.2d 125](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

28. [Smith v. Northern Mich. Hosps., 703 F.2d 942](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

29. [M & H Tire Co. v. Hoosier Racing Tire Corp., 560 F. Supp. 591](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

30. [Chipanno v. Champion International Corp., 702 F.2d 827](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

31. [Charley's Taxi Radio Dispatch Corp. v. Sida of Hawaii, Inc., 562 F. Supp. 712](#)

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, 1978 to Dec 31, 2022
32. <u>In re Mid-Atlantic Toyota Antitrust Litigation, 560 F. Supp. 760</u>	
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, 1978 to Dec 31, 2022
33. <u>Dart Industries, Inc. v. Plunkett Co. of Oklahoma, Inc., 704 F.2d 496</u>	
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, 1978 to Dec 31, 2022
34. <u>Schacht v. Brown, 711 F.2d 1343</u>	
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, 1978 to Dec 31, 2022
35. <u>United States v. Southern Motor Carriers Rate Conference, 702 F.2d 532</u>	
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, 1978 to Dec 31, 2022
36. <u>United States v. Missouri Valley Constr. Co., 704 F.2d 1026</u>	
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, 1978 to Dec 31, 2022

37. [CARTER-WALLACE, INC. v. HARTZ MT. INDUS., 1983 U.S. Dist. LEXIS 17768](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

38. [AB Iro v. Otex, Inc., 566 F. Supp. 419](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

39. [Committee for Independent P-I v. Hearst Corp., 704 F.2d 467](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

40. [Interface Group, Inc. v. Gordon Publications, Inc., 562 F. Supp. 1235](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

41. [U. S. Audio & Copy Corp. v. Philips Business Systems, Inc., 1983 U.S. Dist. LEXIS 17440](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

42. [Walker v. Bruno's, Inc., 650 S.W.2d 357](#)



Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

43. [Gold Cross Ambulance & Transfer v. Kansas City, 705 F.2d 1005](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

44. [MLC, Inc. v. North American Philips Corp., 1983 U.S. Dist. LEXIS 17230](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

45. [Vial v. First Commerce Corp., 1983 U.S. Dist. LEXIS 17195](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

46. [J.T. Gibbons, Inc. v. Crawford Fitting Co., 704 F.2d 787](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

47. [Kimmel v. Peterson, 565 F. Supp. 476](#)

Client/Matter: -None-

Search Terms: "antitrust law"



Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

48. [In re Fertilizer Antitrust Litigation, 1983 U.S. Dist. LEXIS 17042](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

49. [Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

50. [Board of Regents v. National Collegiate Athletic Asso., 707 F.2d 1147](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

51. [Hayden Pub. Co. v. Cox Broadcasting Corp., 566 F. Supp. 503](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

52. [In re Petroleum Products Antitrust Litigation, 1983 U.S. Dist. LEXIS 16687](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:



Content Type

Cases

Narrowed byPractice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 202253. [*Stearns v. Genrad, Inc., 564 F. Supp. 1309*](#)**Client/Matter:** -None-**Search Terms:** "antitrust law"**Search Type:** Natural Language**Narrowed by:****Content Type**

Cases

Narrowed byPractice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 202254. [*In re Mid-Atlantic Toyota Antitrust Litigation, 564 F. Supp. 1379*](#)**Client/Matter:** -None-**Search Terms:** "antitrust law"**Search Type:** Natural Language**Narrowed by:****Content Type**

Cases

Narrowed byPractice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 202255. [*Broad. Music v. T & D Enters., 1983 U.S. Dist. LEXIS 16522*](#)**Client/Matter:** -None-**Search Terms:** "antitrust law"**Search Type:** Natural Language**Narrowed by:****Content Type**

Cases

Narrowed byPractice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 202256. [*Frontier Title Co. v. Chi. Title Ins. Co., 1983 U.S. Dist. LEXIS 20396*](#)**Client/Matter:** -None-**Search Terms:** "antitrust law"**Search Type:** Natural Language**Narrowed by:****Content Type**

Cases

Narrowed byPractice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 202257. [*Furlong v. Long Island College Hospital, 710 F.2d 922*](#)**Client/Matter:** -None-**Search Terms:** "antitrust law"**Search Type:** Natural Language**Narrowed by:****Content Type**

Cases

Narrowed byPractice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

58. [Sun Newspapers, Inc. v. Omaha World-Herald Co., 1983 U.S. Dist. LEXIS 16258](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

59. [Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc., 710 F.2d 87](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

60. [Scott v. Sioux City, 1983 U.S. Dist. LEXIS 16160](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

61. [Lotter v. Collagen Corp., 115 Ill. App. 3d 696](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

62. [Pinney Dock & Transp. Co. v. Penn Cent. Corp., 600 F. Supp. 859](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

63. [Lamoille v. R. Co., 711 F.2d 295](#)



Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

64. [Feather v. United Mine Workers, 711 F.2d 530](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

65. [FTC v. Manufacturers Hanover Consumer Services, Inc., 567 F. Supp. 992](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

66. [Indus. Siderurgica v. Thyssen Steel Caribbean, 114 D.P.R. 548](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

67. [In re Indus. Gas Antitrust Litig., 100 F.R.D. 280](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

68. [Altemose Constr. Co. v. Building & Constr. Trades Council of Philadelphia & Vicinity, 1983 U.S. Dist. LEXIS 15697](#)

Client/Matter: -None-



Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

69. [Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

70. [Colorado High School Activities Asso. v. National Football League, 711 F.2d 943](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

71. [United States v. W. Elec. Co., 569 F. Supp. 1057](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

72. [Aydin Corp. v. Loral Corp., 718 F.2d 897](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

73. [Deauville Corp. v. Federated Dep't Stores, Inc., 1983 U.S. Dist. LEXIS 15534](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language



Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

74. [Texas v. Scott & Fetzer Co., 709 F.2d 1024](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

75. [Slattery v. Costello, 586 F. Supp. 162](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

76. [Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

77. [Jet Courier Services, Inc. v. Federal Reserve Bank, 713 F.2d 1221](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

78. [Custom Auto Body, Inc. v. Aetna Casualty & Surety Co., 1983 U.S. Dist. LEXIS 14941](#)

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, 1978 to Dec 31, 2022

79. [Trident Neuro-Imaging Laboratory v. Blue Cross & Blue Shield, Inc., 568 F. Supp. 1474](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

80. [Fairdale Farms, Inc. v. Yankee Milk, Inc., 715 F.2d 30](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

81. [First American Title Co. v. South Dakota Land Title Asso., 714 F.2d 1439](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

82. [Shafer v. Bulk Petroleum Corp., 569 F. Supp. 621](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

83. [Stevens v. Zenith Distributing Corp., 568 F. Supp. 1200](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022



84. [Macmanus v. A. E. Realty Partners, 146 Cal. App. 3d 275](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

85. [Mission Hills Condominium Asso. M-1 v. Corley, 570 F. Supp. 453](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

86. [Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

87. [Bally Midway Mfg. Co. v. American Postage Mach., 1983 U.S. Dist. LEXIS 14334](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

88. [Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, 716 F.2d 245](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

89. [Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419](#)

Client/Matter: -None-



Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

90. [Johnson v. Nationwide Industries, Inc., 715 F.2d 1233](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

91. [Partee v. San Diego Chargers Football Co., 34 Cal. 3d 378](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

92. [Ellwood City v. Pennsylvania Power Co., 570 F. Supp. 553](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

93. [Feinstein v. Nettleship Co. of Los Angeles, 714 F.2d 928](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

94. [Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 1983 U.S. Dist. LEXIS 14113](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language



Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

95. [Mid-West Underground Storage, Inc. v. Porter, 717 F.2d 493](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

96. [Zoecon Industries, Div. of Zoecon Corp. v. American Stockman Tag Co., 713 F.2d 1174](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

97. [In re Department of Energy Stripper Well Exemption Litig., 578 F. Supp. 586](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

98. [R.D. Andersen Constr. Co. v. Hankamer Ready-Mix Concrete Co., 1983 U.S. Dist. LEXIS 13822](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022

99. [Ralston v. Capper, 569 F. Supp. 1575](#)

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, 1978 to Dec 31, 2022

100. [Wilk v. American Medical Asso., 719 F.2d 207](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type

Cases

Narrowed by

Practice Areas & Topics: Antitrust & Trade Law; Timeline:
Jan 01, 1978 to Dec 31, 2022





Level I Sportswear, Inc. v. Chaikin

United States District Court for the Southern District of New York.

January 25, 1983

No. 81 Civ. 7407.

Reporter

1983 U.S. Dist. LEXIS 19799 *; 99 Lab. Cas. (CCH) P10,646; 1982-83 Trade Cas. (CCH) P65,168

Level I Sportswear, Inc., and Hartfree Group, Ltd. v. Sol C. Chaikin, et al.

Core Terms

retailer, boycott, alleges, per se violation, anti trust law, rule of reason, counterclaim, horizontal, monopolize, motion to dismiss, Sherman Act, certification, competitors, conspiracy, sportswear, defendants', antitrust, employees, damages

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

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

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

HN1 [down arrow] Collectives & Cooperatives, Clayton Act

Section 4 of the Clayton Act, 15 U.S.C.S. § 15, authorizes an action for treble damages by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. The statute does not confine its protections to consumers, or to purchasers, or to competitors, or to sellers. An exception to the broad standing authorization of § 4 exists in those instances in which persons have sustained injuries "too remote" from the alleged violation of the antitrust laws. The determination as to whether an injury is too remote involves an examination of first, the physical and economic nexus between the alleged violation and the harm to the plaintiff, and second, the relationship of the injury alleged with those forms of injury which were of concern to Congress in enacting the antitrust laws.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

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

HN2 [down] Practices Governed by Per Se Rule, Boycotts

Section 1 of the Sherman Act bars only those agreements that impose an unreasonable restraint upon interstate commerce. Certain types of agreements are recognized as per se unreasonable because of their necessary harm to competition and the absence of countervailing benefits. Among the agreements labelled per se violations of § 1 are horizontal territorial restrictionals, group boycotts, and horizontal price-fixing schemes. An agreement that does not fit into the categories of per se violations must be scrutinized under the rule of reason. Under the rule of reason standard, an agreement will be found to violate § 1 only if it appears unreasonable when analyzed in light of the nature of the business where the alleged restraint of trade is applicable, the nature of the restraint and its effects, and the history of the restraint and effects, and the reasons for its adoption.

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

HN3 [down] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the rule of reason, the inquiry as to the legality of an agreement is confined to a consideration of its impact on competitive conditions. Allegations of injury to the plaintiff alone are not sufficient since the essence of a violation of the rule of reason is injury to competition not competitors. Although antitrust claims need not be pleaded with greater specificity than other claims, an antitrust plaintiff as part of its claim of injury to competition must allege the market in which competition was injured, and must provide some indication of supporting facts such as the size of the relevant product and geographic markets, the amount of competition foreclosed, and how the acts of the defendants affected that competition.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

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

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

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

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

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

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

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

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Willfulness

HN4 Scope, Monopolization Offenses

Section 2 of the Sherman Act, [15 U.S.C.S. § 2](#), renders it unlawful for an individual or entity to monopolize, or attempt to monopolize, or attempt to monopolize, or combine or conspire to monopolize. The offense of monopolization under this provision has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. The elements of the offense of attempted monopolization are (1) a dangerous likelihood of success in monopolizing a particular product market and (2) a specific intent to eliminate competition or create monopoly.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > Named Members

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN5 Class Actions, Certification of Classes

Fed. R. Civ. P. 23(a) requires that an individual seeking to represent a class be a member of that class. An organization may serve as a class representative of its members and others similarly situated, even though that organization itself is not a member of the putative class. However, an organization seeking certification as a [Rule 23](#) class representative must also demonstrate that it has standing to maintain the action in an individual capacity. In certain instances when damage claims are not common to the entire membership, nor shared by all in equal degree, but are peculiar to the individual member concerned, the organization lacks standing to claim damages on behalf of each member.

Counsel: [*1] For plaintiffs: Auerbach, Labes & Woicik, New York, N.Y., (Henry C. Woicik, of counsel). For defendants: Winthrop, Stimson, Putnam & Roberts, New York, N.Y. (Francis Carling, of counsel, for F.W. Woolworth Co. and Woolco Dept. Stores; Howrey & Simon, Washington, D.C., Robert W. Steele, Robert E. Hebda, Veronica G. Kayne, Bachner, Tally & Mantell, New York, N.Y. (H. Richard Penn, of counsel); K Mart Corp., Troy, Mich. (James C. Tuttle, of counsel), for K Mart Apparel Corp. and S.S. Kresge Co.; Cole & Deitz, New York, N.Y. (Joseph DiBenedetto, of counsel) for Russell, Burdsall & Ward Inc., dba Mangel Stores; Lewis, Greenwald & Kennedy, New York, N.Y. (Nicholas F. Lewis, of counsel, for New York Coat, Suit, Dress, Rainwear and Allied Workers' Union; Abraham Schlesinger, New York, N.Y., for Office and Distribution Employees' Union Local 99; Max Zimmy, New York, N.Y., for International Ladies' Garment Workers' Union.

Opinion by: GAGLIARDI

Opinion

Opinion

GALGIARDI, D.J.: Plaintiffs Level I sportswear, Inc. and Hartfree Group, Ltd. "(Level I)" commenced this action against defendant unions, union officials and retail stores for alleged violations of the Labor Management Reporting and Disclosure [*2] Act, [29 U.S.C. §§ 401-531](#) ("LMRDA"); the Sherman Act, [15 U.S.C. §§ 1-7](#); and the Clayton Act, 15 U.C.S. §§ 12-27.¹ Defendants Samuel Byer and the Joint Board have filed four counterclaims, charging Level I with intentional torts and with breach of its collective bargaining agreement with its workers, some of whom belong to the Joint Board. Presently before the court are two motions. Retailer defendants have moved to dismiss the complaint pursuant to [Rule 8, Fed. R. Civ. P.](#), for failure to plead with sufficient specificity, and pursuant to [Rule 12\(b\)\(6\), Fed. R. Civ. P.](#), for failure to state a claim upon which relief may be granted. Defendants Byer and the Joint Board have moved pursuant to [Rule 23, Fed. R. Civ. P.](#), to certify their fourth counterclaim as a class action.

[*3] Background

In considering the retailer defendants' motion to dismiss the complaint, the court has accepted as true all material allegations in the complaint. See [Gardner v. Toilet Goods Association, Inc., 387 U.S. 167, 172 \(1967\)](#). Level I is a manufacturer of women's sportswear whose workers were represented by the Amalgamated Workers Union, Local 88, Retail, Wholesale and Department Store Union, AFL-CIO ("RWDSU"). In April 1980, the Joint Board filed a demand with level I that it be recognized as the exclusive representative of the Level I employees and picketed Level I's factory as a means of effecting such recognition. The Joint Board also filed with the National Labor Relations Board ("NLRB") a petition for certification as such representative. The NLRB dismissed the petition. At the same time, the Joint Board together with its parent organization, the ILGWU and another ILGWU affiliate, Local 99, commenced a boycott against Level I. In furtherance of this boycott, Local 99 employees working at the New Jersey warehouses of retailer defendants refused to handle Level I products. The retailer defendants agreed with the ILGWU, the Joint Board and Local 99 that their stores [*4] would not accept Level I merchandise and that they would cancel any pending orders for such products. Within several months, these activities had forced Level I out of business. This litigation ensued.

Discussion

I. Motion to Dismiss

The retailer defendants have moved to dismiss all three counts of the complaint. Count I of Level I's complaint alleges violations of the antitrust laws solely by union defendants and therefore states no claim against the retailer defendants. Count III, similarly, does not allege illegal conduct by the retailer defendants. Counts I and III therefore are dismissed with respect to the retailer defendants.

Count II, which alleges **antitrust law** violations by the retailer defendants, is based upon [sections 1, 2, and 3](#) of the Sherman Act, [15 U.S.C. §§ 1, 2 and 3](#), and [sections 4 and 12](#) of the Clayton Act, [15 U.S.C. §§ 15 and 22](#).² The retailer defendants allege that Level I lacks standing to assert these claims and that, even if Level I is found to have standing, it has failed to state an antitrust claim against the retailer defendants. The court first will consider Level I's standing and then will discuss the merits of Level I's antitrust [*5] claims against the retailer defendants.

¹ Among those named as defendants are: Sol C. Chaikin, President International Ladies Garment Workers Union, AFL-CIO ("ILGWU"); Samuel Byer, Secretary-Treasurer of New York Coat, Suit, Dress, Rainwear and Allied Workers Union, a Joint Board affiliated with ILGWU; New York Coat, Suit, Dress, Rainwear and Allied Workers Union, a Joint Board affiliated with ILGWU ("Joint Board"); Arthur Touretz, President of Office and Distribution Employees Union, Local 99, a local union affiliated with ILGWU; and Office and Distribution Employees Union, Local 99, a local union affiliated with ILGWU ("Local 99"). These defendants will be referred to as the "union defendants." The other defendants named in this action are K Mart Apparel Corp.; S.S. Kresge Co.; Woolco Department Stores, a Division of F.W Woolworth Co.; and Russel Burdsall and Ward Corp. d/b/a Mangel Stores. These defendants will be referred to as the "retailer defendants."

² [Section 3](#) of the Sherman Act applies to antitrust violations involving the District of Columbia and United States territories. The complaint contains no reference to these localities. The claim under [section 3](#) therefore is dismissed. [Section 12](#) of the Clayton Act, [15 U.S.C. § 22](#), is a venue provision.

A. Standing.

HN1[] [Section 4](#) of the Clayton Act, [15 U.S.C. § 15](#), authorizes an action for treble damages by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." As the Supreme Court stated recently in [Blue Shield v. McCready \[1982-2 TRADE CASES P64,791\], 102 S. Ct. 2540, 2545 \(1982\)](#):

[T]he lack of restrictive language reflects Congress' "expensive remedial purpose" in enacting [§ 4 . . . Pfizer, Inc. v. India, 434 U.S. 308, 314-14 \(1978\)](#) (further citations omitted). As we have recognized "[t]he statute does not confine its protections to consumers, or to purchasers, or to competitors, or to sellers." [Mandeville Farms v. Sugar Co., 334 U.S. 219, 236 \(1948\)](#).

The Supreme Court in Blue Shield noted an exception to the broad standing authorization of [section \[*61\] 4](#) in those instances in which persons have sustained injuries "to remote" from the alleged violation of the antitrust laws. The determination as to whether an injury is too remote involves an examination of first, the physical and economic nexus between the alleged violation and the harm to the plaintiff, and second, the relationship of the injury alleged with those forms of injury which were of concern to Congress in enacting the antitrust laws. [Id. at 2548](#).

In the instant case, Level I claims that it was forced out of business by the retailer defendants' unlawful agreement that they would not purchase Level I merchandise. Level I claims that retailer defendants, who previously had purchased 50% of Level I's production, had agreed to this boycott in order to ingratiate themselves with Local 99 and with the ILGWU generally and thereby to gain competitive advantages over other retail stores. Level I thus meets the first part of the Blue Shield standing test by alleging a direct economic nexus between an unlawful agreement and harm to itself as plaintiff. Such harm was a "necessary step in effecting the ends of the illegal conspiracy" alleged. Blue Cross, *supra*, 102 U.S. at 2549. [[*7](#)]

The court also finds the required connection between the alleged harm and the forms of injury contemplated by Congress when it promulgated the antitrust laws. Level I alleges that it was forced out of business as a result of an unlawful boycott and the unlawful use of monopoly power. While there is a serious question as to whether the boycott or use of monopoly power Level I alleges fits within the specific prohibitions of the antitrust laws, see pp. 8-14, *infra*, it is clear that the elimination of a supplier of product through such practices is generally the type of injury those laws were designed to prevent. See [Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656 \(1961\)](#); [Taxi Weekly, Inc. v. Metropolitan Taxicab Board of Trade, Inc., 539 F.2d 907 \(2d Cir. 1976\)](#); see also [Blue Shield, supra, 102 S. Ct. at 2551 n. 21](#) (antitrust action could be maintained by distributor boycotted by retailers for refusal to cooperate with their conspiracy to harm disfavored retailer). Level I thus has established that it has standing to maintain this action.³

[*8] B. Section One Claims

(1) Alleged Per Se Violations

Level I alleges that the retailer defendants at the behest of the union defendants refused to accept Level I merchandise and thereby conspired in restraint of trade in violation of [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#). The Supreme Court has interpreted **HN2**[] [section 1](#) as barring only those agreements that impose an unreasonable restraint upon interstate commerce. [Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 \(1911\)](#). Certain types of agreements have been recognized as per se unreasonable because of their necessary

³ In [Blue Shield, supra, 102 S. Ct. at 2547 n. 12](#), the Supreme Court declined to comment on the "relative utility" of the "target area" test of antitrust standing which has been articulated by the Second Circuit. Even if the target area test is still valid, however, Level I has alleged facts sufficient to allow it to maintain an action because Level I claims that it was the "person against whom the conspiracy was aimed." [Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc. \[1971 TRADE CASES P73,788\], 454 F. 2d 1292, 1295 \(2d Cir. 1971\)](#).

harm to competition and the absence of countervailing benefits. Among the agreements labelled per se violations of [section 1](#) are horizontal territorial restrictions, [U.S. v. Topco Associates, Inc., 405 U.S. 596 \(1972\)](#); group boycotts, [Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 \(1959\)](#); and horizontal price-fixing schemes, [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 \(1951\)](#). An agreement that does not fit into the categories of per se violations must be scrutinized under the rule of reason. Under the rule of reason standard, an agreement will be found to violate [*9] [section 1](#) only if it appears unreasonable when analyzed in light of the nature of the business where the alleged restraint of trade is applicable, the nature of the restraint and its effects, and the history of the restraint and effects, and the reasons for its adoption. See [National Society of Professional Engineers v. United States, 435 U.S. 679, 692 \(1978\)](#).

The only category of per se violation that arguably is applicable to plaintiff's allegations is the group boycott. See [United States v. General Motors Corp., 384 U.S. 127 \(1966\)](#); [Klor's v. Broadway-Hale Stores, supra](#); [Fashion Originators' Guide of America, Inc. v. Federal Trade Commission, 312 U.S. 457 \(1941\)](#). A horizontal agreement to refuse to deal with a third party, that is, an agreement among competitors, was at issue in [United States v. General Motors, supra](#); [Klor's v. Broadway-Hale Stores, supra](#); and [Fashion Originators' Guide v. FTC, supra](#). As the Second Circuit has stated in holding a per se Standard inapplicable to boycotts that do not entail such agreements among competitors:

It is important to distinguish between "horizontal" restraints, i.e., agreements between competitors at the same level of market structure [*10] and "vertical" restraints, i.e. combinations of persons at different levels of the market. . . . Horizontal restraints alone have been characterized as "naked restraints of trade with no purpose except stifling competition."

[Oreck Corp. v. Whirlpool, 579 F. 2d 122, 131 \(2d Cir.\), cert. denied, 439 U.S. 946 \(1978\)](#), quoting [White Motor Co. v. United States \[1963 TRADE CASES P70,679\], 372 U.S. 253, 263 \(1963\)](#).⁴

Level I fails to allege, as part of its section one claim, any agreement between competitors. Paragraph [*11] 45 of the complaint states:

In April 1980, after the labor union defendants undertook a course of action to force Level I out of business, and as part of such course, and at the urging of and in conspiracy with the defendant labor organizations, the defendants [retailers] refused to accept orders placed by them with Level I, cancelled other purchases from Level I, and thereafter refused to deal with Level I.

Level I thus has alleged only a series of agreements between each of the retailer defendants and the union defendants. Such parallel behavior by the retailer defendants does not indicate a conspiracy among them. See [Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F. 2d 102, 110 \(2d Cir. 1974\)](#).

Level I argues that any agreement involving a union and a non-union entity and which is not subject to the labor exemptions, is per se violative of [section 1](#) regardless of whether it entails horizontal elements.⁵ Contrary to level I's contentions, however, the rule of reason standard has been applied to agreements which are not protected by

⁴ Both the Third Circuit and the Ninth Circuit have indicated, in the context of discussing union agreements with non-labor groups, that "vertical combinations designed to exclude from the market direct competitors of members of the combinations" may constitute per se violations of section one. [Consolidated Express, Inc. v. New York Shipping Association, 602 F. 2d 494, 522 \(3rd Cir. 1979\)](#), vacated and remanded on other grounds, [448 U.S. 902 \(1980\)](#); Ackerman Chillingworth, Inc. v. Pacific Electrical Contractors Association, *supra*, 579 F. 2d at 490 n. 7. The Second Circuit, however, in [Oreck Corp. v. Whirlpool Corp., supra, 579 F. 2d at 131](#) rejected this position.

⁵ Certain provisions enacted by Congress which remove unions from the full reach of the antitrust laws, see [United States v. Hutcheson, 312 U.S. 219 \(1941\)](#) have been described as the "statutory exemption." See [United Mine Workers v. Pennington, 381 U.S. 657 \(1965\)](#). The non-statutory exemption is a judicially created doctrine that also serves to protect certain agreements between unions and non-labor groups from antitrust liability. Id. Retailer defendants do not contend that either type of exemption is applicable to them here.

the labor exemptions between unions and non-union entities. See *Larry v. Muko, Inc. v. Southwestern Pennsylvania Building [*12] & Construction Trades Council*, 670 F. 2d 421 (3rd Cir.), cert. denied, 103 S. Ct. 229 (1982); *Ackerman-Chillingworth, Division of Marsh & McLennan, Inc. v. Pacific Electrical Contractors Association*, 579 F. 2d 484 (9th Cir. 1978), cert. denied, 439 U.S. 1089 (1979); but see *South-East Coal Co. v. Consolidation Coal Co.*, 434 F. 2d 767, 775 (6th Cir. 1970), cert. denied, 402 U.S. 983 (1971). The Second Circuit, moreover, has stated that there is a "substantial question" as to whether a per se standard would ever be appropriate in evaluating alleged restraints of trade involving unions and non-labor entities. See *Commerce Tankers Corp v. National Maritime Union of America*, 553 F. 2d 793, 802 & n. 8 (2d Cir.), cert. denied, 434 U.S. 923 (1977); see also *Berman Enterprises Inc. v. Local 333, United Marine Division, International Longshoremen's Association*, 644 F. 2d 930, 936 (2d Cir.), cert. denied, 454 U.S. 965 (1981) (assuming without discussion that the rule of reason was applicable to a union's alleged conspiracy with an employers' association). Given the absence of an allegation of a horizontal conspiracy and the Second Circuit's reluctance to apply the per se test to agreements [*13] involving unions, the court finds that Level I has failed to allege a per se violation of section one.

(2) Rule of Reason Analysis

Because Level I has not alleged a per se violation, the court must determine whether it has alleged a violation under the rule of reason. [HN3](#) Under that rule, "the inquiry [as to the legality of an agreement] is confined to a consideration of its impact on competitive conditions." *National Society of Professional Engineers v. United States, supra*, 435 U.S. at 690. Allegations of injury to the plaintiff alone are not sufficient since the essence of a violation of the rule of reason is injury to "competition not competitors." [*14] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original); see also *Oreck Corp. v. Whirlpool Corp., supra*, 579 F. 2d at 133-34. Although antitrust claims need not be pleaded with greater specificity than other claims, see *George C. Frey Ready Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 544 F. 2d 551, 553-54, (2d Cir. 1977), an antitrust plaintiff as part of its claim of injury to competition must allege the market in which competition was injured, and must provide some indication of "supporting facts such as the size of the relevant product and geographic markets, the amount of competition foreclosed, and how the acts of the defendants affected that competition." *Bus Top Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 997-98 (S.D.N.Y. 1981); see also *Petroleum for Contractors, Inc. v. Mobil Oil Corp.*, 493 F. Supp. 320 (S.D.N.Y. 1980); Prestige Manufacturing Corp. v. Martin Beverage Co., 1977-2 TRADE CASES (CCH) P61,413 (S.D.N.Y. 1977).

Level I contends that the anti-competitive nature of the agreement between the retailer defendants and the union defendants [*15] is demonstrated by (1) the retailer defendants' intent to use the boycott as a way to curry favor with the union defendants and thereby to obtain competitive advantage over other retailers, and (2) the fact that the boycott and the consequent destruction of Level I's business helped to maintain the cartel created by other manufacturers and the union defendants in the market for the production of women's sportswear. Level I's allegations with respect to competition in the retail market for women's sportswear fail to state a violation of the Sherman Act under the rule of reason. Level I makes no allegations as to the nature of that market. Neither does it allege that the union defendants actually accorded the retailer defendants competitive advantages or that the boycott otherwise served to reduce competition at the retail level.

With regard to the alleged boycott's effect on the market for the manufacture of women's sportswear, however, the complaint does describe at some length the nature of that New York market and of the cartel in that market allegedly created by industrywide agreements between union defendants and clothing producers other than Level I. Level I alleges that [*16] the retailer defendant's boycott of its products contributed to the strength of this cartel by eliminating both Level I and injuring the union representing its workers, the RWDSU. Although it is a close question, the court finds that these averments are sufficiently specific with regard to injury to competition in the New

York market for the manufacture of women's sportswear.⁶ The retailer defendants' motion to dismiss Level I's section one claim therefore is denied.

C. Section 2 Claim

Level I also claims that the retailer defendants violated [HN4](#)[↑] section 2 of the Sherman Act, [15 U.S.C. § 2](#) which renders it unlawful for an individual or entity to "monopolize, or attempt to monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize." The Supreme Court has held that the offense of monopolization under this provision [*17] has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." [United States v. Grinnell Corp., 384 U.S. 563, 570-71 \(1966\)](#). The elements of the offense of attempted monopolization are (1) a dangerous likelihood of success in monopolizing a particular product market and (2) a specific intent to eliminate competition or create monopoly. See [Nifty Foods Corp. v. The Great Atlantic & Pacific Tea Co., 614 F.2d 832, 841 \(2d Cir. 1980\)](#). As Level I has failed to allege facts establishing either of these offenses with regard to the retailer defendants and the market in which they operate, Level I's section 2 claim against the retailer defendants is dismissed.

D. Class Certification Motion

Defendants Samuel Byer and the Joint Board have alleged as a fourth counterclaim on behalf of former Level I employees that Level I repeatedly violated its September 1979 collective bargaining agreement with those employees. Byer and Joint Board have moved for certification of that counterclaim as a class action.

[HN5](#)[↑] Rule 23(a), Feb. R. Civ. P., consistently has been held to require that an individual seeking to represent [*18] a class be a member of that class. See [Sosna v. Iowa, 419 U.S. 393, 403 \(1975\)](#); [Bailey v. Patterson, 369 U.S. 31 \(1962\)](#); [Norman v. Connecticut State Board of Parole, 458 F.2d 497 \(2d Cir. 1977\)](#). Defendant Byer concedes that he does not belong to the putative class of former Level I employees. Defendant Joint Board, however, while conceding that it is not a member of the putative class, contends that numbers of former employees of Level I are also members of the Joint Board, and that the Joint Board consequently may be certified as a representative of the class of former Level I workers. The Second Circuit has held that an organization may serve as a class representative of its members and others similarly situated, even though that organization itself is not a member of the putative class. [Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 \(2d Cir. 1968\)](#). In Norwalk CORE, however, the court recognized that an organization seeking certification as a Rule 23 class representative must also demonstrate that it has standing to maintain the action in an individual capacity. *Id. at 937*.

Under [Warth v. Seldin, 422 U.S. 490 \(1975\)](#), the defendant Joint Board lacks standing [*19] to pursue this counterclaim and consequently may not serve as a class representative. In Warth, the Supreme Court held that in certain instances when "damage claims are not common to the entire membership, nor shared by all in equal degree," but are "peculiar to the individual member concerned," the organization lacks standing to claim damages on behalf of each member. [422 U.S. at 515](#); see also [Local 194, Retail, Wholesale and Department Store Union v. Standard Brands, Inc., 540 F.2d 864, 865 \(7th Cir. 1976\)](#). Here, the Joint Board seeks damages on behalf of each former Level I employee. The Joint Board cannot claim that each member of the putative class incurred the same degree of damages as a result of Level I's alleged breaches of the September 1979 collective bargaining agreement. Rather, the amount of damages would vary according to the situation of each employee with regard to the particular breach at issue. Joint Board consequently lacks standing to maintain this counterclaim.⁷ The class certification motion of defendants. Byer and the Joint Board therefore is denied.

⁶The allegations described above also demonstrate that the complaint in this action contained more than a "bare bones statement of conspiracy," [Heart Disease Research Foundation v. General Motors Corp. \[1972 TRADE CASES P74,076\], 463 F.2d 98, 100 \(2d Cir. 1972\)](#) and therefore meet the pleading requirements of [Rule 8\(a\), Fed. R. Civ. P.](#)

⁷Congress may accord standing to a party who, in the absence of legislation, would lack the ability to maintain an action. See [Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 \(1972\)](#). Section 301 of the LMRDA, for example, authorizes a labor

[*20] Conclusion

For the foregoing reasons, Counts I and III of the complaint against retailer defendants are dismissed. The court further finds that Count II fails to allege a per se violation of section one of the Sherman Act and fails to allege any violation of section two. The retailer defendants' motion to dismiss Count II is denied in all other respects. The motion of defendants Byer and Joint Board for class certification of the fourth counterclaim is denied. Plaintiffs are directed to file an amended complaint incorporating the rulings set forth in this opinion.

So Ordered.

End of Document

organization that is a party to a collective bargaining agreement to sue to enforce that agreement on behalf of its members. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). Defendant Joint Board, however, was not a party to the collective bargaining agreement it seeks to enforce on behalf of former Level I employees and therefore can not derive standing from the LMRDA.



Barry Wright Corp. v. Pacific Scientific Corp.

United States District Court for the District of Massachusetts

January 28, 1983

Civil Action No. 78-485-S

Reporter

555 F. Supp. 1264 *; 1983 U.S. Dist. LEXIS 19678 **; 1982-83 Trade Cas. (CCH) P65,189

BARRY WRIGHT CORPORATION, Plaintiff, v. PACIFIC SCIENTIFIC CORPORATION, Defendant

Core Terms

snubbers, mechanical, discounts, sizes, contracts, hydraulic, pipe, market power, hanger, plant, cancellation, manufactured, schedules, smaller, orders, prices, negotiation, purchases, customer, phase, shock, minimum amount, purchase order, Sherman Act, patent, exclusionary, projected, delivery, obliged, costs

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > Preference & Priority Customers

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN1 [] **Market Definition, Relevant Market**

In order to determine whether the defendant has "market power" in an antitrust case it is necessary to determine the relevant market.

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

HN2 [] **Private Actions, Remedies**

Market power is defined as the power to raise the price of a product by limiting its supply.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

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

HN3 [] **Actual Monopolization, Anticompetitive & Predatory Practices**

A manufacturer with market power may not indulge in exclusionary conduct, even if such conduct is not the classic monopolistic exercise of market power. Exclusionary conduct has been very broadly defined as encompassing any practices by a monopolist which are not the inevitable consequences of ability, natural forces or law. Market control is inherently evil and constitutes a violation of [§ 2](#) of the Sherman Act unless economically inevitable, or specifically authorized and regulated by law.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

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

[HN4](#) [Actual Monopolization, Anticompetitive & Predatory Practices]

Nonpredatory and nondiscriminatory price reductions do not violate [§ 2](#) of the Sherman Act. Reasonable reduction of price in response to competition is not a violation of the Sherman Act; it is in fact the result which the antitrust laws were designed to accomplish.

Counsel: [\[**1\]](#) Donald B. Gould, Esq., (Lorraine Goodwin, Procter & Hoar, Boston, for plaintiff.

Pacific Scientific Corporation, John A. Nadas, Esq., Choate, Hall & Stewart, Boston, Pacific Scientific Corporation, Joseph J. O'Malley, Paul, Hastings, Janofsky & Walker, Los Angeles, California, Itt Grinnell, Bingham, Dana, Gould, John Curtin, Boston, for defendant.

Judges: Skinner, D.J.

Opinion by: SKINNER

Opinion

[*1265] FINDINGS, RULINGS AND ORDER

SKINNER, D.J.

Plaintiff Barry Wright Corporation ("Barry") brought this action pursuant to [15 U.S.C. § 15](#) to recover damages for alleged violations of the antitrust laws. Plaintiff claims that defendant Pacific Scientific Corporation ("Pacific") has violated [Sections 1](#) and [2](#) of the Sherman Act ([15 U.S.C. §§ 1](#) and [2](#)) and [Section 3](#) of the Clayton Act ([15 U.S.C. § 14](#)). Plaintiff also alleges an action in tort, claiming that Pacific tortiously interfered with its contractual relations.

Originally ITT Grinnell Corporation ("Grinnell") was joined as a defendant. Before trial, however, the plaintiff and Grinnell effected a settlement and Grinnell is no longer in the case as a party. The case turns on the relationships between Grinnell and Barry on the one [\[**2\]](#) hand, and Grinnell and Pacific on the other. Analysis of the conduct of Grinnell and its officers is pivotal to the resolution of this case.

Findings of Fact.

Grinnell is the country's largest producer of pipe hanger systems for nuclear power plants. The selection of such systems for a proposed plant is typically done by the firm of architects and engineers ("A&E's") who have contracted to design the plant and supervise its construction. Critical components of a pipe hanger system are the shock arresters or snubbers. These must be designed to permit the normal gradual movement of the pipes as they expand and contract in response to the superheated material which passes through them. They must, however,

resist sudden movement from earthquake or explosion. Snubbers are rated by the amount of force which they can resist. The sizes of snubbers involved in this case ranged from 250 lbs. (1/4 kip) to 100,000 lbs. (100 kip) sizes.

Until 1975 most snubbers were hydraulic. Grinnell made its own, which it sold at a favorable mark-up as components of its pipe hanger systems. In 1974 and 1975, hydraulic snubbers distributed by another manufacturer developed leaks. A&E's in [**3] the industry started to specify mechanical snubbers in response to anxiety over the potential danger of leaky hydraulic snubbers.

By 1975 Pacific had designed and produced an effective mechanical shock arrester which operated by a patented rotating inertial device. Pacific was only partially successful [*1266] in making independent sales to the A&E's, because the latter did not wish to carry inventories of snubbers; they wanted the pipe hanger companies to carry the inventory and release snubbers as needed during the installation of the pipe hanger system. Pacific was successful, however, in persuading the A&E's to specify mechanical snubbers to the exclusion of hydraulic snubbers. From 1975 on and during all the period material to this case, Pacific was for all practical purposes the only domestic source of mechanic snubbers. Mechanical snubbers manufactured in other countries did not meet the requirements of the Nuclear Regulatory Commission.

Pacific's share of the domestic pipe snubber market, including hydraulic snubbers, was 47% in 1976, 83% in 1977, 84% in 1978 and 94% in 1979. Pacific also makes sales of mechanical snubbers in foreign countries, but some of these [**4] sales were negotiated in the United States through local A&E's who were constructing nuclear plants abroad.

Grinnell continued to produce its hydraulic snubber (which had not leaked) to satisfy its backlog of orders. Most of Grinnell's new contracts, however, required mechanical snubbers. It attempted to design and manufacture its own mechanical snubber but was unsuccessful. It was therefore forced to buy from Pacific.

At the same time Pacific was trying to sell its snubbers directly to the A&E's as separate components, in competition with Grinnell. The quantity discount which Pacific allowed Grinnell permitted a small mark-up which was considerably less than the mark-up Grinnell had enjoyed on its own hydraulic snubbers. Grinnell set out to find another, more profitable source.

Barry had a division in California (not far from Pacific's plant) which was engaged in aerospace engineering, and had in fact produced mechanical shock absorbers for aerospace application. In 1973 it had produced a prototype snubber for use in nuclear power plants, but had decided not to enter the market and did not develop its product at that time.

Grinnell learned of Barry's prototype snubber and [**5] in late 1975 entered into negotiations with Barry to attempt to generate another source of mechanical snubbers. On January 30, 1976, Grinnell entered into a contract with Barry for the development of a mechanical snubber. The Grinnell-Barry contract consisted of two phases.

The first phase was a development phase which did not bind either party to purchase or sell snubbers. During phase one, Grinnell agreed to pay Barry \$180,000 for development costs, an additional \$54,000 for production tooling, and up to \$60,000 for special test equipment.

On August 31, 1976, Grinnell and Barry agreed to enter into phase two of the contract. During this phase, Barry was to develop production capability for six sizes of snubbers by January 28, 1977. Grinnell was obliged to purchase its requirements of mechanical snubbers from Barry for the next three years, subject to an obligation to purchase at least \$9 million but not more than \$15 million over the three year period. Grinnell retained the option to purchase Barry's snubber production facilities at any time during phase two. Barry agreed not to compete with Grinnell for five years after such purchase. In addition, while Barry was manufacturing [**6] snubbers for Grinnell, it could not sell mechanical snubbers to anyone else.

The contract contained schedules for the completion and qualification (i.e., passing Grinnell's tests of conformity to specifications) of the various sizes of snubbers. Barry claims that these schedules merely reflected goals or expectations. Grinnell apparently claimed that the schedules were contract performance dates. In any case, over

the next eighteen months Barry fell progressively further behind those schedules. As of January, 1977, it had not qualified any of its snubbers.

Meanwhile, Grinnell was buying snubbers from Pacific. Paul Milman, who was in charge of Grinnell's pipe hanger business, was stalling as much as possible on snubber delivery, and purchasing only the required [*1267] minimum amounts, in the hope that the Barry snubbers would soon be in production and available to Grinnell at a more favorable price. Delay became increasingly difficult, however, because of mounting pressure from Grinnell's customers for delivery of snubbers.

In the summer of 1976, Stephen Toth became president of Pacific. He observed that the number of orders that Pacific was receiving from Grinnell was [*7] considerably less than the number of mechanical snubbers that had been specified in outstanding pipe hanger contracts. He determined to have a meeting with Milman in order to create "a more healthy relationship" between the companies, i.e., get more orders from Grinnell for snubbers. Milman, Toth and Pope, the head of Pacific's Kintech Division, which manufactured snubbers, met at Pacific's plant on August 23, 1976. Toth asked Milman for an order. A further meeting was set up for August 31 at the Grinnell office in Providence, Rhode Island. Milman continued to stall on placing a large order, in the hope that Barry's snubber would soon be on line. Toth and Pope then agreed to increase the discount from the standard 20% to 30% on the four smaller sizes of snubber and 25% on the larger sizes.

With this incentive, Milman, on behalf of Grinnell, agreed to order \$5.7 million worth of snubbers to cover Grinnell's expected needs for 1977. Pacific granted the additional discounts.

Milman informed Barry of this development. Barry requested that Grinnell hold off any long term orders to Pacific to give it a chance to qualify its snubbers, which it represented it could do by early 1977.

[**8] Milman then presented the issue to Coyle, the president of Grinnell. Coyle took the position that it was unnecessary to place such a large order. He preferred to rely on Barry to produce its snubber in time to meet customer demand and directed Milman to cancel the September order. Milman cancelled the \$5.7 million order and placed an order for \$1 million of Pacific snubbers on October 20, 1976. Pacific accordingly retracted the additional discounts and accepted the smaller order at the standard discount.

The schedules attached to the Grinnell-Barry contract called for Barry to develop production capacity for six sizes of snubbers by January 28, 1977. As of December, 1976, it had not even produced a prototype of any size snubber which qualified under Grinnell's specification. Barry officials notified Grinnell that they could not deliver a production project before May of 1977. On January 6, 1977, Barry postponed its projected delivery date to June, 1977.

Milman became increasingly anxious about Grinnell's ability to supply its customers. He met with Pope and Toth in California in mid-December, but without significant results, partly because Pope and Toth now distrusted Milman. [*9] Toth in particular thought that he could secure more favorable orders if he could go over Milman's head to Coyle. Milman arranged a meeting in Miami on January 10, 1977 at which he, Coyle, Toth and Pope were present. No business was transacted, but they agreed to continue negotiation in California on January 27.

On January 18, Barry set back its projected delivery dates an additional two months for the smaller units and until February, 1978 for the two larger units.

On January 27, Milman and Coyle met with Toth and Pope at the Pacific plant in California. Milman went to the meeting with the expectation that Pacific would not repeat its offer of extra discounts. He was so concerned about supply, however, that he was prepared to make a substantial order at the standard discount. Nevertheless, he left the negotiations to Coyle. Coyle was initially given a tour of the Pacific plant during which he observed that a substantial portion of the facility was not being fully utilized. He was thereby encouraged to strike a hard bargain. He was right. Toth was concerned that part of his plant capacity was not productive and was particularly anxious to get the Grinnell order. Toth and [*10] Pope were also aware of the existence, though not of the terms of, the Grinnell-Barry contract, and had been since at least [*1268] September, 1976. (Their testimony that they were not in the least concerned with potential competition from Barry is not credible.)

The upshot of the negotiation was that Coyle was successful in retrieving the 25% and 30% discounts which had been offered in the aborted 1976 contract on a minimum purchase of \$4.3 million during the balance of 1977 and January, 1978. The minimum purchase amount was based on Grinnell's projections of its requirements for that period. It was not in form a requirement contract, however, in that Grinnell was not barred from purchasing additional snubbers from any other source. Grinnell had the option to purchase an additional 25% of the minimum order at the same price and to purchase the same quantities at the same discounts for 1978 and 1979.

Most significantly for purposes of this case, the contract provided for a 100% penalty for cancellation of any part of the minimum order. Pope testified that this clause was included because he distrusted Milman and wanted to prevent a repeat of his experience with the aborted [**11] agreement of the previous September. In any case, the clause was readily accepted by Milman and Coyle and was not the subject of extended negotiation.

Milman returned to Providence, and on January 31, sent Barry the following letter, which he had drafted on January 25, before the meeting with Toth and Pope:

In response to your further slippage in schedules, we request an amendment of our agreement of January 30, 1976 to delete all minimum purchase requirements on ITT Grinnell from the agreement. As you know, we have issued two purchase orders to you for the first half of 1977. Since your estimated date for an initial shipment now is at least as late as September, 1977, it does not make sense for us to continue to issue purchase orders which we both now know you can't meet. An amendment deleting all minimum purchase requirements would, I believe, relieve some of the pressure on our relationship. In the alternative, we are not willing to extend the present agreed-to schedules which, in view of the market projection and our delivery commitments, we consider to be a material provision of the Agreement.

Although it is our intention to meet and discuss with you possible revisions [**12] to the Agreement between our companies, our attorneys have asked me to make it clear that these efforts looking toward amendments of that Agreement cannot change the fact that the Agreement as it now stands have been breached by your company.

We do not want our present pleasant relationship to be in any way jeopardized, but, on the other hand, we do not want to mislead you. Our willingness to work with you toward a formal Agreement amendment should not be interpreted as our acquiescence in Barry's failure to comply with existing agreement provisions.

At a meeting on February 25, 1977 with Barry officials, Milman stated that due to the development delays he might have to commit the next two years' purchases to Pacific. Milman proposed to reduce the minimum purchase requirement to \$3.6 million. As an alternative, Barry proposed to "stretch-out" the \$9 million minimum purchase requirement over a longer term. The issue was not resolved. Milman encouraged Barry to continue its development efforts and set May 15, 1977 as a deadline by which Barry had to qualify the four smaller snubbers and complete the design of the two larger sizes, if they were to get any purchases from Grinnell. [**13] Another meeting was held on March 14, 1977, but again no resolution was reached. I find that Milman hoped to keep Barry in the picture as an alternative source rather than become wholly dependent upon Pacific.

On April 25, 1977, David McKenny, vice-president and general counsel of Grinnell, wrote Barry a letter containing the following paragraph:

I would like to make it clear that the May 15th date was only important in that the amendment we offered would not [*1269] take effect unless the qualifications we have been discussing were accomplished by that date. We would not want you to believe that, if Barry Wright accomplishes the qualifications referred to by May 15, ITT Grinnell would be obligated to continue under the original Agreement. While we are always willing to discuss with you agreements under which our two companies could proceed, our present position is that the original Agreement is breached and terminated.

By May 15, Barry had qualified the four smaller sized snubbers.

On May 16, several Grinnell representatives met with John Quinn, president of Barry, and Milt Gilbert, Barry's legal counsel. They discussed their future relationship but reached no [**14] agreement. They agreed to meet again on May 27.

On May 23, Milman called Quinn to postpone the scheduled meeting. Milman informed Quinn that he planned to meet with Toth and Pope in Chicago. Milman also told him that the price difference between Pacific and Barry was still over 10% but that if the differential fell below 10%, it would not be attractive to stay with Barry.

On May 31, 1977, Milman met with Pope and Toth in Chicago and agreed to purchase orders of \$6.9 million for 1978 and, subject to further negotiation on escalation, the same amount for 1979. Both of these contracts provided for the extended discounts of 25% and 30% and for a 100% penalty for cancellation. In the 1979 Agreement, the cancellation penalty applied only to \$5 million of the order.

On June 2, 1977, Grinnell cancelled the two purchase orders it had placed with Barry in September, 1976, upon which Barry had failed to deliver. On July 5 and July 14, 1977, Grinnell placed with Pacific the orders for 1978 and 1979, respectively, which Milman had agreed to on May 31.

I find that as of July, 1977, Barry had qualified one each of its sample snubbers in the four smaller sizes, but that their performance [**15] was still unreliable. The problems of putting even the four smaller sizes into production had not been solved. A critical element of the snubber was a ball screw. Ball screws which were commercially available had to be individually machined to be adapted to the Barry snubbers. No supplier of a ball screw suitable for production runs had been located. Engineering for the 35,000 lb. and 100,000 lb. snubbers, which presented different and more serious problems than the smaller sizes, had not been addressed at all. I am not persuaded by a preponderance of the evidence that Barry had the capacity to produce and deliver a full line of mechanical snubbers before the end of 1979.

The minimum amounts under the agreements for 1978 and 1979 were less than Grinnell's 1977 projections of its requirements for those years, and for 1979 substantially less. In fact, however, Grinnell's purchases were only slightly in excess of the minimum amounts.

All of Pacific's discounted prices were above both marginal and average cost, and Pacific made a substantial profit on the Grinnell sales. It enjoyed some savings in mass production and reduction of selling costs. With a few exceptions, its prices [**16] in all sizes of snubbers were higher than Barry's contract prices (including escalation). (It is likely, however, that if Barry had even gotten into production on the larger sizes, its increased development costs would have precluded them from selling at the contract price, and increases would have been required to make such production profitable).

At the conference on May 31, 1977, Pope and Toth agreed that 1977 prices would increase only 5% over the 1976 price list, that 1978 prices would be the same as 1977 and that 1979 prices would increase at the rate of inflation. The evidence does not support the proposition that this price structure was arrived at for the purpose of securing the contract with Grinnell; it is likely that it had been decided upon across the board, possibly as early as January, 1977.

The evidence does not support a finding that as part of the agreement, Pacific agreed not to solicit Grinnell's "backlog", i.e., existing unfilled orders for pipe hanger [*1270] systems with hydraulic snubbers in order to get the customer to substitute its mechanical snubbers. The evidence is rather persuasive, in fact, that Pacific actually made such solicitations.

At [**17] a meeting of the Society of Security Analysts in New York in the fall of 1977, Mr. Toth, president of Pacific, made the following answer to a question concerning Pacific's competitors in the snubber business:

TOTH: Shock arrestor. Well, our major competitors are our major customers. We traditionally sell the shock arrestors to the pipe hanger people and for instance, there's a division of ITT, Grinnell up in Providence, called the Pipe Hanger Division, that probably has a major share of the market and they make hydraulic shock arrestors. So we have had to sell our product to them when at the same time they were trying to beat us out

with the sale of their hydraulic units. And that's the reason for our selling directly to the utilities. We went right to the end user who just edicted [sic] to the selling engineers that they wanted a mechanical shock arrestor versus a hydraulic. So Grinnell has had to buy our unit. We really were heading on a collision course with this major customer up until last fall when we got together with them and they decided not to offer their unit nor to get into the design of a mechanical unit. So we now have all of their business. We have **[**18]** a contract with them for the next two years. That amounted to a \$16 million order that we got this past summer and it is a major part of our backlog now and they are our friends now.

In October, 1977, a Grinnell internal memorandum seeking approval from corporate headquarters for the cancellation of the Grinnell-Barry contract contained the following paragraph:

During the course of developing the product, Barry Wright Corp. (our partners in the joint venture) exercised their option to increase production costs due to escalation. At the same time our competitors, who have a similar device qualified and in production, have heard of our intent to develop our own device, offered us more favorable terms for both cost and schedules. With these new terms, the cost of developing our own product became marginal, and the project was cancelled.

This memo was endorsed by Milman and other Grinnell officials principally concerned with the snubber contract.

Pacific sent Barry a letter warning Barry against infringing Pacific's patent. No other action was taken. I find that this letter was sent in good faith and did not constitute an abuse of the patent.

*Rulings **[**19]** of Law.*

1. Relevant Market.

HN1 In order to determine whether the defendant has "market power" it is necessary to determine the relevant market. The parties have stipulated that the relevant product market consists of both hydraulic and mechanical snubbers. This is theoretically justifiable even though customer preference was strongly in favor of mechanical snubbers on the ground that there is a point at which a price differential would negate the preference. As a practical matter, however, given the relationship of engineering performances to budgetary limits in this particular industry, it is probable that it would take a very broad price differential to achieve this theoretical result.

Defendant urges that the relevant geographic market is the entire world because Pacific makes some sales in foreign countries in competition with foreign manufacturers. The market in which Grinnell is obliged to buy and in which Barry was obliged to compete for Grinnell's business was the United States. In the United States market, Pacific was not subject to competition from foreign manufacturers. The world market is thus irrelevant to this case. The relevant market is the United States. **[**20]** See generally, Areeda & Turner, Antitrust Law, Little, Brown and Company, 1978, §§ 522-524 and 534.

2. Market Power.

HN2 Market power is defined as the power to raise the price of a product by limiting its **[*1271]** supply. There was evidence of various arcane indicia of market power which in the circumstances of this case I need not review. Pacific's dominance of the market generally and total control of mechanical snubbers in the United States clearly gave it market power. In addition, there were significant barriers to entry into the market because of the patent covering Pacific's product and the cost and difficulty of designing and producing a workable snubber which did not infringe the patent.

The possession of market power is not the equivalent of its exercise, however. It appears in this case that Pacific considered it in its best interests (i.e., presumably the maximization of profits) to reduce prices and increase production in order to utilize its total investment in its productive capacity. This is the reverse of the exercise of market power.

3. Exclusionary Conduct.

HN3 A manufacturer with market power may not indulge in exclusionary conduct, even **[**21]** if such conduct is not the classic monopolistic exercise of market power. Exclusionary conduct has been very broadly defined, most

notably by Judge Wyzanski in [United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 343-345 \(D. Mass. 1953\)](#), aff'd *per curiam*, [347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 \(1954\)](#), as encompassing any practices by a monopolist which were not the "inevitable consequences of ability, natural forces or law". "Market control is inherently evil and constitutes a violation of [§ 2](#) [of the Sherman Act] unless economically inevitable, or specifically authorized and regulated by law."

Barry has asserted that Pacific's conduct was violative of the Sherman Act in several particulars; only two of its arguments merit serious consideration.

The first argument is that the price concessions granted to Grinnell, while not predatory in the sense of violating the Robinson-Patman Act, were nevertheless exclusionary in that they were designed to eliminate Barry as a potential competitor. They were not below any measure of cost, however, and produced a comfortable profit for Pacific. Assuming that the price concessions were in part an answer to the potential [**22](#) threat from Barry, I rule that such [HN4](#)[↑] nonpredatory and nondiscriminatory price reductions do not violate [Section 2](#) of the Sherman Act. Reasonable reduction of price in response to competition is not a violation of the Sherman Act; it is in fact the result which the antitrust laws were designed to accomplish. [Cal. Computer Products v. Intern. Business Machines, 613 F.2d 727, 742 \(9th Cir. 1979\)](#).

The second argument is that, in exchange for price cuts, Pacific imposed on Grinnell a three-year noncancelable requirements contract which was intended to foreclose Barry's entry into the market. The first answer to that argument is that it misread the facts. There was no three-year contract. Pacific offered three separate contracts at favorable discounts. The favorable discounts for 1977 were not conditioned on agreements for 1978 and 1979, nor were 1978 discounts conditioned on an agreement for 1979. Accepting all three contracts was Grinnell's choice, apparently for two reasons: relatively favorable pricing and established availability of a reliable product.

Even if the contracts were requirements contracts, separate one-year contracts in these circumstances are probably not unreasonable. [**23](#) It is not necessary to decide that issue, however, because it seems clear that the agreements were not for requirements but for specific dollar amounts. In 1978 and 1979, the minimum amounts were less than Grinnell's anticipated needs. Barry argues that in fact the minimum amounts were in excess of Grinnell's requirements and that Grinnell ended up with an excessive inventory of snubbers for which there was no economic justification. There was little if any evidence on the justification for Grinnell's inventory, and I am unable to make a finding on the point. A characteristic of a requirements contract is that the purchaser is precluded from buying any of the product from any other supplier. This [*1272](#) was not the case, and indeed Barry might have supplied the excess amount if it had taken up the \$3.6 million option offered to it by Grinnell in the spring of 1977.

The aspect of the contracts which most strongly supports Barry's charges against Pacific is the 100% cancellation penalty, in effect rendering the purchase order noncancelable. It is difficult to say that this provision was "economically inevitable". It was in fact a change in practice. Pacific argues that [**24](#) it simply made specifically enforceable Grinnell's contractual obligation to purchase the minimum amount specified. This argument is a trifle disingenuous. It is clear that blanket purchase orders of the type executed by Pacific and Grinnell in January and July, 1977 were agreements governing price only. No firm obligations of the seller to deliver and the buyer to pay for the goods arose until specific purchase orders were submitted. If the agreed upon minimums were not ordered, the agreed upon discounts would be withdrawn, and the purchaser would be obliged to pay at standard rates for products actually ordered and delivered.

Strict application of the notion of "economic inevitability", however, would render a whole range of business choices illegal to the extent that a particular choice enhanced the chooser's control of the market in any respect. It seems to me to be an extraordinary extension on antitrust theory to hold a noncancelable clause in a one-year purchase contract illegal because not economically inevitable. I have found no case so holding, and I rule that the imposition of this clause, given the history of the relations between Grinnell and Pacific, and Pacific's [**25](#) legitimate desire to plan its production for at least a year, is not illegal exclusionary conduct in violation of [§ 2](#) of the Sherman Act.

Tortious Interference with Contractual Relations.

Barry had added a count against Pacific for tortiously interfering with its contract with Grinnell. With respect to this count, I find and rule as follows:

1. From January, 1977 onward Barry was in default on its contract with Grinnell and there was no likelihood that Barry could produce a line of snubbers within any future period reasonably within the terms of the contract.
2. Pacific did not commit any tortious act.

Conclusion.

I conclude that Pacific had achieved market power in the snubber market generally and a complete monopoly of mechanical snubbers in the United States as of January, 1977. I find that the United States is the relevant geographical market. I further find that Pacific's monopoly was achieved because of its superior skill in devising the only workable and reliable mechanical snubber on the market and because of the protection offered to it by its patent. Its monopoly was thus perfectly legal. I conclude that in 1977 it captured an even [**26] larger share of the market by means of three successive one-year contracts with Grinnell for substantial numbers of snubbers. I do not find that the provisions of these contracts were illegal. I further conclude that it is likely that Pacific would have captured most of this market in any event because Barry was not shown to have the ability to produce a full line of snubbers within the relevant period and no other producer was in the field.

I conclude that Barry's elimination from the market was primarily the result of its inability to furnish the product within the relevant time period, and that Pacific's domination of the market was the result of its filling the void thus created. In that sense, its eventual monopoly position was economically inevitable.

Order for Judgment.

On the basis of the foregoing, judgment shall enter for the defendant, with costs.

So ordered.

End of Document



General Business Systems v. North American Philips Corp.

United States Court of Appeals for the Ninth Circuit

July 12, 1982, Argued and Submitted ; January 28, 1983, Decided

No. 80-4566, No. 81-4386, No. 81-4387, No. 81-4388, No. 81-4389 No. 81-4390, No. 81-4391

Reporter

699 F.2d 965 *; 1983 U.S. App. LEXIS 30980 **; 1982-83 Trade Cas. (CCH) P65,177

GENERAL BUSINESS SYSTEMS, a California corporation, Plaintiff-Appellant, v. NORTH AMERICAN PHILIPS CORPORATION, a Delaware corporation; PHILIPS BUSINESS SYSTEMS, INC., a Delaware corporation, and N.V. PHILIPS GLOEILAMPENFABRIEKEN, a Nederland corporation, Defendants-Appellees; NORTH AMERICAN PHILIPS CORPORATION, a Delaware corporation, et al., Counterclaim Plaintiffs-Appellants, v. GENERAL BUSINESS SYSTEMS, a California corporation; SHASTA GENERAL SYSTEMS, a California corporation, Counterclaim Defendants-Appellees

Prior History: [**1] Appeal from the United States District Court for the Northern District of California.

Robert P. Aguilar, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

mlcs, district court, manufacturer, prices, markets, relevant market, small business, distributor, monopolization, products, customers, sales, peripheral, antitrust, summary judgment, competitors, computer system, purchaser, disk, cases, computer market, conspiracy, technology, contracts, discovery, compete, dealers, cards, tortious interference, specific intent

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

699 F.2d 965, *965LÁ1983 U.S. App. LEXIS 30980, **1

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

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

HN1 **Summary Judgment, Evidentiary Considerations**

Summary judgment should be granted only when, in light of the evidence and pleadings, a court is convinced that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Summary judgment is disfavored in complex antitrust cases involving elusive issues of intent or motive. Nevertheless, this general reluctance does not preclude the use of summary judgment in antitrust litigation. A party opposing summary judgment must present some significant probative evidence tending to support the complaint. Such evidence must be relevant to disputed factual issues that are truly material to the litigation. A lawfully displaced competitor cannot construct a justiciable controversy from artful pleading alone. The courts should not serve as a refuge from the give and take of a properly functioning marketplace.

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > General Overview

HN2 **Monopolies & Monopolization, Actual Monopolization**

The offense of monopolization rests upon the willful acquisition or maintenance of monopoly power in the relevant market and the existence of actual injury to competition in that market. The threshold consideration in establishing market power is the relevant market. A firm cannot impose monopoly prices if buyers are free to purchase a competitor's goods. Thus, all products that are reasonably interchangeable, and so can be said to compete with each other for the same buyers' dollars, are included in the market definition. The relevant market may also be a submarket delineated by 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. Nonetheless, the designation of the relevant market requires considerable judgment. Its dimensions include the product involved, the geographical limits within which it functions, and the appropriate time frame.

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

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

HN3 **Monopolies & Monopolization, Attempts to Monopolize**

Three elements are necessary to prove an attempted monopolization claim in the Ninth Circuit: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. In establishing the presence of these elements the court permits a dangerous probability of success to be inferred from proof of specific intent which, in turn, can be inferred from conduct that forms the basis of a substantial claim of restraint of trade, or conduct that is exclusionary or threatening to competition.

699 F.2d 965, *965LÁ1983 U.S. App. LEXIS 30980, **1

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

[HN4](#) [down] Regulated Practices, Price Fixing & Restraints of Trade

Price parallelism alone generally will not establish price fixing. Other circumstantial evidence is required.

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

[HN5](#) [down] Price Fixing & Restraints of Trade, Tying Arrangements

The elements necessary to establish a tying claim are: (1) Two distinct products or services are in fact tied such that the products are offered as a single package; (2) The defendant has sufficient economic power in the tying market to impose restrictions in the tied product market; (3) The amount of commerce in the tied product is not insubstantial. To possess substantial power in the tying market, a firm must be able to raise prices or to require purchasers to accept burdensome terms that could not be enacted in a completely competitive market.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

[HN6](#) [down] Sherman Act, Claims

To establish a per se violation of [section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a plaintiff generally must show that the defendant engaged in concerted anticompetitive activity with others at the same level of market organization. Exclusive dealerships usually escape the proscriptions of [§ 1](#) because they establish a vertical relationship among firms that do not compete with each other. Restraints solicited by a distributor but implemented by a manufacturer are not automatically per se violations. Restraints of this type come within the per se rule only if they clearly had, or were likely to have, a pernicious effect on competition and lacked any redeeming virtue.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Vicarious Liability > Corporations > General Overview

[HN7](#) [down] Antitrust & Trade Law, Sherman Act

A violation of section 1 of the Sherman Act, [15 U.S.C.S. § 1](#), requires, at the outset, concerted activity. This requirement precludes liability for coordinated activity among multiple corporations operated as a single entity. The single entity test is easily satisfied when corporate policies are set by one individual or by a parent corporation. At

the other extreme, jointly owned corporations that compete in the marketplace, hold themselves out to the public as competing organizations, and set policy independently are as capable of conspiring to restrain trade as unrelated corporations.

Counsel: Jon Michaelson, Esq. Kopkins, Mitchell & Carley, Palo Alto, California, for Appellant.

Paul M.Rose Esq., Brobeck, Phleger & Harrison, San Francisco, California, Forrest Hainline, Esq., Cooper, Kirkham, Hainline & McKinney, San Francisco, California, for Appellee.

Judges: Sneed, Farris, and Norris, Circuit Judges.

Opinion by: SNEED

Opinion

[*969] SNEED, Circuit Judge:

In 1977, General Business Systems (GBS) initiated a federal antitrust suit against N.V. Philips Gloeilampenfabrieken (NVP), a Netherlands corporation, and its American subsidiaries, North American Philips Corporation (NAP) and Philips Business Systems, Inc. (PBSI). The defendants cross-claimed against GBS and its sister corporation, Shasta General Systems (Shasta), alleging both federal antitrust and state law causes of action. GBS later sought sanctions against the Philips companies for alleged abuse of discovery. The district court refused to impose such sanctions and granted summary judgment against all parties. Both sides now appeal the denial of their respective [**2] complaints. We affirm the district court.

I.

FACTS

This case arises out of the Philips companies' attempt to penetrate the small business computer market in the United States. Between 1969 and 1978 NVP marketed its computers in this country through PBSI, its marketing agent, MLC, Inc., or independent distributors. During this period, Philips' share of the small business computer market never exceeded five percent. GBS became the Philips distributor for Northern California in 1972. In return, GBS agreed that it would concentrate its "primary marketing efforts" on Philips computers and would not market "directly competitive hardware." In 1974 PBSI added St. Louis, Missouri, to GBS's market area. The agreement was renewed in 1977 to extend through August 1, 1980. In 1978, however, Philips exercised a buy-out option, terminating the agency relationship.

Philips' initial computer lines, the P300 and P350 series, stored memory on magnetic ledger cards (mlcs). Although a number of small business computers used mlcs at the time, mlcs generally were compatible with only one manufacturer's brand of computers. The mlcs for Philips computers were produced primarily by two German [**3] companies, Jollenbeck-Kasten (JK) and Magnetdruck (MD). Philips provided design specifications and production assistance to JK and MD in order to assure maximum card-machine reliability. In return, JK and MD signed supply contracts restricting their sales of Philips mlcs to distributors "recognized as [members of Philips distribution network] pursuant to a written communication given by Philips to the Vendor." Although it is disputed [*970] whether a binding exclusive dealing relationship was created by this language, JK and MD generally sold mlcs exclusively to Philips affiliates or designees. PBSI was the designated Philips distributor for the United States at all times relevant to this suit.¹ PBSI, in turn, would sell the mlcs to GBS and other Philips computer distributors.

¹ The Philips designee until mid-1975 was MLC, Inc., which operated as a subsidiary corporation. PBSI took over as designated distributor in 1975 after complaints about MLC's effectiveness in handling mlc distribution. MLC is not involved in this litigation.

[**4] In 1974 GBS contacted JK and MD in an attempt to purchase mlcs directly. MD refused because of its exclusive dealing relationship with Philips. JK, however, had experienced negotiating difficulties with PBSI, and in 1975 inquired whether GBS would become an exclusive dealer of the JK-produced Philips mlcs. Although no exclusive dealing agreement was established, GBS did order and receive mlcs from JK during the latter half of 1976.

Philips did not ignore this interference with its distribution network. It repaired its relationship with JK by agreeing to split its orders for mlcs between JK and MD. JK reciprocated by ceasing to deal directly with GBS.

In the mid-1970's the P300 and P350 faced increasing competition from more sophisticated computers using disk memories and cathode ray tube (CRT) displays. These computers threatened the Philips computers with obsolescence. Both Philips and GBS were concerned with the problem. Philips' solution was to develop the P330, a disk/CRT unit. GBS, however, feared that the P330 represented too little, too late. GBS's interest focused on a more viable product, the Diablo disk/CRT computer. In 1976 Diablo's manufacturers inquired [**5] whether GBS would be interested in marketing the Diablo computer. GBS referred the opportunity to PBSI, which was uninterested. On September 3, 1976, GBS agreed to become Diablo's exclusive U.S. distributor. Pursuant to this agreement, GBS's two top management officials incorporated a sister corporation, Shasta, which shared office space and staff with GBS. A separate president, however, was designated to run Shasta. GBS assigned its exclusive Diablo dealership to Shasta, remaining liable should Shasta fail to perform.

Meanwhile, Philips continued to develop the P330. However, it was never able to market the new disk/CRT model successfully. GBS argues that Philips never made a production model available to U.S. distributors. Philips claims that GBS's devotion of time and resources to the Diablo doomed the P330 from the start. In any event, Philips became dissatisfied with its import sales and, in November, 1978, withdrew from the computer import market. Philips sold its residual supply and service functions to Pertec Computer Corporation, which marketed its own small business computers.

II.

PROCEEDINGS BELOW

GBS alleged the following antitrust violations by the Philips [**6] companies:

- (1) monopolization or attempted monopolization of a market or submarket for Philips-compatible mlcs in violation of [section 2](#) of the Sherman Act, [15 U.S.C. § 2](#);
- (2) conspiracy to fix prices and allocate markets and concerted refusal to deal, in violation of [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#);
- (3) product tying in violation of section 3 of the Clayton Act, [15 U.S.C. § 14](#).

GBS also sought to suppress the deposition testimony of certain witnesses because opposing counsel's misconduct allegedly prevented it from adequately cross-examining those witnesses.

In their counter-claim against GBS and Shasta, the Philips companies alleged the following:

- (1) conspiracy to eliminate Philips computers from the domestic computer market, in violation of [section 1](#) of the Sherman Act;
- [*971] (2) attempt to monopolize, in violation of [section 2](#) of the Sherman Act;
- (3) breach of GBS's distributorship contract with PBSI;
- (4) tortious interference by Shasta with GBS's obligations under the distributorship contract;
- (5) tortious interference with the Philips companies' business relationships with JK, MD, and others;

(6) abuse of process.

The district court, **[**7]** following the recommendation of a magistrate, denied GBS's abuse of discovery motion. The court rejected GBS's monopolization claim, primarily for failure to substantiate GBS's market definition. From this it followed that evidence supporting the charges of attempted monopoly, conspiracy, and product tying was lacking, and the district court so held.

As to the Philips companies' counter-claims, the district court concluded that GBS and Shasta were a single entity, and were thus incapable of conspiring together in violation of the antitrust laws. The court dismissed the attempted monopolization claim because the Philips companies had failed to establish the requisite intent to monopolize, or facts from which such intent could be inferred. The breach of contract claim fell in the absence of credible evidence of "direct competition" between the Philips and Diablo computers. Since GBS had not breached its contract with PBSI, the contractual interference claim against Shasta was rejected. The court also found no substantial evidence of improper interference with Philips' business relationships. Finally, it rejected the abuse of process claim because no causal connection between **[**8]** the alleged antitrust conspiracy and GBS's filing of this suit was shown, nor was any evidence introduced of improper use of trade secrets acquired through discovery. Summary judgment was accordingly granted against all claims.

III.

STANDARD OF REVIEW

HN1**[↑]** Summary judgment should be granted only when, in light of the evidence and pleadings, a court is convinced that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. Summary judgment is disfavored in complex antitrust cases involving elusive issues of intent or motive. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962). Nevertheless, this general reluctance does not preclude the use of summary judgment in antitrust litigation. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 694 F.2d 1132, 1136, & n.5, (9th Cir. 1982). A party opposing summary judgment must present some "significant probative evidence tending to support the complaint." *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968); see, e.g., *Betaseed, Inc. v. U & I* **[**9]** *Inc.*, 681 F.2d 1203, 1207 (9th Cir. 1982); *Thomsen v. Western Electric Co.*, 680 F.2d 1263, 1265 (9th Cir.), cert. denied, 459 U.S. 991, 103 S. Ct. 348, 74 L. Ed. 2d 387 (1982); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1381 (9th Cir.), cert. denied, 454 U.S. 831, 70 L. Ed. 2d 109, 102 S. Ct. 128 (1981). Such evidence must be relevant to disputed factual issues that are truly material to the litigation. *Id.* A lawfully displaced competitor cannot construct a justiciable controversy from artful pleading alone. The courts should not serve as a refuge from the give and take of a properly functioning marketplace. With these principles in mind, we turn first to the district court's disposal of GBS's claims.

IV.

GBS's ANTITRUST COMPLAINT

A. Monopolization

HN2**[↑]** The offense of monopolization rests upon the willful acquisition or maintenance of monopoly power in the relevant market, *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); *Greyhound Computer* **[*972]** *Corp. v. IBM*, 559 F.2d 488, 492 (9th Cir. 1977), cert. denied, 434 U.S. 1040, 54 L. Ed. 2d 790, 98 S. Ct. 782 **[**10]** (1978), and the existence of actual injury to competition in that market. See *Betaseed* **[Inc. v. U & I Inc.**, 681 F.2d 1203, 1231-32 (9th Cir. 1982); *California Computer Products v. IBM*, 613 F.2d 727, 735 (9th Cir. 1979)]. The threshold consideration in establishing market power is the relevant market. See *Grinnell*, 384 U.S. at 571. A firm cannot impose monopoly prices if buyers are free to purchase a competitor's goods. Thus, all products that are "reasonably interchangeable," and so can be said to compete with each other for the same buyers' dollars, are included in the market definition. *United States v. E.I. du Pont & Co.*, 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). For purposes of antitrust analysis, the relevant market may also be a submarket delineated by:

industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962); see, e.g., M.A.P. Oil Co. v. [**11] Texaco Inc., 691 F.2d 1303, slip op. at 5240-41 (9th Cir. 1982).

Nonetheless, the designation of the relevant market requires considerable judgment. Its dimensions include the product involved, the geographical limits within which it functions, and the appropriate time frame. The latter two pose no difficulty in this case. We can assume that the United States fixes the geographical limits and the years 1969 to 1978 the appropriate time frame.

The choice of the appropriate product is another matter. According to GBS, the appropriate product in this case is the Philips-compatible mlc when sold at wholesale. Its entire case is dependent on this choice of appropriate product. Only in this narrowly defined market did Philips possess a significant share. GBS relies on several factors to establish its market definition. It asserts that owners of Philips computers were "locked-in" to Philips-compatible mlcs. These owners could find few, if any, adequate substitutes for the JK and MD cards. As a result, GBS argues, Philips was able to raise its prices without facing competition from other mlc manufacturers. GBS also claims that the industry recognized a distinct Philips-compatible [**12] mlc market. The cards produced by JK and MD met Philips' stringent specifications and were not sold for use in other manufacturers' computers. The majority of these cards were handled by dealers who dealt only in Philips products. The foregoing allegedly gave Philips the ability to maintain "premium" prices in this distinct market.

The district court rejected as a matter of law GBS's market definition. It is this interpretation of the law that we must review. If the district court erred, we must reverse its judgment with respect to GBS's claims and remand for further proceedings. The primary source of the failure of GBS to establish its position is the district court's conclusion that the market for Philips-compatible mlcs was *not* insulated from the competitive struggle between computer systems. That is, in its view Philips had little or no power to raise the price of its mlcs without reducing its profits because any such increase would diminish sales of its computer system and very likely adversely affect aggregate profits. Were mlc prices significantly increased, computer system buyers quickly could shift to other sellers who, in turn, could profitably expand their output [**13] to meet the new demand. We agree with the district court that the undisputed facts permit only one conclusion, *viz.*, that the market for mlcs cannot be separated from the general market for small business computer systems.

1. *The Undisputed Facts*

The performance of mlcs was a major concern for businesses contemplating purchase of a P300 or P350. At first this worked to Philips' advantage. The reliability of its mlcs, which reputedly worked better than those of its competitors, played an important role in the campaign to sell Philips [*973] computers. Businesses unwilling to risk processing delays or loss of information would find the Philips computers and their mlcs an attractive package. As other companies developed more modern disk computers, however, Philips' early advantage became a serious disadvantage. Its failure in the American market is attributable to its attempt to cling to mlc computers even after the newer disk computers had proven their greater productivity. Philips' sales of computers dropped as purchasers turned away from systems based on the outmoded mlc technology.

In spite of contrary allegations in GBS's brief, the facts before the district [**14] court demonstrate that prospective purchasers also viewed the cost of mlcs as a major barrier to purchase of a Philips computer. While Philips sold fewer than 3000 computers in the American market between 1974 and 1978, it sold more than 19 million mlcs in the same market in the shorter period from 1975 to October 1978. At between twenty and twenty-eight cents a card, the mlcs' cost was a substantial part of total cost for many users. It is hardly surprising, then, that Shasta included the high cost of mlcs among the factors it used to convince customers to buy the more modern, disk-based Diablo. Even Philip Parise, GBS's vice-president, who maintained that he didn't know of any particular computer sale lost

because of the cost of Philips mlcs, conceded that it could have been easier to sell Philips computers had mlc prices been lower. As we view the record, there is no genuine dispute concerning the fact that the high price of these mlcs, which cost as much as two or three times those of other manufacturers, reduced the competitiveness of the Philips computers.

GBS asserts that the viability of a separate market for mlcs is placed at issue by the price insensitivity of the [**15] market for Philips mlcs after Philips withdrew from the computer market. This is not the case. Philips adhered to high prices after its withdrawal because, as GBS's president, Lawrence Finch, stated in his Declaration in Opposition to Defendant's Summary Judgment Motion, it had higher overhead costs than its competitors. The period during which GBS alleges that these prices were successfully foisted on the market is the same period during which competitors forced Philips, laden with its expensive mlcs, out of the American small business computer market. In due course Philips abandoned its mlc operation as well. It would not have done so had that market been the separate, profitable market alleged by GBS. Philips was the victim, not the beneficiary, of its high prices in the mlc market.

The other factors cited in support of GBS's market definition merit little discussion. Mlcs were sold separately from computers because of the dynamics of use, not market differentiation. Users could hardly be expected to buy a supply of mlcs good for the product life of the computer when they made their initial purchase of a P300 or P350. The physical division of consumer behavior does not [**16] alone establish that it is directed at separate markets. Industry recognition is, of course, a valid indicator of relevant market. See, e.g., [Greyhound Computer, 559 F.2d at 495](#). GBS, however, has failed to direct us to any significant probative evidence of such recognition. The only evidence to which it alludes is the unsupported statement of one witness that Philips-compatible mlcs constituted a market. This does not amount to substantial evidence of industry recognition, particularly when contrasted with the persuasive evidence already discussed of the interdependence of Philips computers and mlcs.

2. The Cases

GBS relies on two cases, [Heattransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964 \(5th Cir. 1977\)](#), cert. denied, 434 U.S. 1087, 55 L. Ed. 2d 792, 98 S. Ct. 1282 (1978), and [Greyhound Computer Corp. v. IBM, 559 F.2d 488 \(9th Cir. 1977\)](#), cert. denied, 434 U.S. 1040, 54 L. Ed. 2d 790, 98 S. Ct. 782 (1978), to refute the district court's determination of the relevant market. The confidence of GBS is misplaced. In *Heattransfer* the jury recognized a separate market in air-conditioning units for Volkswagen automobiles. [**74] These units, [**17] designed to accommodate Volkswagens' air-cooled, rear-mounted engines, were not suitable for other types of engines. Several manufacturers competed in this special market, which was not quickly responsive to price changes in air conditioners suitable for other engine types. Thus, a jury could easily find a market limited to Volkswagen air conditioners. See [553 F.2d at 980-81](#).

The market for mlcs is quite different. Unlike an air conditioner, which is not an integral part of an automobile "system," mlcs are an essential component of the Philips computer system. Not only is an mlc computer useless without cards, but also the quality of the mlcs determines the overall performance of the system. As already pointed out, the rational purchaser of a computer system must consider the cost, availability, and reliability of mlcs when deciding which system to purchase. Conversely, changes in the price, whether direct or indirect, of competing computer systems will quickly affect demand for the Philips computer systems and their mlcs.

GBS's reliance on *Greyhound Computer* is similarly misplaced. In that case the evidence sustained, "though by no great margin," the jury's finding [**18] of a market consisting of leased computers. [559 F.2d at 494-95](#). Contrary to GBS's contention, we expressly declined to rule on the lock-in theory asserted by Greyhound. [Id. at 495-96](#). Rather, we placed heavy reliance on industry recognition of the distinction between leases and sales. See [id. at 495](#).

Standing against GBS's "lock-in" theory is a line of cases rejecting attempts to establish a relevant market with respect to a "locked-in" component. [Telex Corp. v. IBM, 510 F.2d 894](#) (10th Cir.), cert. dismissed, 423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975), and [ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423 \(N.D. Cal. 1978\)](#), aff'd sub nom. [Memorex Corp. v. IBM, 636 F.2d 1188 \(9th Cir. 1980\)](#), cert. denied, 452 U.S. 972, 69 L. Ed. 2d 983,

101 S. Ct. 3126 (1981), both rejected claims that the relevant market was IBM-compatible peripheral equipment. In *Telex*, the Tenth Circuit reversed a district court's definition of the relevant market for peripherals as being that for devices compatible with IBM central processing units. The circuit court expanded the market definition to include non-IBM plug-compatible peripherals. The ease with which [**19] the incompatible could be made compatible established the reasonable substitutability of these peripheral products. [510 F.2d at 919](#).

We adopted a similar approach in *ILC Peripherals*, in which the district court's directed verdict rested in part on the plaintiff's failure to establish a submarket for IBM peripherals. The district court emphasized the "potential competition" from non-IBM plug-compatible manufacturers who could have converted to production of IBM-compatible equipment.² IBM had demonstrated that the costs and engineering barriers to conversion were not excessive. [458 F. Supp. at 429](#). It also relied heavily on [*975] competition between computer systems. Because peripherals formed a large part of total system cost, an increase in peripheral prices would increase the demand for competitive systems. Systems competition was therefore an important restraint on peripheral pricing. *Id.*

[**20] It is true that in *Telex* and *ILC Peripherals* the peripheral equipment represented a more substantial portion of the total system cost than do the mlcs. The same, however, cannot be said about *Advance Business Systems & Supply Co. v. SCM*, 287 F. Supp. 143 (D. Md. 1968), modified on other grounds, [415 F.2d 55 \(4th Cir. 1969\)](#), cert. denied, 397 U.S. 920, 90 S. Ct. 928, 25 L. Ed. 2d 101 (1970). In *Advance Business Systems* the plaintiff, a distributor of copying machine supplies, contended that the relevant market was paper that could be used in SCM copiers. SCM controlled this market, although a number of manufacturers produced paper that could be used with SCM's direct electrostatic process. Copying paper constituted a small portion of overall system cost. The court found the plaintiff's market definition to be unrealistically narrow after citing the competition among both paper suppliers and copier manufacturers. *Id.* at 153-54. It opted instead for a definition that included paper compatible with any copier operating on the direct electrostatic process used by SCM.

Advance Business Systems is consistent with the relevant market cases decided in this [**21] circuit. In [Kaplan v. Burroughs Corp.](#), 611 F.2d 286 (9th Cir. 1979), cert. denied, 447 U.S. 924, 65 L. Ed. 2d 1116, 100 S. Ct. 3016 (1980), the plaintiff alleged that the initial cost of programming equipment locked-in customers to bulk processing centers using Burroughs equipment and, thus, that such centers composed the relevant market. Similarly, in [In re Data General Corp. Antitrust Litigation](#), 529 F. Supp. 801 (N.D. Cal. 1981), commitment to certain software programs had allegedly locked-in customers to the central processing units that executed the programs. In both cases, definitions of the relevant market that were limited to a single company's systems were rejected. Such definitions did not describe "economically significant" markets. In *Kaplan* we stressed the high cross-elasticity of demand as between data processing systems. [611 F.2d at 295](#). *Data General* also turned on the widespread competition in the market for computer services. See [529 F. Supp. at 813-14](#).

GBS's lock-in theory must also be rejected. Philips has amply established that intense systems competition drove it from the market for small business computers and for mlcs. Had there [**22] been a demand for substitute mlcs,

² *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 460 F. Supp. 1151 (N.D. Ill. 1978), rev'd on other grounds, [617 F.2d 478 \(7th Cir. 1980\)](#), although cited heavily by GBS, is not good law in this circuit to the extent that it disregards the role of supply substitutability in the product market definition, see *id. at 1156*. Whether real or only potential, reasonable interchangeability of supply is significant because the existence of possible competitors constrains prices even where there is no direct competition. See [ILC Peripherals](#), [458 F. Supp. at 427-29](#). *Fontana*'s identification of a market for Cessna avionics seems internally inconsistent as well. The court noted that customers bought airplanes without paying any attention to avionics. Had the court adhered to its own admonition that real-world consumer conduct should dictate the product market definition, [460 F. Supp. at 1157 n.20](#), it would have been forced to conclude that the relevant market was for aircraft. *Fontana*'s strategy in approaching the avionic market by buying unequipped planes and then selling packaged planes with avionics in competition with Cessna acknowledged the inseparability of the two markets.

GBS also criticizes the district court's reliance on [Bushie v. Stenocord Corp.](#), 460 F.2d 116 (9th Cir. 1972), and [Spectrofuge Corp. v. Beckman Instruments, Inc.](#), 575 F.2d 256 (5th Cir. 1978), cert. denied, 440 U.S. 939, 59 L. Ed. 2d 499, 99 S. Ct. 1289 (1979). We find its criticism marred by its failure to distinguish existing and potential competition, and its unwillingness to follow the court in *ILC Peripherals* and impute proper significance to the latter.

other manufacturers would have experienced no technological or financial barriers in responding to it. Taken to its logical conclusion, GBS's approach would dictate that a manufacturer, facing competition against which it cannot prevail in the sale of its end product, could be found to monopolize the market for each unique component that goes into the product. This is surely to lose sight of the forest because of fascination with the trees.

We conclude, therefore, that the district court did not err in rejecting a market definition limited to Philips-compatible mlcs.

B. Attempted Monopolization

HN3 Three elements are necessary to prove an attempted monopolization claim in this circuit: "(1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1981), cert. denied, 459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61 (1982). In establishing the presence of these elements we permit a **[**23]** dangerous probability of success to be inferred from proof of specific intent which, in turn, can be inferred from conduct that forms the basis of a substantial claim of restraint of trade, or conduct that is exclusionary or threatening to competition. *Id.* at 1029 & n.11.

[*976] GBS's attempt at direct proof of probability of success is unavailing because of its failure to establish a relevant market limited to Philips-compatible mlcs. See generally *M.A.P. Oil Co. v. Texaco Inc.*, 691 F.2d 1303, slip op. at 5242-44 (9th Cir. 1982) (explaining role of relevant market in attempt to monopolize claims). Philips' diminishing share of the market for small business computers cannot support a finding of probable success in that market. Nor can we infer specific intent because, as the district court found, GBS has failed to show anticompetitive conduct sufficient to survive the grant of summary judgment. It is true, as GBS argues, that direct evidence of specific intent may lessen the burden of the conduct requirement if it clarifies the purpose of otherwise ambiguous conduct. See *Inglis*, 668 F.2d at 1030. However, here GBS has made no showing of predatory conduct whatsoever. **[**24]** Philips competed ineffectually in the market for small business computers and their accessory products. To hold that such conduct supports a charge of attempted monopolization is to suggest that the **antitrust law** punishes losers in the competitive struggle rather than protecting them from the avarice of winners. The district court properly rejected this claim.

C. Price Fixing

GBS's price fixing claim rests on the complex arrangement Philips created to market its products in the United States. JK and MD manufactured mlcs for the American market under contract with NVP. American suppliers could not deal directly with either manufacturer; NVP designated distributors for the mlcs and renegotiated prices annually with JK and MD. NVP set up a two-tier distribution system for its American market. MLCS were first funneled through PBSI, its wholly owned subsidiary. In some areas PBSI then sold these mlcs directly to retail customers; in other markets designated agents like GBS distributed the mlcs.

GBS, in support of its price fixing claim, points out that between 1975 and 1978 the prices charged for JK and MD mlcs were nearly identical. Although GBS is ambiguous on **[**25]** this point, it apparently is complaining about the prices JK and MD negotiated with NVP, not the prices charged by PBSI. GBS relies on the rather vague testimony of a GBS officer who fails to differentiate between sales by PBSI and sales by JK and MD. In addition, it relies on a series of letters from NVP to PBSI which detail NVP's price agreements with JK and MD. GBS argues that negotiations with NVP provided the opportunity for JK and MD to set prices.

We hold that GBS, as an indirect purchaser, lacks standing to complain about prices JK and MD charged PBSI. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977). The cases cited by GBS, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940), and *Ambook Enterprises v. Time Inc.*, 612 F.2d 604 (2d Cir. 1979), cert. dismissed, 448 U.S. 914, 101 S. Ct. 35, 65 L. Ed. 2d 1179 (1980), do not involve similar indirect purchasing arrangements. Even were GBS to have standing our result very likely would not be different because we find no evidence of any illicit agreement between JK and MD.

HN4 [↑] Price parallelism alone generally will not establish price [**26] fixing. Other circumstantial evidence is required. *Id. at 615*; see, e.g., *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, slip op. at 5603-04 (9th Cir. 1982). No such evidence has been shown to exist here. Thus, summary judgment on the price fixing claim was proper.

D. Market Allocation

GBS's per se attack on Philips' agreement to divide purchases evenly between JK and MD is also without merit. GBS asserts that this constitutes an illegal horizontal restraint. Numerous cases have condemned such restraints. In *United States v. Topco Association*, 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972), for instance, potential competitors in the grocery industry combined to allocate markets and compete with larger retailers. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 95 L. Ed. 1199, 71 S. Ct. 971 (1951), [*977] involved a horizontal restraint among manufacturers of antifriction bearings. Here JK and MD did not combine or agree to allocate markets. The Third Circuit in *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), it is true, did treat a vertical allocative scheme as a horizontal agreement where Holiday [**27] Inns, in response to pressure from its franchisees, distributed new franchises in a manner that achieved the same ends as would have a horizontal agreement between the franchisees. *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1975), cert. denied, 426 U.S. 935, 49 L. Ed. 2d 387, 96 S. Ct. 2649 (1976), also cited by GBS, presented an analogous arrangement between an electronics manufacturer and its dealers. No such joint pressure was exerted here and Philips was responding to none such in dividing purchases between JK and MD. In fact, it was responding to the unilateral pressure of JK which GBS was assisting to some extent.

A direct challenge to PBSI's contract as an illegal vertical restraint would be no more successful. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977), the Supreme Court perhaps left open the possibility that per se standards would apply to vertical restraints where a plaintiff could show "pernicious economic effect or lack of any redeeming virtue." *First Beverages, Inc. v. Royal Crown Cola Co.*, 612 F.2d 1164, 1170 (9th Cir.), cert. denied, 447 U.S. 924, 65 L. Ed. 2d 1116, 100 S. Ct. 3016 [**28] (1980). GBS, however, has not attempted to provide the factual evidence necessary to meet its burden under this rule of reason. See *Continental T.V., Inc. v. G.T.E. Sylvania Inc.*, 694 F.2d 1132, slip op. at 4601 (9th Cir. 1982); see also *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918); cf. *First Beverages*, 612 F.2d at 1168 n.3 (reproducing district court's jury instruction, drawn from *Chicago Board of Trade*, on reasonableness of territorial restraint). Accordingly, its market allocation claim must fail.

E. Tying

GBS rests its tying claim on an alleged attempt by Philips to expand sales of JK and MD mlcs, the tied product, by denying service and warranty protection, the tying service, to computer owners who did not use these mlcs. **HN5** [↑] The elements necessary to establish such a claim are: "(1) Two distinct products or services are in fact tied such that the products are offered as a single package; (2) The defendant has sufficient economic power in the tying market to impose restrictions in the tied product market; (3) The amount of commerce in the tied product is not insubstantial." *Portland Retail Druggists Association* [**29] v. *Kaiser Foundation Health Plan*, 662 F.2d 641, 648 (9th Cir. 1981); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1212 (9th Cir. 1977). GBS has not presented facts from which the second element could be inferred. To possess substantial power in the tying market, a firm must be able to "raise prices or to require purchasers to accept burdensome terms that could not be enacted in a completely competitive market." *U.S. Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 620, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977) (*Fortner II*). Under the facts before the district court, Philips possessed no such power with respect to the tying service. To have attempted to impose significant pressure to buy JK and MD mlcs by use of the tying service only would have hastened the date on which Philips surrendered to its competitors in the small business computer market.

It is true that Philips mlcs had a higher price than other similar cards. This could be under proper circumstances the result of being tied. See *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495, 504-05, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969) (*Fortner I*); *Moore*, 550 F.2d at 1216 & n.8. That, however, is not [**30] the case here. The higher prices of Philips mlcs were incident to their greater reliability. Their prices did not depend on Philips' involvement in the tying service. The cost of Philips-compatible mlcs did not drop after Philips withdrew from the market for small

business computers in 1978 and sold its interest in the tied product to a third party. GBS itself sought [*978] to sell more expensive mlcs from another manufacturer in this period. The Philips mlc was hardly a product whose prices were inflated by the vigor of its producer's strength in a tying market. The tying claim also fails.

F. Refusal to Deal

GBS, in pressing its section 1 claims, argues that the Philips companies' exclusive dealing arrangements with JK and MD constituted violations under either a per se or rule of reason analysis.

HN6 [↑] To establish a per se violation of section 1, a plaintiff generally must show that the defendant engaged in concerted anticompetitive activity with others at the same level of market organization. Exclusive dealerships usually escape the proscriptions of section 1 because, as already indicated, they establish a vertical relationship among firms that do not compete [**31] with each other. See A.H. Cox & Co. v. Star Machinery Co., 653 F.2d 1302, 1306 (9th Cir. 1981); Gough v. Rossmoor Corp., 585 F.2d 381, 387 (9th Cir. 1978), cert. denied, 440 U.S. 936, 59 L. Ed. 2d 494, 99 S. Ct. 1280 (1979).

Restraints solicited by a distributor but implemented by a manufacturer are not automatically per se violations. A.H. Cox, 653 F.2d at 1306. Restraints of this type come within the per se rule only if they "clearly had, or [were] likely to have, a pernicious effect on competition and lacked any redeeming virtue." Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, 637 F.2d 1376, 1386-87 (9th Cir.), cert. denied, 454 U.S. 831, 70 L. Ed. 2d 109, 102 S. Ct. 128 (1981); see, e.g., Betaseed, Inc. v. U & I Inc., 681 F.2d 1203, 1235 (9th Cir. 1982).

GBS invokes *Ron Tonkin*'s per se standard as applied in Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979). In *Cernuto*, the Third Circuit implied an anticompetitive effect to reverse a grant of summary judgment where a distributor allegedly had convinced its supplier, a cabinet manufacturer, to cease dealing with a competing distributor. *Id. at 170*. GBS appears [**32] to read *Cernuto* to hold that all a plaintiff need show to establish a per se violation is that a purchaser requested a common supplier to cut off a price-cutting competitor and that the request was honored. The Third Circuit, however, placed equal reliance on evidence of the defendants' concerted activity to restrain price movement. See *id. at 168-70*; Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 115 (3d Cir. 1980), cert. denied, 451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981). This GBS has not shown.

GBS would use Philips' allegedly premium prices to prove its price maintenance motivation. We have already rejected GBS's claim that it demonstrated an artificial price premium. According to GBS's own testimony, the Philips companies had high overhead costs which explain, at least partially, their high prices. Moreover, Philips mlcs were more reliable than the competition's; this explains the market's acceptance of higher prices. GBS's only direct evidence of price motivation is the testimony of a Philips employee that Philips "was aware" of GBS's lower prices during the period it bought mlcs directly from JK. The employee denied any concern [**33] about those prices apart from his general concern about GBS's interference with the Philips companies' exclusive relations with JK and MD. Equally damaging to GBS's *Cernuto* theory is the absence of evidence that Philips communicated its price concerns to JK or MD. *Ron Tonkin* and *Cernuto* each revealed much stronger evidence of complicity between manufacturer and distributor than exists in this case.

GBS claims that even if the Philips companies' exclusive dealerships were not invalid under *Cernuto*, the use of pressure against JK and MD to maintain the exclusive distributorship constituted an unreasonable restraint of trade. For support GBS cites a PBSI employee's testimony that JK was threatening its business relations with Philips by dealing with GBS. The "threat" here, however, is little different than the one in Determined Productions, Inc. v. R. Dakin & Co., 514 F. Supp. 645 (N.D. Cal. 1979), aff'd mem., 649 F.2d 866 [*979] (9th Cir. 1981). In *Determined Productions*, the defendant contracted with a third party to produce stuffed toy animals, which the defendant, in turn, supplied to the plaintiff. The third party was the largest but by no means [**34] the only such manufacturer in Korea. As in this case, the plaintiff tried to sidestep the middle man and deal directly with the Korean toy producer. The defendant responded with a threat to break relations with the Korean toy producer unless it returned to an exclusive dealing relationship. The Korean acquiesced. The district court, having first rejected the plaintiff's per se claim, discarded the rule of reason challenge because of the plaintiff's failure to give evidence of a relevant market and because of the ready availability of alternative sources of supply. *Id. at 648*.

GBS attempts to distinguish *Determined Productions* on the ground that GBS did not have alternative sources of mlcs. This is not so. Alternatives did exist. It is true that substitute mlcs might not have been available on the same terms from other suppliers; this, however, does not indicate economic injustice. As the court noted in *Determined Productions*, a defendant, having succeeded in legitimately controlling "the best, most efficient and cheapest source of supply in Korea," does not have to share "the fruits of its superior acumen and industry," *id.* In trying to secure direct access [**35] to mlcs jointly developed by Philips and JK, GBS was attempting to accomplish just that.

Finally, GBS condemns the refusal to deal as a [section 2](#) violation. Our rejection of GBS's notions of the relevant market foreshadows our response. The relevant market was small business computers. The Philips mlcs were not such unique resources as the railroad terminals in [United States v. Terminal Railroad Association, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 \(1912\)](#), and the power grid in [Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 \(1973\)](#). Nor does the evidence support allegations that Philips used its worldwide market position to coerce JK to refuse to deal with GBS. The only passage GBS cites when referring to Philips' pressure on JK deals explicitly with the United States market. In sum, GBS's [section 2](#) claim is no more supported than its various claims under [section 1](#). We affirm the district court's decision.

V.

GBS's ABUSE OF DISCOVERY CLAIM

GBS moved to have the deposition testimony of two witnesses, Mr. Weniger and Mr. Ockenfels, suppressed unless they were produced for cross-examination along with a third witness, Mr. [**36] Sievers, who was never deposed. The district court refused. Our inquiry on appeal is limited to examining the district court's ruling for an abuse of discretion. See generally [Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24 \(9th Cir. 1977\)](#) (dictum) (decision to grant discovery to determine jurisdiction lies in trial court's discretion), e.g., [Data Disc, Inc. v. Systems Technology Association, 557 F.2d 1280, 1285 n.1 \(9th Cir. 1977\)](#); cf. [Liew v. Breen, 640 F.2d 1046, 1049 \(9th Cir. 1981\)](#) (same standard to determine relevancy in discovery).

As to Mr. Weniger, the court found that GBS terminated discovery and therefore could not complain. This finding is clearly supported by the record and did not amount to an abuse of discretion.

GBS's claim with respect to the Ockenfels' deposition is stronger. Again, however, the district court's refusal to suppress did not amount to an abuse of discretion. The magistrate recommended denial of the plaintiff's suppression request based upon the following facts: (1) GBS had an equal opportunity to cross-examine the witness and filled more transcript space with its deposition than did Philips' counsel; (2) GBS [**37] went beyond the scope of direct examination on cross-examination; and (3) GBS improperly delved into areas that may have involved trade secrets and were certain to cause objections. The district court's acceptance of his recommendation was not an abuse of discretion.

[*980] VI.

THE COUNTER-CLAIMS

A. *Exclusionary Conspiracy*

Philips asserts that GBS and Shasta joined co-conspirators Paradata (a trade organization of Philips distributors) and its lawyer, and Xerox Corporation, its subsidiary Diablo Systems, and their officers, to eliminate Philips from the domestic market. Our review of the record reveals no significant probative evidence to support Philips' charge of conspiracy.

Xerox and Diablo Systems are guilty only of anticipating a shift in demand toward more efficient computers. These companies did not solicit GBS to drop the Philips line or otherwise restrict its existing relationship with Philips. Nor do we find them guilty of any other conspiratorial acts that would violate [section 1](#). The crux of the claim against Paradata and its lawyer is that they sought to prevent Philips from marketing the P330 in Northern California without using GBS, its exclusive [**38] distributor in that area. This attempt by Philips dealers to maintain their distributing

network indicates a desire to keep Philips in the American market, not to drive it out. They sought to exclude other distributors, not Philips.

The claim against GBS and Shasta is not as easily resolved. The district court's finding that they operated as a single business entity, and thus could not conspire in violation of the anti-trust laws, concerns a frequently litigated issue. [HNT](#) A section 1 violation requires, at the outset, concerted activity. [Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 \(9th Cir. 1979\)](#). This requirement precludes liability for coordinated activity among multiple corporations operated as a single entity. [Thomsen v. Western Electric Co., 680 F.2d 1263, 1266](#) (9th Cir.), cert. denied, 459 U.S. 991, 103 S. Ct. 348, 74 L. Ed. 2d 387 (1982); [William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1055](#) (9th Cir. 1981), cert. denied, 459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61 (1982); [Murray v. Toyota Motor Distributors, Inc., 664 F.2d 1377, 1378-79](#) (9th Cir.), cert. denied, 457 U.S. 1106, 102 S. Ct. 2905, 73 L. [Ed. 2d 1314](#) (1982); [Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617](#) (9th Cir. 1979), cert. denied, 447 U.S. 906, 64 L. Ed. 2d 855, 100 S. Ct. 2988 (1980); [Harvey, 589 F.2d at 455](#). The single entity test is easily satisfied when corporate policies are set by one individual or by a parent corporation. See, e.g., [Las Vegas Sun, 610 F.2d at 618](#); [Harvey, 589 F.2d at 454, 457](#). At the other extreme, jointly owned corporations that compete in the marketplace, hold themselves out to the public as competing organizations, and set policy independently are as capable of conspiring to restrain trade as unrelated corporations. See [Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F. Supp. 841, 859](#) (N.D. Cal. 1979), aff'd, 658 F.2d 1256 (9th Cir. 1981), cert. denied, 455 U.S. 1018, 102 S. Ct. 1713, 72 L. Ed. 2d 135 (1982).

The relationship between GBS and Shasta does not fall clearly at either of these extremes. Finch and Parise, GBS's principal officers and its sole directors, held 90% of Shasta's stock and two out of three positions on its board of directors. Shasta and GBS shared offices and personnel. Finch and Parise participated, as directors, [\[**40\]](#) in general policy formulation for Shasta. On the other hand, they left much of the day-to-day operation to Shasta's president, Joseph Walsh. Philips claims that Finch and Parise "swore they had little awareness of Walsh's management decisions." The cited portions of the record indicate that neither was much involved with policy decisions during the period in which the alleged conspiracy was to have been formed. Walsh was apparently given general control over Shasta's sales policies. In sum, the degree of control exercised by GBS is unclear.

On this record, the district court should not have decided the legal status of GBS's relationship with Shasta. We have found the single entity issue unsuited for resolution as a matter of law when faced with similar factual uncertainty. See [Murray, I*981 664 F.2d at 1379](#); [Inglis, 668 F.2d at 1055](#); [Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 927 n.5](#) (9th Cir. 1980), cert. denied, 450 U.S. 921, 67 L. Ed. 2d 348, 101 S. Ct. 1369 (1981); compare [Thomsen, 680 F.2d at 1266-67](#). GBS has raised a genuine issue of material fact that cannot be resolved conclusively on the basis of the evidence before us.

[\[**41\]](#) We need not reverse the district court's disposal of Philips' section 1 claim, however. On so clear a record, we are free to affirm the district court on any ground supported by the evidence before us. [Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 821](#) (9th Cir.), cert. denied, 456 U.S. 1011, 102 S. Ct. 2308, 73 L. Ed. 2d 1308 (1982); [United States v. County of Humboldt, 628 F.2d 549, 551](#) (9th Cir. 1980). Even if GBS and Shasta operated independently and could be guilty of conspiring, Philips has not pointed us to any probative evidence of either specific intent or conduct to eliminate it from the small business computer market.

Philips claims that GBS and Shasta "formulated and undertook a plan to take Philips' marketing position in the United States and eliminate Philips as a competitor in the small business competitor [sic] market." The evidence, even when interpreted most favorably to Philips, does not support this claim. Philips lost the American market; it was not taken from it. GBS, far from seeking to eliminate Philips, urged Philips early on to add the Diablo to its product line. Only after Philips declined did GBS set up its marketing arrangement [\[**42\]](#) with Shasta. Philips points to GBS's plan to form "NUCO systems" to market Diablo's Ranger computer. This plan, however, which GBS claims was never pursued, did not itself drive Philips from the American market. Although the Diablo was clearly more attractive than the old Philips computers, GBS continued to maintain the infrastructure of its Philips distributorship. There is no evidence that either GBS or Shasta ever sabotaged Philips' sales. GBS sold 67 Philips computers in 1976, the year it began marketing the Diablo, up from 49 the year before. GBS's later declining sales

of Philips computers was part of a nationwide decline from 832 computers in 1976 to 250 in 1978. In this same period the total annual sales of small business computers jumped from 27,000 to 38,000. GBS's poor sales were the result of an impersonal shift in demand that Philips did not anticipate, or at least did not respond to effectively. Philips cannot retrieve its lost market share by blaming GBS, which was merely the messenger with the bad news.

In view of these conclusions, the district court could properly have granted summary judgment against Philips had it reached beyond the intracorporate defense. **[**43]** We therefore affirm the district court's disposition of Philips' section 1 claim.

B. Attempted Monopoly

The Philips companies allege that GBS and Shasta attempted to monopolize Philips' American trade.³ We find that this claim easily fails, for we agree with the district court that Philips provides no credible evidence of either specific intent to monopolize or predatory conduct.

[44] C. Breach of Contract and Tortious Interference**

The district court rejected the breach of contract claim for want of evidence that GBS, contrary to the terms of the contract, marketed "directly competitive" **[*982]** equipment.⁴ Philips claims that disk/CRT and mlc computers were "directly competitive" from statements by GBS officers that these computers, although vastly different in performance and cost, fulfilled the "same basic tasks" and competed for the same "profile" of customers. Philips attempts to buttress this claim by citing testimony that some of its customers did turn to disk/CRT computers such as the Diablo.

[45]** This evidence, while showing that disk/CRT computers replaced some mlc computers, does not show "direct competition" within the meaning of the contract. As Louis Fuchs, Philips' manager for new products when the Diablo came out, testified, mlc computers were no longer competitive with newer CRT models. The computer industry has experienced the rapid obsolescence characteristic of high technology markets. In such technologically sensitive markets, where every advance brings a major increase in productivity or decrease in price, old products do not remain in "fierce, direct competition" with the new, as Philips claims. The group of customers may remain the same, but their demand shifts from one product group to another as technology redefines their needs and expectations. "Direct competition," within the meaning of the contract, appropriately should embrace only computers of approximately the same technological generation.

Philips mentions competition between old and new products in the markets for flexible wrappings, *United States v. E.I. du Pont & Co.*, 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956); energy, *United States v. General Dynamics Corp.*, 415 U.S. 486, **[**46]** 39 L. Ed. 2d 530, 94 S. Ct. 1186 (1974); fire protection, *United States v.*

³ Although the counterclaim also appears to state a claim of monopolization, Philips concedes in its reply brief that it raised only an attempt claim. Were Philips to raise a straight monopolization claim, it could be disposed of quickly. Our rejection of GBS's market definition would be equally fatal to any counterclaim predicated on Philips mlcs as a relevant market. GBS had no significant power in other markets. It played no significant role in the general mlc market. Charges of monopoly in the small business computer market would be equally insupportable, given GBS's de minimis portion of the growing and increasingly competitive market already shared, as Philips admits, by nearly seventy firms. There is no evidence of its power in this market, as required by *United States v. Grinnell Corp.*, 384 U.S. 563, 570, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966).

⁴ The court also noted that the withdrawal of the Philips computer from the domestic market motivated GBS's defection. Philips correctly urges that the district court erred if it believed Philips withdrew before GBS agreed to market the Diablo. GBS incorporated Shasta in 1976, two years before Philips pulled out of its American computer operations. The district court may have been referring to Philips' effective withdrawal from the market by its failure to provide an operational CRT computer in time to compete with the Diablo, not to its final departure in 1978. In any event, Philips' failure to provide substantial evidence that its computers were "directly competitive" with the Diablo makes the district court's additional reliance on the timing of Philips' retreat harmless error at worst. Thus, although we agree that the court's second finding may well be either misleading or incorrect, we need only address the first finding, as it is dispositive.

Grinnell Corp., 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); and automobiles, *Sherman v. British Leyland Motors, Ltd., 601 F.2d 429 (9th Cir. 1979)*, but in none of these markets have new products vanquished the old as completely as in the functionally sensitive market for small business computers. In this market yesterday's technology is simply not competitive. Philips' departure from the American market demonstrates this even with respect to only marginally obsolescent computer products.

Philips relies on certain portions of the record to prove that GBS breached its contractual duty to focus its "primary marketing effort" on the P330 when it became available. Philips claims that its computer was "operational and ready for market" in mid-1977. The cited portions of the record do not support the claim, however. These portions refer only to dates in 1978 and give no detailed information about what "operational" means. Philips does not answer GBS's claim that workable software and peripheral equipment, which are crucial to successful marketing efforts, were unavailable in 1978. Indeed [**47] its evidence boils down to an assertion that a P330 computer demonstrated at a computer show in March, 1978, the same year it abandoned the American market, was a production rather than prototype model.

Be that as it may, GBS did not shirk its duty to Philips. To the contrary, GBS rejected PBSI's offer to release it from its agency agreement and expressed continued interest in the P330. Philips, on the other hand, withdrew from the American market rather than pressing forward to develop a fully operational P330. Thus, we need not decide whether such a P330 would have been in direct competition with the Diablo.

[*983] Philips' claims of tortious interference with its contracts with GBS and other dealers have no substance. Shasta did not tortiously interfere with Philips' contracts with GBS; nor did GBS and Shasta interfere with other dealers' contracts. Philips refers us to no breached contracts, no direct evidence of intent on the part of GBS or Shasta to induce a breach, and no damages connected to any contracts they had with Philips' dealers.

Similarly, inasmuch as customers were offered a new and better computer, no claim of tortious interference with Philips' customer [**48] relations is made out. Shasta sold the Diablo to a wide range of customers to whom Philips no longer offered competitive equipment. Neither the deposition of Shasta salesperson Shirley nor the "NUCO" document shows that the Diablo computer was particularly targeted at Philips' customers, as Philips asserts. Shasta sought to sell the Diablo to whomever it could.

Finally, with respect to Philips' relationship with JK and MD, we find no evidence that GBS, whose direct dealing with JK in 1976 was immediately terminated by PBSI, sought improperly to tie up the mlc market or to use its distribution of mlcs to identify Philips' customers. In short, Philips has adduced no evidence to support its many claims of tortious interference.

D. Abuse of Process

Philips claims that GBS brought its suit hoping to procure trade secrets and then to manufacture mlcs itself. There is no evidence that GBS was interested in manufacturing mlcs after 1976, when it was able to obtain them from JK. The cited portions of the record, contrary to Philips' assertions, reveal that GBS lost interest in manufacturing mlcs when it established a relationship with JK. No evidence supports the charge [**49] that GBS improperly misused trade secrets, or had an improper motive at the time this suit was filed. Philips' allegations rest on pure speculation.

VII.

CONCLUSION

There is no support for any of the claims asserted in this case. The judgment of the district court is affirmed.

AFFIRMED.

Judge Norris may file a separate statement at a later date.



Litton Systems, Inc. v. American Tel. & Tel. Co.

United States Court of Appeals for the Second Circuit

June 14, 1982, Argued ; February 3, 1983, Decided

Nos. 81-7598, 81-7766, 81-7776, 81-7778, 81-7856, Nos. 1323-26, 1344 -- August Term, 1981

Reporter

700 F.2d 785 *; 1983 U.S. App. LEXIS 30791 **; 1982-83 Trade Cas. (CCH) P65,194; 12 Fed. R. Evid. Serv. (Callaghan) 1426; 1983 WL 962841

LITTON SYSTEMS, INC., Litton Business Telephone Systems, Inc., Litton Business Systems, Inc., and Litton Industries Credit Corporation, Plaintiffs-Appellees-Cross Appellants, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Western Electric Company, Inc., Bell Telephone Laboratories, Inc., New York Telephone Company, Inc., New Jersey Bell Telephone Company, Southern Bell Telephone and Telegraph Company, The Ohio Bell Telephone Company, Southwestern Bell Telephone Company, The Pacific Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company, Defendants-Appellants-Cross Appellees; LITTON SYSTEMS, INC., v. SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant-Appellee

Prior History: [**1] Appeal from jury verdict in an antitrust action in the United States District Court for the Southern District of New York, William C. Conner, Judge, finding defendant liable for willful maintenance of monopoly power and attempted monopolization and awarding plaintiff damages in its capacity as competitor and customer of defendant.

Disposition: Affirmed.

Core Terms

tariff, certification, interface, interconnection, terminal, competitors, telephone, customers, argues, network, antitrust, trial court, bad faith, practices, anticompetitive, installation, leasing, telephone system, connecting, lost profits, instructions, estimate, damages, deButts, wiring, sham, government action, assumptions, employees, parties

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] Appeals, Standards of Review

In reviewing the jury's verdict the evidence must be viewed in the light most favorable to the appellee.

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

HN2[] Jury Trials, Verdicts

It is completely appropriate to submit special interrogatories to the jury, particularly in a case that is complex and protracted.

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

HN3 **Jury Trials, Verdicts**

If the jury fails to answer interrogatory it is appropriate to resubmit the interrogatory a second and third time to obtain answers to the unanswered questions.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN4 **Regulated Industries, Energy & Utilities**

A tariff filed by an electric utility can not evade scrutiny under the antitrust laws simply because it is filed in accordance with state law and approved by a state agency.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN5 **Exemptions & Immunities, Noerr-Pennington Doctrine**

Where the administrative and judicial processes are abused in an attempt to stifle competition, the Noerr-Pennington doctrine is inapplicable. Although the "abuse" standard is a difficult line to discern and draw, this line is crossed when the defendant's activity is intended to injure the plaintiff directly rather than through a governmental decision. When the antitrust defendant has not truly sought to influence the governmental decision, his invocation of governmental machinery is a sham. Where he has no reasonable expectation of obtaining the favorable ruling, his effort to do so is a sham.

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

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN6 **Monopolies & Monopolization, Attempts to Monopolize**

Repetition is but one indicium of a sham claim; under California Motor Transport's abuse standard many other forms of illegal and reprehensible practice may corrupt the administrative or judicial processes and result in antitrust violations.

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

Civil Procedure > Appeals > Standards of Review

[HN7](#) Jury Trials, Jury Instructions

Because an appellate court must assume that the jury discharged its obligation to apply the law in accordance with the trial judge's instructions, the court's review is limited to whether the instructions misled the jury as to the applicable law.

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

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[HN8](#) Monopolies & Monopolization, Attempts to Monopolize

Petitioning an administrative agency such as the Federal Communications Commission or seeking review in courts may result in delays because administrative or judicial procedures are often time consuming. Creating such delays does not constitute willful exercise of monopoly power as long as petition or application to courts is based on good faith interest in influencing agency or obtaining court ruling. However, there is exception to general rule that efforts to influence public officials do not violate antitrust laws, and that is the so-called sham or bad faith exception. If a campaign, ostensibly directed toward influencing government action, is mere sham or artifice to cover what is essentially nothing more than an attempt to smother competition by pattern of knowingly filing baseless claims or making misrepresentations to administrative agencies in a way designed to deprive competitors of meaningful access to those agencies, [First Amendment](#) protections are lost and Sherman Act applies.

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

Constitutional Law > Bill of Rights > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

[HN9](#) Monopolies & Monopolization, Attempts to Monopolize

There is no reason to impose any higher burden of proof on the antitrust plaintiff asserting sham than would ordinarily be applicable in any civil issue.

Administrative Law > ... > Evidence > Admissibility of Evidence > Hearsay

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Burdens of Proof

Evidence > ... > Exemptions > Statements by Party Opponents > Vicarious Statements

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Statements as Evidence > Hearsay > Hearsay Within Hearsay

[HN10](#) [blue document icon] Admissibility of Evidence, Hearsay

[Fed. R. Evid. 801\(d\)\(2\)\(D\)](#) excludes from hearsay admissions by a party-opponent in the form of statements made by a party's agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship.

Evidence > ... > Statements as Evidence > Hearsay > General Overview

[HN11](#) [blue document icon] Statements as Evidence, Hearsay

[Fed. R. Evid. 803\(24\)](#) provides for the admission of hearsay statements not specifically enumerated in [Rule 803](#).

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Common Carriers

Energy & Utilities Law > Utility Companies > Rates > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

[HN12](#) [blue document icon] Filed Rate Doctrine, Common Carriers

The Keogh doctrine is inapplicable to ultimately disapproved tariffs when the regulatory agency expressly refuses to commit itself pending investigation.

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

Torts > ... > Elements > Causation > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

[HN13](#) [blue document icon] Monopolies & Monopolization, Attempts to Monopolize

A plaintiff must allege a causative link to his injury which is "direct" rather than "incidental" or which indicates that his business or property was in the "target area" of the defendant's illegal act. These terms do not provide talismanic guides to decision but they do indicate the need to examine the form of violation alleged and the nature of its effect on a plaintiff's own business activities. Customers are not per se outside the target area. The test is ultimately one of directness. The court looks to whether the conspiracy was "aimed" at a particular entity in the area of the economy threatened by anticompetitive conduct and to whether the injury in question was central to the attainment of the anticompetitive objective rather than a mere incident thereto.

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

[HN14](#) [blue document icon] Private Actions, Remedies

Damages in antitrust cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. Accordingly, where there is a basis on which a jury can reasonably infer significant antitrust injury, the court should be very hesitant before determining that damages cannot be awarded.

700 F.2d 785, *785L^A 1983 U.S. App. LEXIS 30791, **1

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

HN15[] **Private Actions, Remedies**

Damage studies are inadequate when only some of the conduct complained of is found to be wrongful and the damage study cannot be disaggregated.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Governments > Courts > Court Personnel

HN16[] **Private Actions, Costs & Attorney Fees**

The payment of attorneys' fees is a part of the penalty for violating the antitrust laws. There is no doubt that attorneys as officers of the court must operate on an honor system, and must be appropriately disciplined to provide both specific and general deterrence.

Civil Procedure > Sanctions > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN17[] **Civil Procedure, Sanctions**

Fed. R. Civ. P. 37(b) expressly empowers the court to impose a wide range of specified sanctions for failure to obey court orders.

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

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN18[] **Discovery, Methods of Discovery**

Where there is repeated defiance of express court orders dismissal may be an appropriate remedy.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Torts > ... > Liability > Claim Presentation > General Overview

HN19[] **Dismissal, Involuntary Dismissals**

Because dismissal denies the party access to justice, if the party has a valid claim, dismissal would, in the case of attorney misconduct such as gross negligence, amount to a windfall to an adversary to be resorted to only when necessary to preserve the integrity of the judicial system, or in similar extreme circumstances.

Counsel: Howard J. Trienens, New York, New York (Jim G. Kilpatrick, William J. Jones, David J. Ritchie, New York, New York; Leonard Joseph, Harvey Kurzweil, Joseph Angland, Fred R. Biesecker, Dewey, Ballantine, Bushby, Palmer & Wood, New York, New York; Frank C. Cheston, Henry T. Brendzel, of counsel), for Defendants-Appellants-Cross-Appellees.

William Simon, Howrey & Simon, Washington, District of Columbia (Theodore F. Craver, Larry L. Yetter, Litton Industries, Inc., Beverly Hills, California; Peter E. Fleming, Jr., Curtis, Mallet-Prevost, Colt & Mosle, New York, New York; John Bodner, Jr., Francis A. O'Brien, John W. Nields, Jr., Ralph Gordon, Albert O. Cornelison, Jr., Kevin P. McEnery, Lewis M. Barr, Lisa A. Gok, Howrey & Simon, Washington, District of Columbia), for Plaintiffs-Appellees-Cross Appellants.

Judges: Oakes, Meskill and Kearse, **[**2]** Circuit Judges.

Opinion by: OAKES

Opinion

[*789] OAKES, Circuit Judge:

This appeal is taken from jury awards exceeding ninety million dollars before trebling entered by the United States District Court for the Southern District of New York, William C. Conner, Judge, in an antitrust action brought by Litton Systems, Inc. and some of its subsidiaries (Litton) against the American Telephone and Telegraph Company and some of its subsidiaries (AT&T). The awards were based on special jury findings that AT&T used its telephone monopoly illegally to monopolize the telephone terminal equipment market, thereby excluding Litton as a competitor, and imposing costs on Litton as a customer, of the AT&T system. The jury found that this was accomplished principally through opposing the adoption of certification standards and the imposition of tariffs filed with but not approved by the Federal Communications Commission (FCC). The tariffs required telephone customers to connect equipment purchased from AT&T's competitors to the telephone system only through the use of a device designed by AT&T.

This device -- called an "interface device" by Litton and a "protective connecting arrangement" (PCA) by **[**3]** AT&T -- was used in lieu of a system of "certification standards." These standards would have regulated, as they indeed now do regulate, the kind of equipment that can be connected with the AT&T system to ensure interconnection compatibility. Under the AT&T tariff, however, Litton had to pay for the privilege, so to speak, of connecting to the system with a "black-box" of AT&T's devising. The tariff was eventually rejected by the FCC in favor of certification standards, and Litton's principal argument before the jury and to the district court was that AT&T's bad faith opposition to certification standards drove Litton out of the telephone terminal equipment market in the interim period between the filing and the ultimate rejection of the tariff. While our recounting of the facts will disclose many other complexities, pro and con, of Litton's case, certainly a crucial factor is **[*790]** the FCC's ultimate finding that the interface device was not needed to protect the AT&T network from harm. Various network users had long purchased equipment from AT&T's competitors, using it without an interface with "no demonstration of harm" to the AT&T network. *Proposals for New* **[**4]** or *Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, 56 F.C.C.2d 593, 598 (1975). The gist of Litton's case and the jury's findings is that the interface device was unnecessary and uneconomical and that AT&T at all times knew this was so, and that despite clear prior indications from the FCC that the tariff would be set aside as unreasonable and destructive of competition, AT&T nevertheless proposed and fought to maintain the tariff -- all in bad faith in order to exclude competition in the terminal equipment market.

AT&T raises a score of issues on appeal. In addition to disputing the evidence underlying the jury's verdict, AT&T argues that its opposition to certification standards was privileged under the *First Amendment* by virtue of the *Noerr-Pennington* doctrine because it merely advocated a position before a government agency. AT&T also claims that the district court erred in its evidentiary rulings, instructions to the jury, and handling of special interrogatories, and that the jury's damage award was not supported by substantial evidence and was inconsistent with certain jury findings in AT&T's favor. **[**5]** The jury verdict for Litton as an AT&T customer is attacked as both unsupported by the evidence and improper under the "filed tariff" doctrine of *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922) and the "target area" standing doctrine, see *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), cert. denied, 406 U.S. 930, 32 L.

Ed. 2d 132, 92 S. Ct. 1776 (1972). Finally, AT&T argues that Litton's misconduct during discovery, which resulted in the denial of attorneys' fees to Litton, warranted outright dismissal of the case. Litton appeals the denial of attorneys' fees and conditionally cross-appeals on the basis that the district court's instructions to the jury prevented it from recovering its full measure of damages.

Bearing in mind that [HN1](#) in reviewing the jury's verdict the evidence must be viewed in the light most favorable to Litton, we affirm, holding the *Noerr-Pennington* doctrine inapplicable to Litton's suit as a competitor. We have considered all the parties' contentions and have found none requiring reversal. We find that the evidence was sufficient, both in terms [**6] of its weight and from the standpoint of causation, to support the damage award and that the district court's instructions to the jury and evidentiary rulings were free from prejudicial error. We also uphold the verdict for Litton *qua* customer -- no small sum, albeit almost wholly insignificant relative to the principal verdict. Although we are not without doubt, perhaps because the amounts involved are so large, we uphold the district court's imposition of discovery sanctions under [Federal Rule of Civil Procedure 37](#) and therefore deny Litton's unconditional cross-appeal. Our disposition of the case renders consideration of Litton's conditional cross-appeal unnecessary. In affirming, we take due note that this case was a model of judicial technique for handling a serious, complex, and difficult jury trial. Irrespective of what we might say regarding certain of the rulings below that we think were questionable or debatable, if not reversible error, we commend the district court's handling of the case.

I. BACKGROUND

A. Early Restrictions on Interconnection

Prior to 1956, AT&T had an absolute monopoly over long distance telephone service and local telephone service [**7] in areas accounting for over eighty percent of this country's telephones. Independent telephone companies, familiar to many rural users, interconnected with AT&T's long distance network and provided local telephone service in those areas not serviced by AT&T. The AT&T "telephone network" comprised local central office switching systems [*791] as well as the wires and cables linking them with the businesses and homes of customers. This monopoly, administered under the aegis of the FCC, was recognized as perfectly lawful and proper.

But AT&T had another monopoly -- not similarly sanctioned -- over the sale and lease of individual telephone sets and business telephone systems. Broadly speaking, a business telephone system can be classified into one of two general categories. The first, a Key System, allows a single telephone set to connect several others through the use of buttons on the telephone. Key Systems are used primarily by small offices. The second category, a PBX System, employs a central console or switching mechanism to allow interconnection of up to several thousand telephones. Key Systems and PBXs -- stipulated as the relevant product market in this case -- [**8] are referred to in the industry as "telephone terminal equipment." AT&T's monopoly over such equipment (including residential telephones) was preserved after the expiration of Alexander Graham Bell's original patents by the simple expedient of prohibiting the attachment of non-AT&T equipment to the AT&T system. AT&T enforced this policy by cutting off service to customers who attached non-AT&T equipment.¹ This practice was approved first by state regulatory agencies and later by the FCC after it assumed regulatory responsibility for telecommunications under the Communications Act of 1934, [47 U.S.C. § 151 et seq.](#) Because telephone terminal equipment sends electrical signals into the network, this policy was at that time considered necessary to ensure the safe and effective operation of the nationwide telephone network.²

¹ Western Electric, and AT&T subsidiary, manufactures telephone terminal equipment sold by AT&T.

² The AT&T brief describes the potential harms to the telephone network from "unbridled terminal equipment" as follows:

Improper voltages generated or transmitted by customer-provided terminal equipment can cause potentially hazardous electric shock to telephone company customers and employees. Longitudinal imbalance usually results from improper grounding of the telephone lines and can cause a user to hear increased noise or another voice (*i.e.*, crosstalk) on the telephone line. Excessive signal power also causes noise and crosstalk. Faulty network control signaling can cause

[**9] After World War II, however, various users sought to connect devices that AT&T had always considered "foreign attachments" to the telephone network. Efforts to challenge AT&T's absolute prohibition against interconnection of non-AT&T equipment met with some limited success as early as 1947 when, in *Use of Recording Devices*, 11 F.C.C. 1033 (1947), the FCC approved the use of machines to record telephone conversations because such use was not "detrimental to the quality of telephone service." *Id.* at 1048. At the same time, the Commission ruled that interconnection must be made through "adequate connecting arrangements," *id.* at 1048-49, but the responsibility for installing and maintaining connecting arrangements was vested in AT&T. The FCC's concern for the network's integrity was manifested in perhaps its most extreme form in *Hush-A-Phone Corp.*, 20 F.C.C. 391 (1955), where it prohibited the use of a mouthpiece shield designed to enhance user privacy because, although the shield did not harm the network,³ [*792] it could cause garbling of conversation. The Commission's ruling was set aside and remanded by the unanimous decision in *Hush-A-Phone Corp. v. United States*, 99 U.S. App. D.C. 190, 238 F.2d 266, 269 (D.C. Cir. 1956),⁴ which found the ruling "neither just nor reasonable." In characterizing the ruling as an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental," *id.*, the *Hush-A-Phone* court suggested that actual harm to the telephone network was to be the principle governing the validity of interconnection prohibitions.

[**11] On remand, the FCC adhered to this principle by ordering AT&T to modify its tariffs to eliminate restrictions against the use of the Hush-A-Phone device and "any other device which does not injure [AT&T's] employees, facilities, the public in its use of [AT&T's] services, or impair the operation of the telephone system." *Hush-A-Phone Corp. v. American Telephone & Telegraph Co.*, 22 F.C.C. 112, 114 (1957). The ruling thus implicitly acknowledged that the AT&T network could be harmed by some forms of interconnection. See notes 2 & 3, *supra*. At the same time, the Commission's reference to "any other device" made it clear that the scope of the ruling extended beyond use of the Hush-A-Phone device. Nevertheless, AT&T cast its revised tariff so as to prohibit interconnection of customer-provided telephone systems.⁵

numerous problems, including wrong numbers, false busy signals, and incorrect billing Although a minor problem might be acceptable to a particular customer, the combined effect of many such problems could impair telephone service for other customers. Brief at 11 n.9.

It is to be noted, however, that no proof of *actual* harm to the telephone network from interconnection with competitors' terminal equipment was ever adduced before the FCC, see *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, 56 F.C.C. 2d 593, 596, 598 (1975) (First Report & Order), or in this case. The FCC certification standards as set forth in the order cited above, and as subsequently amended, are nevertheless designed to prevent the occurrence of the four basic potential harms -- hazardous voltages, excessive signal power levels, excessive longitudinal imbalance, and improper network control signalling. *Id.* at 601-11.

³This depends on how "harm" is defined; AT&T has always advanced the idea that anything causing a user to hear increased noise or another voice (crosstalk) is harmful and that longitudinal imbalance and excessive signal power do just that. See note 2 *supra*.

⁴The court stated:

To say that a telephone subscriber may produce the result in question by cupping his hand and speaking into it, but may not do so by using a device which leaves his hand free to write or do whatever else he wishes, is neither just nor reasonable.

238 F.2d at 269.

⁵Tariff FCC No. 132 provided in part:

B. GENERAL REGULATIONS

7. Unauthorized Attachments or Connections. -- No equipment, apparatus, circuit or device not furnished by the telephone company shall be attached to or connected with the facilities furnished by the telephone company, whether physically, by induction or otherwise [except as provided in this tariff.] In case any such unauthorized attachment or connection is made,

[**12] At about the same time the *Hush-A-Phone* controversy was wending its way through the Commission and the courts, a Texas inventor by the name of Thomas F. Carter was inventing a mobile radio device that allowed its users to conduct two-way conversations with persons using ordinary, stationary telephones. The "Carterfone" used inductive and acoustic principles to connect the mobile user with a telephone "base station" that completed the link to the telephone network.⁶ Carter began marketing [*793] his device in 1959, and within a few years he had sold several thousand units in the United States and throughout the world. The AT&T tariff filed in response to the *Hush-A-Phone* decision was consistently interpreted as prohibiting the use of the Carterfone. See *Use of the Carterphone Device in Message Toll Telephone Service*, 13 F.C.C.2d 430, 438 (1967). Carter challenged the tariff in 1967, and the FCC hearing examiner found that with the exception of a single trivial incident, *id.* at 436, the Carterfone performed "satisfactorily without causing technical problems detectable by the user." *Id.* at 433. Because the Carterfone had no adverse effect on the telephone [**13] network, the examiner ruled that its use fell within the rationale of *Hush-A-Phone Corp. v. United States*, 99 U.S. App. D.C. 190, 238 F.2d 266 (D.C. Cir. 1956), and that it was "unjust and unreasonable to continue to prohibit use of the Carterphone for the purpose of interconnection after its beneficial and harmless nature has been demonstrated." 13 F.C.C.2d at 439.

The Commission decision following the hearing held that the tariff was "unreasonable and unduly discriminatory." *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d [*14] 420, 423 (1968). In contrast to the hearing examiner's conclusion that "a general prohibition against the use of interconnection devices is [not] unjust or unwise," *Carterphone*, 13 F.C.C.2d at 440, the Commission found the fact

that the telephone companies may not have known prior to the proceedings herein that the Carterfone was in fact harmless is irrelevant, since they barred its use without regard to its effect upon the telephone system. Furthermore, the tariff was the carrier's own. It was not prescribed by the Commission.

13 F.C.C.2d at 425. The Commission further underscored its rejection of a blanket prohibition against interconnection when it noted that "no one entity need provide all interconnection equipment for our telephone system any more than a single source is needed to supply the parts for a space probe." *Id.* at 424. It then invited the submission of "new tariffs which will protect the telephone system against harmful devices" and specifically stated that "the carriers . . . may specify technical standards if they wish." *Id.* at 426.

AT&T immediately sought reconsideration of the Commission's decision. In its order denying reconsideration, [*15] the Commission in a very real sense cemented its previous decision as follows:

We held that the Carterfone filled a need, that its use did not adversely affect the telephone system, that its use was nevertheless precluded by the tariff, and that the tariff was unlawful, and had been in the past, because it prohibited the use of the Carterfone and other interconnecting devices without regard to actual harm caused to the telephone system. We did not prescribe the terms of a new tariff, but left that to the initiative of the

the telephone company shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service.

24. Miscellaneous Devices Provided by the Customer. -- The provisions of paragraph 7 preceding shall not be construed or applied to bar a customer from using devices which serve his convenience in his use of the facilities of the telephone company in the service for which they are furnished under this tariff, provided any such device so used would not endanger the safety of telephone company employees or the public; damage, require change in or alteration of, or involve direct electrical connection to, the equipment or other facilities of the telephone company; or interfere with the proper functioning of such equipment or facilities, or impair the operation of the telephone system or otherwise injure the public in its use of the telephone company's services. [Except as otherwise provided in this tariff,] nothing herein shall be construed to permit the use of [a recording device] or of a device to interconnect any line or channel of the telephone company with any other communications line or channel of the company or of any other person.

Quoted in Use of the Carterphone Device, 13 F.C.C.2d at 437 (brackets in original; footnotes omitted).

⁶The Carterfone transmitted to a two-way radio at the base station serving the mobile radio system. To connect a telephone user to the mobile radio user, the base station's telephone handset was placed on a cradle in the Carterfone which automatically switched the radio to the transmitting mode when the mobile user spoke, and returned it to the receiving mode when he stopped -- all this without any direct electrical connection to the telephone network.

telephone companies, pointing out that they were in no wise precluded from adopting reasonable standards to prevent harmful interconnection. Basic to our holding was a rejection of AT&T's position that because AT&T cannot control the interconnected private system, interconnection is by definition a degradation of the message toll telephone system without regard to the quality of the interconnecting device or of the interconnected mobile radio system, i.e., without regard to actual harmful effects. We viewed this position [n2] and the rule embodying it as unreasonable

The primary contention upon reconsideration is that our decision permits the use of [**16] a myriad of customer-provided devices for interconnection without adequate exploration of the technical and economic problems. This record convinces us that there can be inter-connection without harmful technical effects

Use of the Carterfone Device in [Message Toll Telephone Service v. American Telephone & Telegraph Co., 14 F.C.C.2d 571, 572 \(1968\)](#).

We found no substantial factors outweighing the necessity of eliminating the arbitrary tariff. Standards to prevent [*794] the introduction of harmful inputs can be devised, and enforcing them would be no more difficult than enforcing the present absolute prohibition. Furthermore, notification to the carrier of the installation of a connecting device, which would be a reasonable requirement, would greatly relieve any problems of discovering the source of any harmful interconnection. The record also showed that terminal devices may be used under a standard making actual harm a factor, and the distinction between terminal devices and interconnection appears to be solely one of function unrelated to inherent propensity for injurious effects.

Id. at n.2 (citations omitted).

Significantly, the [**17] Commission also noted the broad sweep of its decision:

We also reject the related claim that the decision goes beyond the issues. To say, as some of the parties do, that the hearing related solely to the Carterfone and not to the validity of the tariff's broad prohibition would make the hearing essentially meaningless. The issues plainly included consideration of the basic validity of the tariff if it was the total prohibitory effect of the tariff which rendered its application to the Carterfone unreasonable. As we pointed out in our June decision, such a fault in a tariff can only be remedied by its revision. It should be noted in this connection that it was well understood that this was an "interconnection" case, and AT&T and General both argued on a broad base the need for a general prohibition against all interconnection not arranged by them.

Id. at 573. (footnotes and citations omitted)

We quote from the Memorandum Opinion and Order denying the petition for reconsideration at length for two reasons. First, a redacted version was submitted to the jury, a matter disputed by AT&T and considered by us, *infra*. Second, we believe that the clarity of the Commission's [**18] language was such that from AT&T's perspective it had to be clear as a bell, so to speak, that at least as of the 1968 *Carterfone* decision, if not before, it was unreasonable, unjust, and discriminatory to prohibit interconnection of terminal equipment without respect to any harm such devices might cause. The ruling by its very terms "require[d] tariffs reasonably addressed to the asserted problems." 14 F.C.C.2d at 573. It was therefore incumbent upon AT&T to devise tariffs that would permit attachment of non-harmful devices.

B. *The Interface Tariffs*

We suspect that the parties would disagree little with what we have said about the state of affairs up until the time of the *Carterfone* decision; at least they would agree on the facts, if not our interpretation of them. But what happened after *Carterfone* is hotly debated. Two quite different cases were presented to the jury and argued to us. The telephone company's scenario runs somewhat as follows.

1. *The AT&T Version*

The *Carterfone* decision was to become effective on November 1, 1968, whereupon -- intolerably to AT&T -- there would be no tariff provisions at all to limit equipment interconnection [^{**19}] or specify interconnection standards. AT&T thus faced the prospect of proposing interconnection standards on very short notice with no FCC guidance and novel problems of "real" risks. See note 2 *supra*. In 1967, AT&T had formed a Tariff Review Group -- perhaps in anticipation of the *Carterfone* ruling -- to review possible tariff modifications. Although the Review Group thought performance or certification standards were feasible, this approach was viewed as posing weighty problems of a non-technical nature. Specifically, we are told, the Review Group feared that promulgation and enforcement of such standards by AT&T itself would raise serious antitrust questions. At the same time, the Review Group thought that improperly installed or maintained "good" equipment threatened the system's integrity as much as "bad" equipment, and therefore concluded that a substantial degree of protection could be effected by requiring interface hardware -- the "protective connecting" [^{*795}] arrangement" or PCA.⁷ AT&T ultimately followed the Review Group's recommendation and adopted the PCA rather than the certification standards approach. Thus, in late October of 1968, AT&T filed [^{**20}] a tariff requiring the use of a PCA to interconnect terminal equipment. AT&T was to provide, install, and maintain the PCA at the customer's expense as fixed by the filed tariff.

The filing of the tariff sparked a spirited response, with twenty-nine parties filing responsive pleadings and comments. Opponents of the tariff argued that the PCA approach was a flawed response to *Carterfone* because it failed to specify interconnection standards, barred the use of customer-provided telephones for network control signalling, and discriminated generally in AT&T's favor. In late December of 1968, the Commission permitted the proposed tariffs to take effect, stating in *American Telephone & Telegraph Co. "Foreign Attachment"* [^{**21}] [Tariff Revisions, 15 F.C.C.2d 605, 609-10 \(1968\)](#), that the decision in "*Carterfone* does not hold that a customer may substitute his own equipment or facilities (whether it be telephone instruments, loops, poles, or central office equipments) for that furnished by the telephone company." Although the Commission allowed what we will call the "interface tariffs" to take effect, it explicitly stated that its action was not to be construed as "giving any specific approval to the revised tariffs," *id.* at 610, leaving entirely open the possibility of further action. In the interim, the Commission directed all segments of the telecommunications industry to engage in "informal engineering and technical conferences," to ascertain what "further changes are necessary, desirable, and technically feasible" in AT&T's tariff offerings. *Id.* at 610.

AT&T tells us that terminal equipment interconnection was the subject of much thought and engineering and economic consideration after the Commission decided to allow the interface tariffs to take effect. Throughout this period, however, AT&T concedes that it had no "statistically meaningful" data regarding actual harm to the network due [^{**22}] to interconnection. AT&T Brief at 17-18 & n.21. But, AT&T points out, a National Academy of Sciences (NAS) report commissioned by the FCC ultimately found -- the report took some ten months to prepare -- that network harm could be caused by a variety of factors. The report concluded that, on balance, the PCA requirement was appropriate because, although a properly enforced certification system could also protect the network from harm, the responsibility for creating and administering such a system should be shouldered by a regulatory agency rather than a private concern. In apparent response to the NAS report, the FCC formed a PBX Advisory Committee in May of 1971. The committee, composed of representatives of various interested parties including, of course, AT&T, studied the feasibility of interconnection without the PCA requirement. AT&T continued to maintain that unlimited interconnection could harm the network.⁸

⁷ The PCA mechanism generally combined in a single housing a "network control signalling unit," which AT&T had always claimed was necessary to protect against wrong numbers, false busy signals and incorrect billing, and a "connecting arrangement"; hence the term "protective connecting arrangement."

⁸ The only data AT&T produced, however, addressed effects on the network, such as crosstalk, rather than causes. Thus, in response to a request by the FCC Common Carrier Bureau for comments on certification standards proposals in October of 1973, AT&T in part submitted the following:

It is often argued that the impact on the quality of service of the interconnection of customer-provided equipment is merely potential and not real or actual. This is simply not true. In fact, our experience is clearly to the contrary. For example, current studies [the "Hunt Studies"] indicate that intercity private line serving links equipped with at least one customer-provided terminal generated trouble reports at a rate at least 50 percent higher than did serving links equipped with

[**23] [*796] In June of 1972, while the PBX Advisory Committee was preparing its final report, the FCC instituted rulemaking proceedings addressing the interconnection issues. The FCC took the "extraordinary" step of convening a Federal-State Joint Board (Joint Board) pursuant to [47 U.S.C. § 410\(c\) \(1976\)](#), to determine "whether, and to what extent, there is public need . . . to go beyond what we ordered in *Carterfone* and permit customers to provide, in whole or in part" network control signalling units and connecting arrangements. [*Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service \(MTS\) and Wide Area Telephone Service \(WATS\), 35 F.C.C.2d 539, 542 \(1972\)*](#). AT&T points to these developments to buttress its claim that the need for and propriety of the PCA requirement was very much an open question, emphasizing the fact that it took the FCC almost four years after *Carterfone* to address the interconnection issue.

The PBX Committee submitted its final report shortly after the Joint Board convened in 1972. The report included a model certification program based on a "barrier PBX system" that would incorporate protective circuitry [**24] obviating the need for a PCA.⁹ [**25] But by this time, after "lengthy internal debate," AT&T Brief at 21, AT&T decided to oppose certification standards as an unnecessary substitute for the PCA requirement. Mr. John deButts, then AT&T Chairman, announced this position in a speech before the National Association of Regulatory Utility Commissioners (NARUC) in late September of 1973. DeButts stated in his speech that the nationwide switching network was "too valuable a resource to risk a perhaps irreversible threat to its performance that would ensue from fragmentation of responsibility for that performance." Shortly thereafter, AT&T formally opposed the certification standard approach by filing comments in the FCC rulemaking proceedings.¹⁰ That this opposition [*797] to

telephone company-provided terminals only. The studies now in progress on message telephone lines are showing like results -- the trouble report rate for lines equipped with customer-provided terminals is more than 25 percent higher than lines connected solely to telephone company-provided terminals. As we have previously reported to this Commission with respect to interstate voice grade private line data services, where the same minimum protection criteria apply as on the public switched telecommunications network, a sizable percentage (8.5 percent) of the customers utilizing their own data transmitting equipment were applying signal power in excess of the established network protective criteria, thereby degrading the service of other customers. The same survey showed, in the case of a particular type of connection or interface which is comparable to that encountered on public switched network services, that 18 percent of the customer-provided terminals violated the minimum network protection criteria by a substantial degree.

The comments did state, however, that:

Complete and exhaustive statistics demonstrating all the harms from uncontrolled interconnection or the total impact on the quality of service might not be obtainable, given the nature of the problem studied. Certain effects simply are not measurable. How many wrong numbers or how much crosstalk occurs from the use of customer-provided terminals can only be observed at the time of or during their occurrence. The difficulties in making such measurements are apparent. However, the data cited above are sufficiently consequential to suggest that interconnection has an adverse impact on the quality of service. Certainly, for the reasons set forth in these comments, further loosening of interconnection policies, such as customer options embodied in the certification proposal before the Commission in this proceeding, is not in the public interest and should not be adopted.

(Footnote omitted).

⁹ AT&T claims that no equipment available at that time met the standards of the "barrier PBX" posited by the Advisory Committee and suggests that the concept was approved over its objection by non-AT&T chairpersons of Advisory Committee subcommittees. See AT&T Brief at 19-20 n.24.

¹⁰ Elaborating some of the concerns expressed by deButts in his earlier speech, the comments stated:

The public interest . . . will inevitably be impaired by the duplication of facilities and the division of responsibility that will ensue from further interconnection in an industry where compatibility of components and precise coordination of process are crucial. Interconnection has had an adverse impact on the innovative process in the telephone industry and the impact of certification would be even more detrimental.

. . . Any program of certification would, in our view, inevitably lead to the uncontrolled connection of customer-provided equipment to the telecommunications network. The ability to allocate responsibility for network performance would be destroyed.

certification standards was undertaken in bad faith was a principal special finding of the jury on which the verdict against AT&T turned.¹¹

[**26] AT&T's decision to stand behind the PCA requirement greatly upped the odds against adoption of a certification standards system. AT&T seems to agree with Litton that the deButts speech was a coda marking Litton's demise as a competitor, but denies that it opposed certification standards in bad faith and argues that Litton's failure in the terminal equipment market was inevitable by late 1973, if not earlier. According to AT&T, Litton's efforts to establish itself in this market were short-lived, poorly executed, and plagued with internal difficulties ranging from inadequate staffing to high-level corporate bribery. Litton entered the market in 1971, selling equipment made by other companies, with the hope that it could quickly develop its own products to feed the distribution and service network it created immediately after *Carterfone*. But by 1973, AT&T claims, Litton had failed to develop the caliber of product needed to compete with AT&T's evolving line of terminal equipment. This fact, coupled with the revelation that certain Litton officials had bribed their way into contracts with terminal equipment users, prompted Litton to exit the market in early 1974. AT&T's rendering [**27] of Litton's short, unhappy run in the terminal equipment race suggests that Litton lost because it sprinted early and winded quickly, and not because AT&T squeezed Litton into the rail with the PCA requirement.

In any event, Litton decided to withdraw from the terminal equipment market in early 1974. It was not until November of 1975, AT&T points out, that the FCC adopted regulations establishing certification standards.

Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), 56 F.C.C.2d 593, 599-613 (1975) (First Report & Order).¹² [**29] Although the FCC declined to include PBX and Key Systems in the certification program at that time, it expressed doubt regarding the Joint Board's recommendation that this equipment presented technical problems warranting general exclusion. AT&T perforce concedes that this ruling included statutory findings that the interface tariffs were "unnecessarily restrictive" and amounted to "unjust and unreasonable discrimination." *Id.* at 598. A few months later, the FCC amended its [*798] regulations to cover PBX and Key Systems that employed protective circuitry, [**28] Interstate and Foreign Message Toll Telephone Service, 58 F.C.C.2d 736 (1976) (Second Report & Order). The FCC's order was affirmed on appeal. North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874, 54 L. Ed. 2d 154, 98 S. Ct. 222 (1977).¹³ Thus, as of October 1977, after certiorari was denied by the Supreme Court, interconnection of non-AT&T equipment employing protective circuitry became a possibility. Finally, in April of 1978, the FCC issued a third order eliminating the protective circuitry requirement for

¹¹ The finding of predatory or anticompetitive conduct was based in part on "opposing certification in bad faith." Other such conduct initially found was "bad faith refusal to sell inside wiring at all or on a reasonable basis."

After returning its initial verdict, at which time the jury could not agree on whether the interface device tariff had been *filed* in bad faith and whether there had been "bad faith delay in making cutovers," the jury further deliberated at the court's request and found for Litton on these issues as well: hence our use of the term "a principal special finding."

¹² AT&T claims that certain FCC proceedings occurring prior to the adoption of certification standard regulations had the effect of placing the FCC's imprimatur upon the PCA requirement. See Telerent Leasing Corp., 45 F.C.C.2d 204 (1974), aff'd sub nom. North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027, 50 L. Ed. 2d 631, 97 S. Ct. 651 (1976); AT&T-Mebane Home Telephone Co., 53 F.C.C.2d 473 (1975). It is difficult to see how either of these decisions can be read to qualify the FCC's earlier, explicit statement that it was not approving the proposed tariffs, however. *Telerent* was a declaratory judgment order expressing the Commission's disapproval of a state utility commission's proposed rule that would absolutely prohibit the interconnection of customer-provided equipment on any intrastate portion of the telephone network. The Commission held that the proposed rule was contrary to the thrust of *Carterfone* and recently instituted proceedings considering the possibility of liberalizing the post-*Carterfone* tariffs. In *Mebane* a local telephone company sought exemption from so much of the post-*Carterfone* tariffs as allowed interconnection of customer-provided equipment. Although the Commission upon its own motion granted the local carrier an opportunity to demonstrate the need for a waiver from the tariffs on the basis of economic injury, it specifically ruled that, under *Carterfone*, customers must generally be allowed to provide their own equipment.

¹³ The appeal covered both the First and Second Report and Order in Docket No. 19528. 56 F.C.C.2d 593 (1975); 58 F.C.C.2d 736 (1976). The latter related to key systems and PBXs. See 552 F.2d at 1044.

properly registered and installed PBX and Key Systems. *Interstate and Foreign Message Toll Telephone Service, 67 F.C.2d 1255 (1978)* (Third Report & Order).

To summarize, the AT&T scenario sketches a hard-fought battle before the FCC with good faith efforts being made to protect the network. AT&T points out that it was not alone in opposing certification standards; several other interested parties -- e.g., NARUC, the Joint Board, and several state utility commissions -- supported the PCA approach. AT&T relies on this support, and on the fact that it took over four years from the time Litton exited the terminal equipment market for the FCC to establish certification standards, to back up its claim that it was not AT&T's "bad faith" opposition to certification standards that drove Litton from business. As might be expected, Litton's scenario plays out quite differently.

2. The Litton Case

In Litton's scenario, AT&T is cast as a Dorian Gray. To paraphrase Commissioner Johnson's dissent from the order staying the effect of *Carterfone* pending **[**30]** AT&T response, to Litton, the PCA requirement was much as if an electric utility prohibited customers from using a toaster unless it was designed, manufactured, and installed by the utility itself. Litton's case against AT&T relies heavily on the fact that AT&T has never been able to make a case for the PCA requirement. Litton reminds us that AT&T has not demonstrated -- before the FCC or at the trial of this case -- a single instance in which the network had been harmed by a competitor's terminal equipment. Litton Brief at 8. Nevertheless, AT&T imposed the PCA requirement on all equipment sold by its competitors. Strikingly, in one case involving two Atlanta hotels using the very same brand of PBX equipment, no interface was required for the equipment that AT&T purchased from a third-party manufacturer and leased to one hotel, while an interface was required when the other hotel purchased its equipment directly from the third-party manufacturer. Litton suggests, as did the Fourth Circuit in *North Carolina Utilities Commission*, that the PCA requirement was a naked attempt to maintain "private lawmaking authority over independent manufacturers." *552 F.2d at 1051* (emphasis **[**31]** omitted). The PCA requirement stood for almost ten years, giving AT&T a chance to interfere with the normal course of every sale of terminal equipment by Litton and all of AT&T's other competitors.

Litton's argument that AT&T opposed the development of certification standards in bad faith is based on evidence that Litton believes clearly demonstrates, first, that AT&T was aware that it could not substantiate its claims of harm to the network; second, that AT&T knew that without the PCA requirement it was vulnerable to competition; and, finally, that AT&T could have developed certification standards itself immediately after *Carterfone* but opted not to in order to buy the time necessary to meet competition in the terminal equipment market.

Litton put into evidence a number of AT&T documents to support the contention that AT&T simply could not demonstrate that the PCA requirement was necessary to protect the network from harm. Specifically, Litton points to an in-house report apparently **[*799]** prepared in 1971 by one of two AT&T representatives to the PBX Advisory Committee ¹⁴ which stated:

A Credibility Gap Exists

Limited interconnection on the message network **[**32]** and greater interconnection on private line facilities has been in existence for a long period of time and the carriers still find it virtually impossible to cite cases of harm . . . result[ing] from . . . interconnect[ion] . . . This inability to demonstrate cases of harm . . . is causing the manufacturers . . . users and regulatory bodies to . . . challenge the expansive efforts which [AT&T] insists must be taken to avoid the network pollution.

Litton Brief at 29-30 (emphasis omitted). To like effect is a 1972 report submitted to AT&T management by the Director of AT&T's Management Sciences Division stating that AT&T was in its "weakest position now, because even though everyone concedes that serious breaches of our tariffs by illegal or unauthorized equipment has grown

¹⁴ Litton claims in its brief that this report was prepared by a Mr. Byers. This appears to be the case; although the copy of the report in the appendix is unsigned, Byers' initials are typed in at the top. In any event AT&T does not dispute Litton's attribution of the report.

over the years, we have not been able to produce evidence of harm to anyone." *Id.* at 30. The report recommended that the interface requirement be rescinded. Litton points out that AT&T's sole evidence of potential harm to the system was derived from the Hunt Studies referred to in note 8 *supra* and which were cited by AT&T to the FCC as support for the interface requirement. Various [**33] AT&T officials conceded that the studies did not "prove anything." Nevertheless, we know that deButts maintained in his 1973 speech and in the formal filings submitted to the FCC that there were data supporting AT&T's position on network harm from interconnection.

Litton argues that a portion of the PCA device championed by AT&T was really no more than the dial or pushbutton mechanism of a telephone -- the network control signalling unit -- that only duplicated the function of the same mechanism in AT&T's competitors' equipment. Moreover, AT&T knew at the outset that the PCA requirement was useless; a Task Force of the Tariff Review Group charged by AT&T management with developing "the strongest possible case to resist customer ownership [**34] of telephone equipment" had concluded in early 1968 that a PCA requirement would only "shift[] . . . [existing] restrictions on customer-owned devices to similar restrictions through the provision of an arbitrary and redundant Telephone Company device that duplicates the customer's equipment."¹⁵ Litton highlights the fact that the internal AT&T Task Force characterized the PCA requirement as "a redundant, artificial and economic barrier to those wishing to purchase their own [*800] equipment." Thus, according to Litton, AT&T's own documents reveal its awareness as stated in a presentation by an AT&T executive at a Traffic Service Advisors' meeting in 1972 that "only the 'black box' . . . stands as the last hardware barrier between us and the final challenge of unbridled, unlimited, no-holds-barred competition."

[**35] In Litton's account, AT&T's support for the PCA requirement was based more on a concern for its share of the terminal equipment market than it was on concern for the safety of the telephone network. Thus, AT&T kept the interface device not only to exclude competition but also to palliate its own competitive inadequacies because, despite the vaunted reputation of Bell Laboratories, AT&T had done little in the years prior to *Carterfone* to update its terminal equipment. Accordingly, notwithstanding the opinion expressed by several members of the AT&T Tariff Review Group that the PCA requirement was not responsive to *Carterfone*,¹⁶ AT&T imposed the requirement in order to give it time to develop competitive terminal equipment. At trial, Litton put in evidence another AT&T document, the McKinsey Report, indicating that AT&T had produced development and marketing problems that prevented it from meeting competition in the post-Carterfone era. Litton also claims that when AT&T finally did update its terminal equipment line, it did so with "Chinese copies" of successful Japanese products.

¹⁵ The task force report said, *inter alia*:

An attempt to design an interface, or a family of interfaces, sufficient to minimize all adverse effects of customer-provided equipment poses an economic and administrative problem . . . Such an interface device would be priced at a level of at least what our existing equipment offering is now. This would, of course, result in what effectively might be considered to be an unjustified economic restriction in allowing a customer to provide his own device. And the provision of an interface does not, in itself, necessarily provide the full protection we desire . . .

The report also stated: "In general, the arguments against the provision of an interface remain the same, *i.e.*, redundancy, artificial economic barrier to the customer, impracticalities of administration, doubtful acceptance of customers, etc." The task force, in making its report to the Tariff Review Group explicitly rejected the interface device requirement and specifically endorsed technical standards:

The entire concept of customer-owned equipment must be based on tariff type-approval of all terminal equipment, wiring, and apparatus, rather than on interfaces that would attempt to provide the degree of safety, quality of service, and flexibility for future services that we may wish to provide. The provision, by the Bell System, of families of interfaces for specific devices or of one interface, sophisticated enough to work with all services, would erect a redundant, artificial and economic barrier to those wishing to purchase their own equipment.

¹⁶ See the minutes of Tariff Review Group meeting of July 11, 1968 noting that members Cohen, North, and Miller "feel and expressed themselves that current tariff efforts, particularly with respect to interconnection, is [sic] not at all responsive to FCC Carterfone decision."

[**36] Finally, Litton maintains that AT&T could have adopted certification standards no more than a year after *Carterfone*. In support of this claim Litton again points to internal AT&T documents and memoranda suggesting that AT&T management believed the development of certification standards was inevitable by 1972, or 1973 at the latest. Litton Brief at 31-32. Litton suggests that AT&T's participation in the PBX Advisory Committee was a ruse or delaying tactic, and that the decision to oppose certification was concealed from the FCC while AT&T appeared to cooperate with the Advisory Committee so as to avoid the appearance of bad faith.

If there is an individual villain in Litton's piece it is Mr. John deButts. DeButts took over as Chairman and CEO of AT&T about four years after *Carterfone* and stressed the fact to his management that AT&T would have only one policy with respect to certification standards: opposition. In the face of recommendations from subordinates that a certification standards approach was preferable to the PCA requirement, deButts nevertheless opposed the standards. Moreover, Litton argues that the AT&T position on certification, as dictated by deButts, [**37] was taken with full knowledge that the FCC would ultimately reject this position. Litton claims that AT&T understood that its opposition to certification exposed it to antitrust liability, citing an AT&T film simulating an antitrust trial of a suit similar to the one eventually filed by Litton and urging employees to destroy incriminating company documents. DeButts apparently remarked to AT&T lawyers shortly after his speech that he had created more opportunities for lawyers than anything "since Sherman wrote his famous law."

We thus arrive again at what both parties agree was a pivotal point for Litton in the interface tariff chronology: the deButts speech of 1973. In contrast to AT&T's claim that the PCA requirement amounted to only a little protection for the system that also served to avoid the antitrust difficulties that might flow from an AT&T enforced certification program, Litton argues that AT&T's opposition to certification -- its insistence upon the PCA requirement -- posed psychological and economic market barriers that drove Litton from the terminal equipment market. On the psychological side, Litton claims that the very imposition of the PCA requirement, without [**38] [*801] regard to its cost or inconvenience, caused customers to doubt the quality of Litton's product. Litton analogizes its burden under the interface tariffs to that which would face a foreign car manufacturer if its ability to sell in the American market were conditioned upon including a giant fire extinguisher in the car's trunk. Litton also presented evidence tending to show that AT&T engaged in slash and burn tactics calculated to make cutover from AT&T to Litton equipment as bothersome as possible for Litton and its customers alike. AT&T installers from time to time would chop off existing AT&T wiring flush with office walls in preparation for the installation of Litton equipment. AT&T made the PCA requirement onerous for customers in other ways as well: refusing to acknowledge receipt of letters arranging cutover dates, changing cutover dates, or failing to provide the necessary PCA equipment. Finally, Litton argues that AT&T's PCA devices themselves occasionally malfunctioned, thus adding actual injury to technological insult.

The PCA requirement also effected a direct economic barrier to Litton's market entry insofar as it increased the cost of installing and using [**39] Litton equipment. Although this case did not involve single line telephone sets, i.e., residential telephones, Litton is quick to point out that the PCA requirement precluded all of AT&T's competitors from entering this market because the PCA cost alone exceeded the cost of renting a telephone from AT&T.¹⁷ Litton argues that these costs also effectively foreclosed sales of Key Systems involving five lines or less, estimated to be over 90% of the Key System market. In the market for larger Key Systems and PBX Systems, the PCA requirement was, in effect, a surcharge imposed by AT&T on customers using non-AT&T equipment sold by Litton and other competitors. When it became clear in late 1973 that AT&T would fight for the PCA requirement, Litton believed its only recourse was to cut its losses and leave the terminal equipment market because by that time AT&T had copied the successful products Litton was offering, narrowing whatever competitive advantage Litton would have had even in the absence of the PCA surcharge.

¹⁷ The monthly charge for the AT&T interface device was about \$6.00, as compared to a residential phone rental rate of about \$1.25 a month. Litton claims that the PCA requirement increased its Key Systems customers' costs by some 18 to 35 percent, depending on the size and type of installation, over what they would have been in the absence of the requirement. In the PBX Systems market, Litton claims the PCA requirement increased its customers' costs by 8 to 20 percent. Litton Brief at 48-49.

[**40] Thus, in Litton's scenario, AT&T's support for the PCA requirement -- its opposition to certification standards -- was no more than a rear guard effort to delay the effect of *Carterfone*, undertaken in bad faith in order to handicap competitors. The deButts speech slammed shut what was, from Litton's perspective, the "window of opportunity" created by *Carterfone*. Litton had intended to take advantage of this opportunity by following the same three-step market development program it had used successfully in other product markets.¹⁸ First it engaged in the sale of reliable products manufactured by other concerns -- this to allow Litton the opportunity to establish an immediate market presence while it readied its own products. Litton compares its 1980 gross sales of close to five billion dollars with its start in 1953 as a small electronics company and emphasizes its highly successful progress and depth of skill in the telecommunications industry. In [*802] fact, Litton had extensive engineering and installation expertise in terminal equipment -- highly sophisticated terminal equipment for special customers like airports and the Department of Defense. Litton's statistics [**41] indicate that, if anything, its performance exceeded its own expectations. Within a year and a half of its decision to enter the terminal equipment market, it was making close to one quarter of all interconnect sales. To counter AT&T's claim that Litton had no marketable products of its own in the early 1970's, Litton argues that AT&T itself was responsible for this: it refused to interconnect the innovative Litton "plexcom" switch, which was "years ahead" of anything AT&T had to offer. By this time, according to Litton, AT&T's anticompetitive efforts had taken their toll in increased prices and decreased sales. When the deButts speech made it clear that AT&T would continue to resist the implementation of *Carterfone*, Litton claims that, like many other manufacturers during that period, it simply could not remain in the market.

[**42] Ultimately, the jury agreed in the main with Litton, finding that AT&T opposed certification standards in bad faith and that other AT&T conduct involving the supply of PCAs and the sale of inside wiring was unreasonable and injurious to Litton as a competitor. The jury also, after rendering the main verdict with respect to liability and damages, found that AT&T *filed* the interface tariffs in the first instance in bad faith. Despite arguments made here that the damage award was based on a study relying on unsupported assumptions that made it impossible for the jury to estimate the damages attributable only to conduct found illegal, liability was found in a specific amount, namely, in the case of Litton *qua* competitor, \$91,990,000, and in the case of Litton *qua* customer, \$268,243. The sum of these figures, \$92,258,243, was trebled as provided by [15 U.S.C. § 15](#).

II. DISCUSSION

A. *Introduction*

As the factual summary above suggests, there is little in this case that the parties agree upon. AT&T contends that a portion of the jury's verdict and two of its factual findings must be set aside because they were made "belatedly" and as a result of coercion. Second, [**43] AT&T argues that under the *Noerr-Pennington* doctrine the jury was precluded from finding that certain practices relied on to support both the initial and the "belated" verdict were anticompetitive or predatory. Third, AT&T maintains that there was insufficient evidence to support any of the jury's factual findings and the entire verdict must therefore be set aside. Fourth, again in an evidentiary vein, AT&T claims that various rulings by the trial court judge on the admissibility of evidence so prejudiced its defense that it is entitled to a new trial. AT&T's fifth argument flanks the merits, so to speak, and attacks the jury's damage awards. Finally, AT&T argues that the entire case should have been dismissed as a sanction for Litton's discovery misconduct. Litton argues that this misconduct was an excusable oversight and that the district court's sanction -- denial of any attorneys' fees -- was impermissibly severe.

B. *The "Belated" Jury Findings*

¹⁸ Litton's market strategy as outlined in its 1971 Business Telephone Systems Interconnect Opportunity Plan comprised three essential steps. The first step involved the creation of an extensive distribution and service network covering major metropolitan areas. In this first stage Litton planned to sell reliable terminal equipment manufactured by established firms while it continued its own research and development efforts. In the second stage, Litton planned to introduce its own equipment to customers. In the third and final stage, the sales and distribution network would be expanded to cover the entire country, at which time Litton would sell and distribute its own products nationwide.

After eight days of deliberation, the jury found AT&T guilty of monopolization and an attempt to monopolize the relevant product market. In response to special interrogatories the jury specifically found three AT&T practices [**44] -- opposition to certification, delay in providing interface devices, and conduct in connection with the sale of inside wiring -- anticompetitive and predatory. Because the jury found that AT&T's monopolization was the proximate cause of Litton's injury, it entered an award for Litton as both a competitor and customer of AT&T. The jury initially failed, however, to reach unanimity on three matters: (1) whether the attempted monopolization proximately caused Litton's injury, and whether either (2) the original filing of the interface tariff or (3) delay in affected cutover from AT&T to Litton equipment was anticompetitive or predatory. The trial judge asked the jury to attempt [*803] to reach a unanimous result one way or the other on the remaining issues and the jury indicated its willingness to do so. After deliberating a short while, the jury returned with affirmative answers favorable to Litton on all three questions. AT&T makes an extensive argument that these "belated" findings were coerced and therefore should be set aside. Although the verdict on the monopoly charge can be sustained, and the damage award affirmed, if there is support for each of the initial three findings [**45] made pursuant to [Federal Rule of Civil Procedure 49](#), see [Northeastern Telephone Co. v. AT&T](#), 651 F.2d 76, 94-95 (2d Cir. 1981), cert. denied, 455 U.S. 943, 102 S. Ct. 1438, 71 L. Ed. 2d 654 (1982), disposition of the threshold claim that these later findings must be set aside will enable us to consolidate our discussion of the more difficult *Noerr-Pennington* issues AT&T raises.

HN2[¹⁹] It was, of course, completely appropriate to submit special interrogatories to the jury, particularly in a case as complex and protracted as this one.¹⁹ In asking the jury to specify whether it found each of the alleged predatory practices to have been proved, the trial court was merely following [Berkey Photo, Inc. v. Eastman Kodak Co.](#), 603 F.2d 263, 299 (2d Cir. 1979), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980). For whatever reason, the jury did not agree unanimously on two interrogatories and the proximate cause component of the attempted monopolization charge. There was nothing unusual, much less erroneous, in the trial court's resubmission of these questions. See, e.g., [Turchio v. D/S A/S DEN NORSKE AFRICA](#), 509 F.2d 101, 105 (2d Cir. 1974) **HN3**[²⁰] (if the jury [**46] fails to answer interrogatory it is appropriate to resubmit the interrogatory "a second and third time to obtain answers to the unanswered questions").²⁰

[**47] AT&T's contention that the jury was somehow "coerced" into rendering answers favorable to Litton upon resubmission cannot be squared with the facts. The jury did not indicate that it was deadlocked on these questions; it indicated that it was divided. That the jury took its task seriously and deliberated conscientiously is manifest; before rendering its initial verdict the jury requested guidance from the court as to whether it could continue if it was divided on a question. AT&T can hardly argue that the jury was predisposed to find in Litton's favor given the fact that it found *against* Litton on two out of four theories of liability and divided on a third.²¹ AT&T's argument that the jury had no incentive to find against Litton on the unresolved proximate cause question because the initial verdict would stand in any event is pure speculation. Even if we were to concede AT&T's premise that the jury was likely to shirk its duty conscientiously to reconsider these questions -- a premise we find highly questionable given that

¹⁹ The practice has been described as "usually preferable to the opaque general verdict." [Skidmore v. Baltimore & Ohio RR. Co.](#), 167 F.2d 54, 67 (2d Cir.), cert. denied, 335 U.S. 816, 93 L. Ed. 371, 69 S. Ct. 34 (1948). See also Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199, 206 (1966) (submission of special verdicts can serve to clarify confusing or complicated litigation).

²⁰ Indeed, if the jury had found against Litton on the proximate cause question relating to the attempted monopolization charge, the trial court judge might reasonably have inferred that this was inconsistent with the jury's general verdict and damage award. The record indicates that this possibility was of some concern to both the trial court judge and the attorneys for both parties. In light of the express provision in [Fed. R. Civ. P. 49\(b\)](#) that a trial court may "return the jury for further consideration of its answers and verdict" in order to eliminate any inconsistencies between a general verdict and special findings, we do not see how it can be error to "return the jury for further consideration" of an interrogatory it did not answer.

²¹ Specifically, the jury found against Litton on its claim that AT&T engaged in a conspiracy to monopolize (claim three) and in a conspiracy to restrain trade (claim four).

the jury served over five months without a single absence and deliberated for eight days²² -- the conclusion [***804**] that it was likely to resolve [****48**] these questions in Litton's favor simply does not follow.²³

Nor do we find anything [***49**] coercive in the trial judge's instructions. The jurors were informed that their answers to the questions were "important" and that they should listen to the views of their fellow jurors without abandoning their own conscientiously held views. Far from being coercive, this instruction was completely in keeping with the recognition that:

A system which requires the unanimous verdict of a jury . . . can function satisfactorily in most cases only because most jurors are reasonable . . . and after a certain amount of discussion has produced a large majority in favor of one view, those in the minority may be willing to join the majority in the belief that if so many other reasonable people have a contrary view, the views of the minority may well be mistaken. Instructions . . . in both state and federal courts stress the importance of jurors listening to the views of one another and making allowance for the fact that there can be a reasonable difference of opinion.

Grace Lines, Inc. v. Motley, 439 F.2d 1028, 1033 (2d Cir. 1971) (Lumbard, C.J., concurring). The instructions here fall far short of those sustained in e.g., *United States v. Corcione*, 592 F.2d **[**50]** 111, 117 n. 5 (2d Cir. 1979), cert. denied, 440 U.S. 975, 99 S. Ct. 1545, 59 L. Ed. 2d 794 (1979) (after jury deadlocked on criminal charge, trial judge instructed jury that it should "consult with one another and . . . deliberate with a view to reaching agreement if you can possibly do so"); *United States v. Robinson*, 560 F.2d 507, 511 n.6 (2d Cir. 1977), cert. denied, 435 U.S. 905, 55 L. Ed. 2d 496, 98 S. Ct. 1451 (1978) (jury instructed that "it is important that a decision . . . be reached here, and I really see no good reasons why a decision cannot be reached").²⁴ [***51**] Litton was entitled to a jury determination on all of its claims and we do not believe the trial court judge erred either in resubmitting the claims or in instructing the jury as he did. There is no factual or logical basis for AT&T's arguments that resubmission of these questions tipped the balance in Litton's favor.²⁵

C. AT&T's Noerr-Pennington Claims

²² The trial court judge praised the jury at the close of the trial as follows:

Not a single juror has missed a single day because of illness or any other personal matter . . . That is absolutely amazing . . . You have also been the most punctual jury I have ever had . . . You have been a vindication of the jury system and all that it means.

²³ AT&T's argument that the jury had no incentive to find against Litton on one claim because it had found for Litton on another is a criticism that can be made whenever a plaintiff's case involves multiple claims, any one of which would be sufficient to support a damage award. Thus viewed, AT&T's position is more an indictment of the jury system than an argument against resubmission.

²⁴ AT&T's contention that the trial court judge "pressured" the jury into resolving the undecided questions in Litton's favor is based on the following instruction:

Any question that is left unanswered creates a possible problem for the parties and the Court. I don't need to give you specific examples of that. It is a fact that we would like positive answers of either 'yes' or 'no' to the questions, *if you can possibly agree after discussing the matter again . . . to see whether or not you can't in good conscience adopt [the views of other jurors] as your own*. It will clear up a lot of problems for us if you can.

(Emphasis added.)

This instruction correctly emphasized both the importance of reaching a verdict and the necessity of doing so only in accordance with the conscientiously held views of each juror. If the trial court judge had elaborated upon the "possible problem" -- i.e., inconsistency between a general verdict in Litton's favor and negative finding on the attempted monopolization proximate cause question -- we might be inclined to agree with AT&T that the effect could be to bias the jury. But this is precisely the effect that the trial court judge avoided by phrasing the instruction as he did.

²⁵ We note that under the trial court judge's instructions the jury could have, but did not, increase the damages it previously awarded Litton. Empirically, this undercuts AT&T's contention that the jury was predisposed to find against it.

According to AT&T, the "fundamental error that pervaded the trial of this case was the failure of the trial court to recognize that the principal . . . conduct upon which the judgment is based . . . was protected" under the doctrine developed in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 *805 S. Ct. 523 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965). AT&T Brief at 43. AT&T argues that both its opposition to certification standards and its original filing of the interface tariffs should not have been submitted to the jury because this conduct did not, as a matter of law under the evidence adduced by Litton, fall within the only exception -- the so-called "sham" exception -- to [**52] *Noerr-Pennington*.

Noerr, it will be recalled, involved a deceptive political campaign waged as part of the bitter economic feud between the railroad and trucking industries for control of the interstate, heavy freight hauling market. Trucking industry representatives sued a railroad trade association, alleging that a publicity campaign advocating legislation favorable to the railroads violated the Sherman Act because the campaign's sole purpose was to hamper the trucking industry's ability to compete with the railroads. The Court held that "the Sherman Act . . . does not apply to . . . activities comprising mere solicitation of governmental action with respect to the passage and enforcement of laws," *365 U.S. at 138*, irrespective of whether the activities might be considered fraudulent or deceptive. The *Noerr* holding was, strictly speaking, a matter of statutory construction,²⁶ [**54] but *First Amendment* concerns clearly informed the decision. The Court feared that an expansive construction of the Sherman Act would impinge upon the right to petition and impair the government's ability "to take actions through its legislature and executive that operate to restrain trade." [**53] *365 U.S. at 137, 81 S. Ct. at 529, 5 L. Ed. 2d 464*.²⁷ These factors, as well as the "essential dissimilarity" between joint efforts to seek legislation and "agreements traditionally condemned" under the Act, *id. at 136*, led the Court to conclude that Congress could not have intended the Act to reach such behavior. In reaching this result, the Court found the question of intent irrelevant, stating that "insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." *365 U.S. at 139-40*. In dictum, however, the Court indicated that "there may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id. at 144*.

The *Pennington* decision restated, and to some extent arguably amplified, *Noerr*. In *Pennington* an industry union and large firms urged the Secretary of Labor to establish minimum wage levels that would have the effect of squeezing out smaller firms.²⁸ The Court held that "*Noerr* shields [*806] from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *381 U.S. at 670*. *Pennington* made it clear that efforts directed at executive officials or agencies -- as distinguished from the legislative [**55] and publicity efforts involved in *Noerr* -- were protected. *Pennington* also emphatically reaffirmed *Noerr*'s holding that

²⁶ See *365 U.S. at 132 n.6*. See generally, Fischel, *Antitrust Liability for Attempts to Influence Governmental Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 82-84 (1977).

²⁷ The Court was concerned that construing the Sherman Act to reach essentially political activity would hamper the "ability of the people to make their wishes known to their representatives," *365 U.S. at 137*, thus invoking a traditional *First Amendment* theme. See also *id. at 138*; A. Meiklejohn, *Political Freedom* 26-28 (1948); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

²⁸ The conduct challenged in *Pennington* included efforts to induce the TVA, a government corporation, to curtail its purchases of coal at reduced prices on the spot market. The Supreme Court did not address the issue, but some lower courts have concluded *Noerr-Pennington* does not immunize anticompetitive efforts directed at government agencies acting in a proprietary capacity -- i.e., as buyers or sellers. See, e.g., *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local No. 150*, 440 F.2d 1096, 1099 (9th Cir.), cert. denied, 404 U.S. 826, 30 L. Ed. 2d 54, 92 S. Ct. 57 (1971); *George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 33 (1st Cir.), cert. denied, 400 U.S. 850, 27 L. Ed. 2d 88, 91 S. Ct. 54 (1970). A Fifth Circuit case, and a district court decision in the Third Circuit, are contra. See *Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152 (5th Cir. 1971) (reh. en banc); *United States v. Johns-Manville Corp.*, 259 F. Supp. 440 (E.D. Pa. 1966).

anticompetitive intent did not make an otherwise legitimate attempt to secure governmental action or express a political position illegal; the Court stated that "such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.*

[**56] The last case generally cited in any exegesis of the *Noerr-Pennington* doctrine is [*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#). This case involved a group of trucking companies that opposed "with or without probable cause, and regardless of the merits of the cases, " each and every license application made by the group's competitors to a state regulatory agency. [*Id. at 512*](#). *California Motor Transport* both expanded and limited the *Noerr-Pennington* doctrine. Although the Court ultimately held against the defendants, it broadened and strengthened the base of the doctrine by holding, first, that it applied to administrative and adjudicative proceedings and, second, that it was constitutionally based.²⁹ At the same time, the Court imposed limits upon the doctrine by holding that the plaintiff's allegations triggered the application of the *Noerr* sham dictum.

[**57] AT&T points primarily to the *Noerr* and *Pennington* decisions and argues that even if its conduct was undertaken for anticompetitive reasons, it was nevertheless protected. To this Litton replies that *Noerr-Pennington* is inapplicable because AT&T injured Litton not by requesting or as a result of governmental action, but by virtue of what AT&T itself did in filing and maintaining the interface tariffs while opposing the only feasible alternative -- certification standards -- in bad faith. In the alternative, Litton maintains that this case presents a "paradigm of the 'sham' exception to the *Noerr* doctrine." Thus, there are two strings to the Litton bow: inapplicability of the *Noerr-Pennington* doctrine because the injury flowed from actions not within the scope of the doctrine, and applicability of the "sham" exception. Judge Meskill and I agree with Litton on both counts for reasons we set forth below; Judge Kearse concurs only on the second ground and does not join in the immediately following portion of the opinion.

1. *Applicability of the Noerr-Pennington Doctrine*

AT&T characterizes its filing of the interface tariffs after *Carterfone* as an [**58] "application" to the FCC, and contends that "*Noerr-Pennington* does not permit antitrust liability to be based on such applications to a regulatory agency." AT&T Brief at 82. In essence, AT&T's argument is that its conduct in devising and filing the tariffs is immunized because the tariffs were contested and AT&T defended them before the FCC. If this argument were accepted, a common regulatory practice³⁰ [*807] designed to protect consumers would instead shield from antitrust liability the very entities the practice seeks to restrain and regulate. In an earlier case involving this same defendant we concluded that pervasive regulation of the telecommunications industry does not, without more, confer antitrust immunity. See, [*Northeastern Telephone Co.*, 651 F.2d at 83](#); see also [*International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 935-36 \(9th Cir. 1975\)](#); cf., [*United States v. American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1357-60 \(D.D.C. 1981\)](#) (declining to decide whether compliance with regulatory mandates insulates a defendant from antitrust liability.) If extensive substantive regulation does not [**59] warrant an antitrust exemption, then surely an essentially procedural aspect of regulation -- tariff filing -- cannot.

²⁹ [*404 U.S. at 510-11*](#). The *California Motor Transport* Court squarely held that [*First Amendment*](#) rights of petition and association underlay the *Noerr-Pennington* doctrine. The *Noerr* Court only went so far as to suggest that an interpretation of the Sherman Act contrary to the one it adopted "would raise important constitutional questions." [*365 U.S. at 138*](#).

³⁰ See, e.g., [*14 C.F.R. § 221.3 \(1982\)*](#) (Civil Aeronautics Board) (requiring all domestic and foreign air carriers to file "tariffs showing all rates, fares, and charges" for air transportation); [*18 C.F.R. § 35.1\(a\) \(1982\)*](#) (Federal Energy Regulatory Commission) (requiring "every public utility [to] file . . . full and complete rate schedules . . . setting forth all rates and charges for any transmission or sale of electric energy"); [*46 C.F.R. § 531.3 \(1981\)*](#) (Federal Maritime Commission) (requiring "every domestic offshore carrier [to] file . . . tariffs showing its actual rates, fares and charges"). Filing requirements like those cited above and those imposed by the FCC under 47 C.F.R. § 61 et seq. (1981) hearken back to the original justification for administrative regulation of industries affected with a public interest: preventing discrimination on the basis of price or terms of service. See generally *Jaffe, The Effective Limits of the Administrative Process: A Reevaluation*, 67 Harv. L. Rev. 1105, 1106-07 (1954).

[**60] Apart from the obvious difficulty of reconciling the effect of AT&T's *Noerr-Pennington* argument with the Supreme Court's repeated admonition that antitrust exemptions are to be countenanced only where "there is a 'plain repugnancy between the antitrust and regulatory provisions,'" *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975), quoting *United States v. Philadelphia National Bank*, 374 U.S. 321, 350, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963); see also *Silver v. New York Stock Exchange*, 373 U.S. 341, 357, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963), we believe that AT&T's position must be rejected for a more fundamental reason. AT&T erroneously assumes that a mere *incident* of regulation -- the tariff filing requirement -- is tantamount to a request for governmental action akin to the conduct held protected in *Noerr* and *Pennington*. But in this case, as in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962), the *Noerr-Pennington* doctrine is "plainly inapposite" because AT&T was "engaged in private commercial activity, no element of which involved" [**61] seeking to procure the passage or enforcement of laws." The decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC; AT&T's power to exclude Litton and other competitors from the telephone terminal equipment market resulted not from the FCC's regulatory authority but from AT&T's exclusive control of the telephone network.³¹ [**62] AT&T cannot cloak its actions in *Noerr-Pennington* immunity simply because it is required, as a regulated monopoly, to disclose publicly its rates and operating procedures. The fact that the FCC might ultimately set aside a tariff filing does not transform AT&T's independent decisions as to how it will conduct its business into a "request" for governmental action or an "expression" of political opinion.³² Similarly, [*808] the FCC's failure to strike down a tariff at the time of its filing does not make the conduct lawful, particularly where, as in this case, the agency specifically declines to rule on a tariff's legality.

[**63] We therefore follow the plurality in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976), where four Justices rejected AT&T's *amicus curiae* argument that a tariff filing was protected as a request for governmental action under *Noerr-Pennington*. In *Cantor*, the plurality held that *HN4* a tariff filed by an electric utility could not evade scrutiny under the antitrust laws simply because it was filed in accordance with state law and approved by a state agency. The *Cantor* plurality stated that

nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct.

³¹ See also *United States v. American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981) (analyzing AT&T's monopoly over local telephone service in terms of the "essential facility" or "strategic bottleneck" doctrine).

³² Under applicable federal regulations, AT&T could have at any time revoked the interface tariff on its own initiative by filing another tariff. 47 C.F.R. § 61.57(a) (1981). We concluded almost ten years ago in *American Telephone & Telegraph Co. v. FCC*, 487 F.2d 865, 871-76 (2d Cir. 1973) that sections 203 and 205 of the Communications Act of 1934 contemplated "carrier initiated rate changes" that the FCC could set aside only in the manner prescribed by the statute itself. The obverse of this, of course, is that a tariff is an independent exercise of the carrier's business judgment that receives no government imprimatur until and unless the FCC reviews the tariff in response to a complaint or upon its own initiative. A number of other courts have reached the same conclusion. See *Phonetel, Inc. v. American Telephone & Telegraph Co.*, 664 F.2d 716, 733, 735 (9th Cir. 1981) (FCC does not adopt or approve tariff filings it permits to become effective; tariff filings are "the product of the regulated entity's independent initiative and judgment"); *Sound, Inc. v. American Telephone & Telegraph Co.*, 631 F.2d 1324, 1330 (8th Cir. 1980) ("Bell, not the FCC, proposes its rates, regulations and restrictions In filing each tariff, Bell implements its own business judgment"); *MCI Telecommunications Corp. v. FCC*, 182 U.S. App. D.C. 367, 561 F.2d 365, 374 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040, 54 L. Ed. 2d 790, 98 S. Ct. 780, 98 S. Ct. 781 (1978) ("The tariff provisions of the Communications Act embody a considered legislative judgment that carriers should in general be free to initiate new rates or services . . . unless and until the Commission, after hearing, determines that such rates or practices are unlawful").

We note that AT&T's argument does not rely on the "filed tariff" doctrine of *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 162, 67 L. Ed. 183, 43 S. Ct. 47 (1922). See *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981) ("filed tariff" doctrine inapplicable where regulatory agency expressly refuses to commit itself and tariff is ultimately disapproved).

Id. Chief Justice Burger did not concur in that portion of the plurality's opinion discussing *Noerr-Pennington*, but his objection went to the plurality's construction of the "state action" exemption doctrine under [*Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)*](#), and he said nothing [**64] in disagreement with the plurality's interpretation of *Noerr*. Justice Blackmun's concurrence also did not address *Noerr*, but rather would rely on "a rule of reason, taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits." [*428 U.S. at 610*](#). Although we are aware that plurality opinions can provide only limited guidance on an issue a majority of the Court did not address,³³ [**65] we believe that to the extent that both Justice Blackmun and Chief Justice Burger were unwilling to equate "state action" with a utility's adherence to a tariff filing required by state law, they would reject a *fortiori* the argument [*809] that the tariff filing amounted to a request for governmental action.³⁴

Much of our analysis relating to the filing of the interface tariffs applies to AT&T's opposition to certification. Opposition to certification is simply the other side of the interface tariff coin; AT&T's filing and maintenance of the PCA requirement was the very embodiment of opposition to the only feasible alternative -- certification standards. To be sure, AT&T argues that its "opposition" to the development of certification standards was by [**66] definition protected under *Noerr-Pennington* because it amounted to no more than espousing a position before an administrative body. But our review of the evidence presented by Litton suggests that AT&T's *post hoc* characterization of the opposition-to-certification issue is distorted. Litton's evidence indicated that AT&T made unsupportable claims to the FCC regarding network harm, feigned cooperation with the PBX Advisory Committee's efforts to develop certification standards, and generally attempted to buy as much time as possible to improve its own competitive position at the expense of Litton and other competitors.³⁵ The effect of this was to maintain the

³³ The Court has indicated that in interpreting plurality holdings lower courts should look to the "narrowest ground" relied upon in a concurring Justice's opinion. See [*Marks v. United States, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 \(1977\)*](#); [*Gregg v. Georgia, 428 U.S. 153, 169 n. 15, 49 L. Ed. 2d 859, 96 S. Ct. 2909 \(1976\)*](#) (plurality opinion). Although this rule seems of limited utility where, as here, the concurring Justices do not address the issue in question, it seems plausible to assume that if either Chief Justice Burger or Justice Blackmun felt there was merit to the *Noerr-Pennington* argument made by the defendant or AT&T as *amicus*, they would not have concurred in the judgment. Nor is it entirely clear that the dissenting opinion written by Justice Stewart and joined by Justices Powell and Rehnquist would hold AT&T's conduct in this case protected under *Noerr-Pennington*. Although the dissenting opinion stated that

Parker, Noerr, and Goldfarb [v. [*Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 \(1975\)*](#)] point unerringly to the proper disposition of this case The utility company engages in two distinct activities: It proposes a tariff and, if the tariff is approved, it obeys its terms. The first action cannot give rise to antitrust liability under *Noerr* and the second -- compliance with the terms of the tariff under the command of state law -- is immune from antitrust liability under *Parker* and *Goldfarb*.

[*428 U.S. at 624*](#), the tariff in question in *Cantor* was apparently specifically approved by the state regulatory agency. [*Id. at 583*](#). In this case, of course, the FCC took pains to state that permitting the tariff to take effect was not to be construed as approval of the tariff.

³⁴ We note that Chief Justice Burger stated in his concurring opinion that the plurality "correctly concludes: 'The Commission's approval of respondent's decision to maintain such a program does not, therefore, implement any statewide policy.'" [*428 U.S. at 604*](#). The Eighth Circuit has recently read *Cantor* as not providing *Noerr-Pennington* protection for tariff filings. See [*City of Kirkwood v. Union Electric Co., 671 F.2d 1173, 1181*](#) (8th Cir.), cert. denied, [*459 U.S. 1170, 103 S. Ct. 814, 74 L. Ed. 2d 1013 \(1983\)*](#). See also [*United States v. Title Insurance Rating Bureau of Arizona, Inc., 517 F. Supp. 1053, 1059-60 \(D. Ariz. 1981\)*](#).

³⁵ We review this evidence in greater depth in our discussion of the sham exception, *infra*, but we believe that this evidence tends to show that the conduct fairly considered under the rubric of "opposition to certification" amounted to more than simply an expression of AT&T's opinion. Cf. [*City of Kirkwood v. Union Electric Co., 671 F.2d at 1181*](#) ("The *Noerr-Pennington* doctrine will not protect a utility which manipulates the federal and state regulatory processes to achieve anti-competitive results. It is not for expression of opinion that [the plaintiff] seeks to compel [the defendant] to respond in damages, but rather for [the defendant's] conduct in the market place.").

interface tariffs and whatever anticompetitive or exclusionary effect that flowed therefrom. AT&T's opposition to certification accordingly embraced much more than merely advocating a position before the FCC.

[**67] 2. The "Sham Exception"

Even if our conclusions regarding the applicability of *Noerr-Pennington* are incorrect, the doctrine is subject to the sham exception suggested by way of dictum in *Noerr* and relied on in *California Motor Transport*. In *California Motor Transport* the defendant instituted proceedings challenging the regulatory approval sought by the plaintiff not with the expectation of prevailing but for purposes of harassment and delay. The Court held that [HNS[↑]](#) where "the administrative and judicial processes [are] abused," [404 U.S. at 513](#), in an attempt to stifle competition, *Noerr-Pennington* is inapplicable. The focus of the Court's concern in *California Motor Transport* was the "illegal result" of the abuse, specifically, "effectively barring respondents from access to the agencies and the courts." *Id.*³⁶ Although the Court conceded that an "abuse" standard involved "a difficult line to discern and draw," a leading [\[*810\]](#) antitrust commentator has suggested that this line is crossed when

the defendant's activity was intended to injure the plaintiff directly rather than through a governmental decision. When the antitrust defendant [\[**68\]](#) had not truly sought to influence the governmental decision, his invocation of governmental machinery is a sham Where he had no reasonable expectation of obtaining the favorable ruling, his effort to do so was a sham.

P. Areeda, *Antitrust Law* para. 203.1a (Supp. 1982).

[**69] Professor Areeda's view of the heart of the sham exception -- invoking the process of administrative or adjudicatory decisionmaking for the injury that the process alone will work upon competitors -- possesses the virtue of accommodating the Supreme Court's concern in *California Motor Transport* that these processes not be abused with impunity behind claims of *Noerr-Pennington* immunity. To be sure, there are difficulties involved in determining whether a defendant "truly sought to influence the governmental decision" and whether there was a "reasonable expectation" of doing so. One indicium of whether a defendant could have reasonably expected its position to prevail, and therefore whether the invocation of process was actually an attempt to influence a decision rather than an attempt to interpose delay, is a "pattern of baseless, repetitive claims." [404 U.S. at 513](#). Thus, we held in *Landmarks Holding Corp. v. Berman*, [664 F.2d 891, 896 \(2d Cir. 1981\)](#) that an attempt by a defendant to delay the construction of a competitor's shopping mall by carefully orchestrating a series of court and administrative actions designed to defeat a zoning variance was not protected under [\[**70\]](#) *Noerr-Pennington*.

But [HNG[↑]](#) repetition is but one indicium of a sham claim; under *California Motor Transport*'s abuse standard "many other forms of illegal and reprehensible practice may corrupt the administrative or judicial processes and result in antitrust violations." [404 U.S. at 513](#). In *Landmarks Holding*, for example, our conclusion that the judicial and administrative processes had been abused was based in part upon "unethical lawyer conduct" which included, *inter alia*, requests for delays that the defendant's own documents proved were "purely bull." [664 F.2d at 894](#).³⁷

³⁶ We reject the suggestion made in AT&T's brief that the applicability of the sham exception turns on whether a competitor is barred from access to administrative agencies or the courts. The Supreme Court's opinion in *California Motor Transport* cited access barring as one example of the illegal results that might flow from abuse of the administrative process. One of the allegations in *California Motor Transport* that the Court found sufficient to trigger the sham exception is similar to the one Litton made in this case, namely that the defendants "became 'the regulators of the grants of rights, transfers and registrations.' " [404 U.S. at 511](#). More recent Supreme Court opinions have referred to the sham exception's availability without regard to the necessity of "access barring," see, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, [435 U.S. 389, 405, 55 L. Ed. 2d 364, 98 S. Ct. 1123 \(1978\)](#); *Vendo Co. v. Lektro-Vend Corp.*, [433 U.S. 623, 635 n. 6, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 \(1977\)](#) (Rehnquist, J., concurring).

³⁷ Cf. Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 Harv. L. Rev. 715, 726-35 (1973).

In deciding whether Litton adduced sufficient evidence to demonstrate that AT&T's conduct in connection with the interface tariff and opposition to certification was a sham, we are of course required [**71] to view the evidence in the light most favorable to Litton, giving it the benefit of all inferences that the evidence fairly supports regardless of whether contrary inferences might be drawn. *Continental Ore Co., 370 U.S. at 696; Taxi Weekly, Inc. v. Metropolitan Taxicab Board of Trade, Inc., 539 F.2d 907, 911 (2d Cir. 1976)*. With this in mind, and with reference to the Litton case set out above in I(B) (2) which we think is fairly supported by the evidence, we believe that the sham exception is applicable to AT&T's conduct. As early as the ultimate decision in *Hush-A-Phone*, AT&T knew that the FCC's basic position was that AT&T could not exclude "any device" -- a category clearly including telephone terminal equipment -- absent a showing of actual harm. The lengthy litigation in *Carterfone* was a matter of industry-wide knowledge and interest; the decision was viewed at the time as a smashing blow to AT&T and as a "window of opportunity" for AT&T's competitors. Anyone reading the language of the *Carterfone* rehearing decision and the Tariff Review Group Task Force Report we have quoted above could conclude that neither filing of the interface tariff nor opposition [**72] of certification squared with the FCC's mandate in *Carterfone*.

AT&T nevertheless consistently maintained that the PCA requirement was necessary to protect the telephone network. [*811] This was not so much a "pattern of . . . repetitive claims" as it was a unitary, ongoing claim.³⁸ There was sufficient evidence to allow the jury to conclude that this claim was "baseless"; AT&T's own reports pointed out that the interface device was redundant, uneconomic, and unnecessary. Time and again AT&T inveighed against the harm that would flow from certification standards without once demonstrating a single instance of harm from what its own reports indicated was a trend in the direction of "illegal" or "unauthorized" interconnection. AT&T asserts that evidence of harm was difficult to produce because of its transitory nature and because the PCA requirement was effective, but the jury could have reasonably concluded -- on the basis of evidence indicating that governmental agencies and some 1600 non-AT&T telephone companies were interconnected without a PCA -- that AT&T's ongoing claim of harm to the system was baseless.

[**73] There was also evidence tending to indicate that AT&T affirmatively misled the FCC with respect to the need for the PCA requirement and the difficulty of developing certification standards. For example, while it opposed certification standards pursuant to the policy announced before NARUC in the deButts speech, AT&T provided the FCC with a study that its own author believed did not prove anything. Similarly, AT&T's own documents indicate that many of its senior executives thought that certification standards could be developed within a matter of months. Indeed, some AT&T documents demonstrated that many AT&T executives believed the standards were inevitable regardless of the position AT&T adopted.

Not surprisingly, AT&T argues that intra-corporate division of opinion on an issue of this nature is inevitable and therefore not indicative of an attempt to subvert the regulatory process. But again, a review of the evidence in the light most favorable to Litton compels us to conclude that the jury could reasonably have inferred that AT&T opposed the development of certification standards in a manner calculated to delay the day when *Carterfone*'s pro-competitive mandate would become [**74] fully effective. Litton introduced evidence, and AT&T concedes in its brief, that AT&T "did not complete some of its 'homework assignments' on time" in connection with the PBX Advisory Committee's efforts to develop certification standards. AT&T Brief at 20. And, although AT&T had decided in March of 1973 that it would oppose certification standards, it continued to work with the Advisory Committee in accordance with an internal "Tactics Memorandum" which concluded that withdrawing from the committee would accelerate "decisions in favor of certification." This evidence is sufficient to support an inference that AT&T did what it could to delay and obfuscate the efforts undertaken by the FCC and other interested parties to develop certification standards. As a textbook example of a monopolist in control of an essential facility, see *United States v. Terminal Railroad Association, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912)*, it is difficult to conclude that these efforts could not have amounted to an abuse of the administrative process. The result, to draw an obvious

³⁸ The Circuits are split on whether a single claim is sufficient to support application of the sham exception. See *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F.2d 1252, 1266-67 & n.24 (9th Cir. 1982)* (concluding that a single claim can be a sham and citing cases on both sides of the proposition).

analogy to *California Motor Transport*, was that Litton and other terminal equipment competitors were [**75] barred from access to the telephone network system.

AT&T had no realistic hope that the FCC would approve the interface device; its own people thought that the device was a redundant "artificial barrier" to competition. It nevertheless consciously pursued a policy of delaying the time when the FCC would strike down the PCA requirement. It implemented this policy by making baseless claims relative to potential harms to the network while opposing certification standards in every way possible. AT&T argues that it actually wanted the FCC to [*812] approve the interface device and reject certification standards, but as Professor Areeda points out

to be sure, [a competitor] would always be pleased to obtain a governmental decision against his rival. But where he had no reasonable expectation of obtaining the favorable ruling, his effort to do so [is] a sham.

P. Areeda, *supra*, at 5. AT&T's conduct was not undertaken in the hope of influencing governmental action, but in the hope of delaying it.³⁹ See *Landmarks Holding Corp. v. Berman, supra*. As such, it amounted to the sort of abuse of the administrative process that falls within the *Noerr-Pennington* [**76] sham exception. The jury's determination to that effect is sustainable if the instructions were correct.

3. The Trial Court's Noerr-Pennington Instructions

AT&T challenges the *Noerr-Pennington* instructions on two grounds. [**77] First, AT&T claims that the instructions entitled "Opposition to Registration" and "[First Amendment](#) Protection and the Bad Faith Exception" had the effect when taken together of denying it any *Noerr-Pennington* defense because the jury could have premised its verdict merely on anticompetitive intent. Second, AT&T argues that the [First Amendment](#) values that *Noerr-Pennington* reflects require the use of a "clear and convincing" rather than a "preponderance" evidentiary standard.

AT&T's first point can be answered by reviewing the jury instructions, as we must, in their totality. See, e.g., *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 362-63 (2d Cir. 1966). AT&T maintains that the instructions were flawed because they established a "good faith/bad faith" dichotomy that conditioned the availability of the *Noerr-Pennington* defense on good faith, and equated bad faith with anticompetitive intent. The instructions that AT&T objects to are set forth in the margin.⁴⁰ [HN7](#)[↑] Because we must assume that the jury discharged its obligation to

³⁹ Professor, now Circuit Judge, Bork has suggested that the [antitrust law](#) must develop standards to address the anticompetitive effects of litigation and administrative actions instituted solely to harass and injure a competitor's rivals. See R. Bork, *The Antitrust Paradox* 357 (1978). The need to ensure that the regulatory processes not be used to thwart competition seems all the more pressing where, as here, there is serious doubt regarding whether the process can function at all without the regulated entity's full cooperation. See *United States v. American Telephone & Telegraph Co.*, 524 F. Supp. at 1359 (former Chief of FCC's Common Carrier Bureau testified at trial that FCC may be "incapable of effectively regulating a company of AT&T's size, complexity, and power").

⁴⁰ The court's charge on the issue of "Opposition to Registration" -- before the *Noerr-Pennington* defense was mentioned -- was as follows:

You have also heard about Bell's opposition to proposals made before the FCC that the PCA tariffs be replaced by various programs of certifying or registering equipment with the FCC. The question for your decision is whether Bell's opposition was interposed in bad faith for the purpose of excluding competition or whether Bell took this position because it believed that the registration proposals being made were not in the public interest and would not provide sufficient protection to Bell System employees, customers and the telephone network.

AT&T Brief at 63. AT&T correctly argues that a "purpose of excluding competition" does not suffice to create antitrust liability. The charge went on to say:

Many of these actions, if successful, might be harmful to a competitor. Nevertheless, the [First Amendment](#) guarantees that persons or corporations may participate in good faith efforts to influence the passage or enforcement of laws or government regulations or to influence public officials regardless of whether the results of the government action they seek would be harmful to competition.

apply the law in accordance with the trial judge's instructions, our review is limited to whether the instructions misled the jury as to [**78] the applicable law. AT&T's brief fails to consider, as we must on review, that portion of the charge where the court explicated what it meant by good faith and bad faith. That portion follows:

You are also instructed that [HN8](#)[↑] petitioning an administrative agency such as the [*813] FCC or seeking review in the courts may result in delays because administrative or judicial procedures are often time consuming. Creating such delays does not constitute willful exercise of monopoly power as long as the petition or application to the courts is based on a good faith interest in influencing the agency or obtaining a court ruling.

However, there is an exception to the general rule that efforts to influence public officials do not violate the antitrust laws, and that is the so-called sham or bad faith exception. If a campaign, ostensibly directed toward influencing government action, is a mere sham or artifice to cover what is essentially nothing more than an attempt to smother competition by a pattern of knowingly filing baseless claims or making misrepresentations to administrative agencies in a way designed to deprive competitors of meaningful access to those agencies, the [First Amendment](#) [**79] protections are lost and the Sherman Act applies.

To be sure, the contours of the sham exception are far from clear; the courts have themselves had difficulty defining the doctrine. See Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 104 (1977). The instruction here apprised the jury that "creating delays" did not constitute an antitrust offense regardless of anticompetitive intent. While the instruction might have been more explicit as to the nature of bad faith, it accurately, if in general terms, tracked the Supreme Court's explication of the sham exception in *California Motor Transport*, and comported in its essentials with our discussion of the sham exception, *supra*. We cannot agree that the instructions were erroneous when viewed as a whole.

[**80] The trial court judge did not charge the jury that the sham exception had to be demonstrated by "clear and convincing" evidence. While AT&T cites libel, patent, and fraud cases in support of its argument, it points to no authority holding that the sham exception should be subject to the higher standard of clear and convincing evidence.⁴¹ AT&T argues that the standard should be required in cases such as this to avoid a chilling effect on speech. We recognize that the standard of proof may well be a substantive element of a claim or defense, see, e.g., [Palmer v. Hoffman](#), 318 U.S. 109, 117, 87 L. Ed. 645, 63 S. Ct. 477 (1943), but by requiring a plaintiff to prove

Id. at 64. AT&T argues that the jury was not given a definition of "good faith," but "bad faith" had just been defined as meaning "for the purpose of excluding competition."

⁴¹ The libel cases include [New York Times Co. v. Sullivan](#), 376 U.S. 254, 285-86, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) and [Yiamouyiannis v. Consumers Union of United States, Inc.](#), 619 F.2d 932, 940 (2d Cir.), cert. denied, 449 U.S. 839, 66 L. Ed. 2d 46, 101 S. Ct. 117 (1980).

The fraud and civil perjury cases include: [Clark v. John Lamula Investors, Inc.](#), 583 F.2d 594, 597 n.2, 600 (2d Cir. 1978) (securities fraud); [Geller v. Commissioner of Internal Revenue](#), 556 F.2d 687, 690 (2d Cir. 1977) (income tax fraud); [McDonnell v. American Leduc Petroleums, Ltd.](#), 456 F.2d 1170, 1176 (2d Cir. 1972) (fraud under New York and California law); [Barr Rubber Products Co. v. Sun Rubber Co.](#), 425 F.2d 1114, 1120-21 (2d Cir.), cert. denied, 400 U.S. 878, 27 L. Ed. 2d 115, 91 S. Ct. 118 (1970) (civil perjury). See also 86 Harv. L. Rev., *supra* note 37, at 724-25 (recommending clear and convincing evidence standard for sham exception claims).

The patent case is [Cataphote Corp. v. DeSoto Chemical Coatings, Inc.](#), 450 F.2d 769, 772 (9th Cir. 1971), cert. denied, 408 U.S. 929, 92 S. Ct. 2497, 33 L. Ed. 2d 341 (1972); see also [Handgards, Inc. v. Ethicon, Inc.](#), 601 F.2d 986, 996 (9th Cir. 1979), cert. denied, 444 U.S. 1025, 62 L. Ed. 2d 659, 100 S. Ct. 688, 100 S. Ct. 689 (1980) (allegation in antitrust case that patentee's infringement suit prosecuted with knowledge of patent invalidity).

We take due note that the charge in [MCI Communications Corp. v. American Tel. & Tel. Co.](#), 708 F.2d 1081 (7th Cir. 1983), was put in terms of "clear and convincing" proof.

that a defendant's conduct was a sham, the Supreme Court had already struck a rough balance between the competing First Amendment and antitrust interests. And as the Court pointed out in *United States v. Topco Associates, Inc., 405 U.S. 596, 610, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*, the antitrust laws are as important to the preservation of economic freedom and the free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. We see Hng[¹] no reason to impose any [*814] [**81] higher burden of proof on the antitrust plaintiff asserting sham than would ordinarily be applicable in any civil issue. See *Herman & MacLean v. Huddleston, 459 U.S. 375, 390, 103 S. Ct. 683, 74 L. Ed. 2d 548, 51 U.S.L.W. 4099, 4103 (1983)* (preponderance of the evidence standard applicable in securities fraud action under Section 10(b), noting that the interests of defendants in such cases do not differ from the interests of defendants "sued for violations of . . . antitrust . . . laws, for which proof by a preponderance of the evidence suffices").

[**82] D. Sufficiency of Proof

Our discussion above indicates that we believe there was ample evidence to justify the jury's findings regarding the filing of the interface tariff and opposition to certification. We also conclude, after reviewing the evidence in the light most favorable to Litton, that the jury could reasonably have found that AT&T's conduct in connection with the supply and installation of PCAs, the sale of inside wiring, and "cut-over" from AT&T to Litton equipment was predatory.

AT&T argues that Litton's evidence as to delays in the supply and installation of PCAs consisted of no more than "some vendor and customer complaints." But Litton's evidence, some of which we summarize here, tended to show that PCA shortages were chronic, that they were intentionally maintained or "contrived," and that AT&T misled the FCC with respect to the magnitude of this problem. For example, Litton introduced a 1970 memorandum written by an AT&T vice president stating that AT&T had

repeatedly been contacted by the FCC staff and outside attorneys with respect to connecting arrangements not being available. So far we have been able to placate the situations with explanations [**83] of "a possible misunderstanding or only a temporary delay" and assurances that no serious supply problems exist -- followed of course by a four alarm fire approach to meet the particular demand. It is doubtful that this approach will continue to avoid formal action of some sort by the FCC.

The shortages nevertheless continued, as evidenced by complaints received by AT&T from its own local affiliates.

In June of 1972, for example, Illinois Bell, in a telex to AT&T headquarters in New York, explained that because "so many defective units [KS 20721 couplers] have been received we have difficulty in providing this interface unit and meeting customer due dates." And, in October of 1972, an Ohio Bell executive stated in a letter to Ohio Bell's Assistant Vice President that "An increasing number of vendors have complained bitterly because of our failure to supply this equipment. In many recent cases we have been unable to even quote any kind of a realistic delivery date." This same letter posed a question that no doubt puzzled the jury:

How can we continue to insist on the use of an interconnect device when we are unable to provide such a device? It seems to me that these problems [**84] must be given the highest level of attention at Ohio Bell, Western Electric and A.T. & T. before we end up with a large-scale customer revolt and potential legal action for restraint of trade.

AT&T's response to this letter confirmed the existence of a "critical supply situation . . . throughout the system," which resulted in 76% of customers' PCA requests in New England being "missed" by an average of 10 days, although AT&T had an average lead-time of 24 days to fill the requests. The shortages were discussed at a June 14, 1973 meeting of the Bell Interconnecting Equipment Coordinating Committee and the minutes of the meeting disclose recognition of "some very serious service complaints" and "extreme service problems" with certain PCA hardware.

We believe that the evidence thus revealed more than isolated "customer and vendor" complaints; Litton's evidence tended to show that AT&T was aware of PCA supply problems and failed to take the steps necessary to correct them. In view of AT&T's own policy of requiring interconnection [*815] only through a PCA, we do not think it was

unreasonable for the jury to conclude that these shortages were orchestrated to frustrate [**85] Litton and other terminal equipment competitors.

The jury could also reasonably have inferred from the evidence introduced by Litton that some of AT&T's practices in connection with "inside wiring" -- i.e., wiring owned by AT&T but located on or in a customer's premises -- were anticompetitive. AT&T professed its willingness to sell the wiring if a customer wanted to "cut over" from AT&T to a competitor's equipment, but Litton's evidence tended to show, first, that AT&T would often negotiate in bad faith by quoting unreasonably high prices for the wiring and, second, that in "many, many instances" AT&T chopped this wiring off flush with a customer's walls. Indeed, a South Central Bell general manager noted at one point that the practice of destroying inside wiring was "unreasonable and could very well be interpreted as . . . vindictive." That is the conclusion the jury reached and we see no reason to overturn it.⁴²

[**86] Finally, AT&T argues that Litton failed to introduce sufficient evidence to justify the jury's conclusion that AT&T's delay in making "cutovers" -- the final step involved in switching from AT&T to non-AT&T equipment -- was anticompetitive. The record indicates, however, that Litton introduced, *inter alia*, testimony from representatives of various terminal equipment competitors to the effect that cutover delays frustrated their attempts to install equipment on schedule. The jury could have concluded from this and other evidence of intransigent cutover practices that AT&T's conduct injured Litton and other terminal equipment competitors.⁴³

⁴² AT&T argues that the only evidence was that on three isolated occasions one operating company, Southwestern Bell, chose not to sell its cable to Litton but that even as to these instances there was no showing of bad faith on Southwestern Bell's part; again the evidence is argued to be insufficient under *Berkey*. But the former Litton BTS Vice President of Operations said:

In installations, we would find that when a customer was having the Bell system removed, the Bell folks would just come in like with an axe and just chop up the multipin connector wiring at walls. Gosh, darndest thing I ever saw. Just couldn't believe people would do that. That particular thing we tended to get over over a period of time and we ended up up [sic] some coordination meetings to try get the Bell folks to leave the premises on a reasonable basis as opposed to one of appearing to be mad.

He added that:

A. It wasn't one customer. It was many many installations where that would occur and I just do not remember.

Q. Did you ever observe that situation?

A. Yes. Because I couldn't believe it, so I went and looked myself.

Q. How often did you do that?

A. Twice.

Q. When you referred to damage, is it the same damage at each customer's premises?

A. The two that I observed was the same damage and that was just going along and cutting the wires at the walls.

Q. When you say cutting the wires at the walls, can you be a bit more specific about the nature of the damage?

A. Yes. There are pairs of wires that are grouped together in cables and are wrapped in some plastic covering that come to a key phone or single phone or whatever, different size connectors. They would be chopped right off at the wall so you had no capability of coming to those wires with your connectors and so forth, even though you might be purchasing a cable from them.

⁴³ AT&T points to [*Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 94 \(2d Cir. 1981\)](#), cert. denied, 455 U.S. 943, 102 S. Ct. 1438, 71 L. Ed. 2d 654 (1982), where we set aside a jury verdict because the plaintiff "introduce[d] [no] evidence whatsoever" that an AT&T affiliate provided poor service to the plaintiff's customers *after* the purchase and installation of the plaintiff's terminal equipment. But Litton's claim is that shortages, missed cutover dates, etc., prevented it both from satisfying existing customers and luring prospective customers because it could not "cutover" on schedule. Unlike *Northeastern*, there is evidence in this case to support Litton's claim that the problems associated with delay were real.

[**87] AT&T takes the position that these practices amounted to no more than *de minimis* injury under *Berkey Photo Inc., 603 F.2d at 288-89*; see also *Federal Prescription Service Inc. v. American Pharmaceutical Ass'n, 214 U.S. App. D.C. 76, 663 F.2d 253, 268-71 (D.C. Cir. 1981)*, cert. denied, 455 U.S. 928, 102 S. Ct. 1293, 71 L. Ed. 2d 472, 50 U.S.L.W. 3587 (1982). We disagree. AT&T's *seriatim* attacks upon the jury's findings invite us to approach Litton's proof as if this case involved "completely separate and unrelated lawsuits tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co., 370 U.S. at 698-99*. But on the basis of any one of these practices -- all of which were supported by sufficient evidence -- the jury could have reasonably concluded that Litton suffered competitive injury.⁴⁴ The jury's finding that this conduct was predatory, i.e., undertaken with an anticompetitive intent in an attempt to injure Litton, is all the more reasonable given the synergistic nature of these practices in relation to Litton's primary claim that it was excluded from the terminal equipment [**88] market. AT&T argues at length that Litton failed to prove that the shortages, delays, and inside wiring episodes were deliberate, but this ignores the fact that "circumstances in which intent can be inferred other than from conduct which is itself exclusionary will no doubt be rare The relationship between intent and conduct is intimate: thought enlivens the deed; it can also be inferred from the deed." L. Sullivan, Antitrust § 39, at 105 (1977).

E. Evidentiary Rulings

AT&T challenges several of the trial court's rulings on the admissibility of evidence, arguing that the exclusion or limited admission of some evidence prevented it from proving that Litton chose [**89] to leave or was driven from the terminal equipment market because of adverse publicity resulting from a bribery scandal and other corrupt practices. AT&T also maintains that the trial court judge erred in admitting some evidence that was unduly prejudicial to AT&T while excluding similar evidence favorable to AT&T on the issue of the reasonableness of the PCA requirement. The cumulative effect of these errors, AT&T argues, requires reversal. We deal with these arguments in the order advanced by AT&T.

1. Exclusion of the Roberts Notes

In 1973 Litton conducted an internal investigation of possible employee misconduct related to the sale of Litton terminal equipment. A Litton attorney, Norman Roberts, made notes of his interviews with various Litton employees during the course of this investigation. AT&T argues that these notes constitute a "devastating admission" against Litton insofar as they reveal that Litton employees gave potential customers "calculators, girls and anything else" to make a sale, that "sales morale and performance [were] . . . way down," and that "skimming" and "funny deals" were commonplace. AT&T claims that the notes were admissible under *Federal Rule [**901 of Evidence 801(d)(2) (D)]*, which *HN10* excludes from hearsay "admission[s] by [a] party-opponent" in the form of statements made by a party's "agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."

AT&T's claim that Roberts' notes -- which summarized what various Litton employees recounted to him about wrongdoing on the part of other Litton employees -- were admissible because the multiple levels of hearsay were all made in the course and scope of employment, is not persuasive. See *Northern Oil Co. v. Socony Mobil Oil Co., 347 F.2d 81, 85 (2d Cir. 1965)*. The fact that Roberts summarized what some Litton employees said about other employees in the course of his investigation does not bring the events he summarized within the "scope of his agency or employment" under 801(d) (2) (D). See J. Weinstein, 4 Evidence 801-164 (1981) ("Gossip does not become reliable merely because it is heard in an office rather than a home.") The hearsay which he summarized may well have been [*817] inadmissible even if testified to by the employees interviewed. See *Oreck Corp. v. Whirlpool Corp., 639 F.2d 75, [**91 80 n.3 (2d Cir. 1980)]*, cert. denied, 454 U.S. 1083, 70 L. Ed. 2d 618, 102 S. Ct. 639 (1981). In any event, AT&T made no attempt at trial to lay the necessary foundation for the admission of the notes under 801(d) (2) (D) or any other rule, and simply argues here that the terms of 801(d) (2) (D) were satisfied.

⁴⁴ See *Northeastern Telephone Co., 651 F.2d at 95 n.28*, citing *California Computer Products, Inc. v. International Business Machines Corp., 613 F.2d 727 (9th Cir. 1979)* (holding that no synergistic effect arises from individual allegedly anticompetitive practices where proof in numerous critical aspects is utterly lacking).

We decline to hold that the trial court committed reversible error by failing to admit the notes, either for their truth or otherwise, particularly in view of the fact that AT&T could have overcome the trial court's objections by examining Roberts himself or those Litton employees he interviewed. See *Litton Systems, Inc. v. AT&T Co.*, 91 F.R.D. 574, 578 (S.D.N.Y. 1981). We note that while Judge Kearse disagrees with our hearsay analysis, she agrees that there was no reversible error.

2. *The San Mateo Bribery Incident*

In November of 1973 four of Litton's executives in its terminal equipment division were indicted for paying bribes to an employee of the state college system in San Mateo, California. The trial court permitted AT&T to prove that the officials were indicted and subsequently discharged, but excluded evidence of the bribery under *Federal Rule of Evidence* [**921 403](#) because of its emotional and prejudicial content. We note that the trial court at one point indicated that it would consider admitting the bribery evidence if AT&T would allow Litton to offer proof that AT&T had bribed public officials; AT&T declined the offer. Plainly the trial court did not abuse its discretion in excluding this evidence.

3. *The Mellor Memorandum*

AT&T argues that the trial court erred in not admitting for its truth a memorandum taken by James Mellor, a Litton senior vice-president, that summarized Mellor's conversation with Leonard Mende, one of the Litton BTS (Business Telephone Systems) executives who had been discharged as a result of the San Mateo incident. Mellor's notes of this conversation indicate that he told the discharged executive that the San Mateo scandal had "screwed up a very promising business activity." The trial court admitted the memorandum for the purpose of showing what Mellor had said to Mende, but refused to admit the memorandum for its truth -- i.e., as proof that the San Mateo scandal caused Litton to leave the terminal equipment market. AT&T makes the same argument under 801(d) (2) (D) with respect to this evidence that it [**93](#) makes with respect to the Roberts notes, and the reservations we expressed earlier are applicable here. In any event, Mellor himself testified that the contents of the memorandum accurately summarized what he said, and the memorandum was examined by the jury and quoted in AT&T's opening and closing arguments. We therefore cannot see how AT&T was prejudiced by the trial court's decision not to admit the memorandum for its truth.

4. *The Selph Deposition*

The trial court granted AT&T special leave to take the deposition of a Litton employee who had been discharged in connection with the San Mateo incident. In granting AT&T's request to take this deposition, the trial court limited discovery to those matters made relevant as a result of Litton's eleventh-hour disclosure of the Roberts notes. AT&T argues that some of Selph's deposition testimony that the PCA device had no effect on Litton's sales should have been admitted, particularly in view of the fact that the trial court allowed Litton to introduce deposition testimony outside the scope of a similar special leave. We attribute this difference in treatment to a difference in the content of the testimony. In granting special [**94](#) leave to take the Selph deposition the trial court imposed certain limitations that AT&T ignored; the discretion involved in reopening discovery could be cast aside if parties could ignore such limitations with impunity. In any event, the cumulative nature of the evidence excluded belies any claim that AT&T was prejudiced.

5. *Admission of Hoxie's Testimony*

AT&T contrasts the trial court's exclusion or limited admission of all of the [*818](#) above evidence with the admission of testimony by Lowell Hoxie, a former Litton vice president in charge of the terminal equipment division's marketing and administration group. Hoxie testified that problems associated with defective PCAs, short supply, and missed delivery dates imposed "incredible cost[s]" on Litton, the effects of which were "devastating" to Litton's efforts to establish itself in the terminal equipment market. The trial court rejected the argument that this testimony was inadmissible as hearsay because, although Hoxie testified in part from recollection of oral reports made by subordinates, much of his testimony was based on first hand knowledge and observation or reports made in the ordinary course of business. [**95](#) The testimony was therefore admitted under *Federal Rule of Evidence* [803\(24\)](#), which [HN11](#) provides for the admission of hearsay statements not specifically enumerated in *Rule 803*.

The trial court found that the testimony had sufficient "circumstantial guarantees of trustworthiness," [Fed. R. Evid. 803\(24\)](#), to justify its admission because the reports, even if oral, were made in the ordinary course of business. The court also explained that it was doing so to avoid the "expensive and very inefficient" alternative of "call[ing] enough witnesses to furnish non-hearsay substantiation of [the] summary" offered by Hoxie. Thus, although the trustworthiness of recollections of the sort Hoxie's testimony contained is open to question, see [Bowman v. Kaufman, 387 F.2d 582, 586-87 \(2d Cir. 1967\)](#), the potential hearsay taint of Hoxie's testimony is not sufficient to justify reversal.

6. Evidence Relating to the Reasonableness of the Interface Tariffs and AT&T's Opposition to Certification

AT&T objects to the trial court's treatment of three other items of evidence, all of which were offered by either AT&T or Litton as bearing on the reasonableness of the interface tariffs or AT&T's opposition [\[**96\]](#) to certification standards. The first ruling to which AT&T takes exception is the admission of various FCC decisions that described AT&T's tariffs as "unreasonable," "illegal," "discriminatory," or "unlawful." Although the trial court excised the words "unlawful" and "illegal" at AT&T's request, it refused to remove portions stating, for example, that the interface tariff was "unnecessarily restrictive" and an "unjust and unreasonable discrimination." According to AT&T, the different meanings of "reasonableness" under the Sherman Act and the Communications Act justified its request to have these words removed and the jury was unavoidably prejudiced by the trial court's failure to do so.

We agree with Litton that these decisions were central both to Litton's claim that the PCA device was unnecessary and Litton's rebuttal of AT&T's defense that the interface tariff was an attempt to comply with previous FCC rulings. The order excluding all portions of the FCC rulings stating that the tariffs were "unlawful" or "illegal" gave AT&T all to which it was entitled because the FCC continually held after *Hush-A-Phone* that AT&T's practices were not necessary to protect the telephone system. [\[**97\]](#) The findings thus directly undercut the predicate of AT&T's argument that the PCA requirement was "reasonable" under the antitrust laws because it was an attempt to follow regulatory policy. The findings were properly admitted under [Federal Rule of Evidence 803\(8\) \(C\)](#) as factual findings resulting from an investigation made pursuant to authority granted by law.⁴⁵ Moreover, the court's charge made it clear to the jury that the term "reasonable" as used in the rulings did not necessarily [\[*819\]](#) signify the same thing as "reasonableness" under the antitrust laws and were therefore not binding.

[\[**98\]](#) AT&T's second objection contrasts the admission of the above FCC decisions with the trial court's exclusion of a 1969 New York State Public Service Commission decision upholding the interface as a reasonable means of protecting the network against harm. The trial court excluded the 1969 decision upon its own motion on the grounds that the monthly charge for the interface considered there was fifty cents, as opposed to the average monthly charge of over six dollars for the interface device challenged in this case. AT&T argues that it was deprived of an opportunity to prove to the jury that AT&T was not alone in its belief that the interface device was absolutely necessary to protect the telephone system from harm. Cf. [Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co., 615 F.2d 1372, 1390](#) (5th Cir.), cert. denied, 449 U.S. 912, 101 S. Ct. 286, 66 L. Ed. 2d 140 (1980).

We view this evidence as arguably probative of AT&T's position, and find it difficult to justify the exclusion of this decision in light of the admission of the various FCC rulings. Although there is a considerable difference in cost between the two interface devices, this goes more [\[**99\]](#) to the weight to be accorded the evidence than its admissibility; any confusion or prejudice probably could have been avoided by appropriate instructions. But we are also mindful of the fact that this was a complicated and extensive trial, involving four and one-half years of pretrial proceedings, five months of trial, more than 18,000 pages of testimony and 945 exhibits. If a jury trial of this size

⁴⁵ AT&T cites to our decision in [City of New York v. Pullman Inc., 662 F.2d 910 \(2d Cir. 1981\)](#) as support for the proposition that a finding made by a government agency for one purpose should be excluded from other proceedings considering the same or similar facts because of the undue weight a jury might accord such findings. In *City of New York*, however, we affirmed the trial court's exclusion of an interim staff report of a government agency because the report was "by its own terms, . . . not the final report or finding of a government agency within the meaning of [Fed. R. Evid. 803(8) (C)]." *Id. at 914*. In the alternative, we noted that the trial court judge had not abused his discretion in deciding that admission of the report was inadvisable under [Fed. R. Evid. 403](#). *Id. at 915*. Here, of course, there is no question that the FCC decisions are within the scope of 803(8) (C).

and complexity is to be had at all, the trial court must have the discretion to limit the evidence at some point. We cannot find that this exclusion amounted to prejudicial error.

AT&T's final objection to the trial court's evidentiary rulings involves a 1976 report prepared by a former member of the PBX Advisory Committee. The report indicated, *inter alia*, that AT&T's competitors viewed some of its practices in connection with the PCA requirement and general pricing scheme as anticompetitive. The trial court recognized that the report was hearsay, and therefore refused to admit it for its truth, but admitted the evidence for the limited purpose of showing what was reported to AT&T. But by 1976 Litton had left the terminal equipment market and the PBX Advisory Committee had **[**100]** completed its work. We therefore cannot see how the report bears on the only issue for which it could have been relevant, viz., whether AT&T knew that the Committee felt that AT&T's opposition to certification was in bad faith. Thus the ruling was erroneous, and the possible prejudicial effect -- the report stated that AT&T's competitors felt that "Bell pricing has virtually killed the Interconnect market" -- is troubling. We view the trial court's ruling as unfortunate, but do not believe that this ruling, or any of the other rulings, denied AT&T a fair trial even when considered collectively. [Fed. R. Evid. 103\(a\)](#); [Fed. R. Civ. P. 61](#). See, e.g., [McKinnon v. Skil Corp.](#), *638 F.2d 270, 276 (1st Cir. 1981)* (ruling, if erroneous, harmless as not affecting "substantial rights").

F. The Verdict for Litton as Customer

In addition to the injuries it sustained as AT&T's competitor, Litton alleged that it was entitled to recover \$491,778.57 spent for the installation and rental of AT&T interfaces on its own internal telephone equipment for the eleven year period running from January 1, 1969 to the end of 1979. The jury awarded Litton exactly six-elevenths of this amount, **[**101]** \$268,243, possibly reflected in the jury's initial determination that AT&T opposed certification in bad faith from and after 1973 until the end of 1978. We do not, for reasons stated in our discussion of Litton's claims as a competitor, believe that this verdict should be overturned **[*820]** on *Noerr-Pennington* grounds. But AT&T offers us three other reasons -- one factual and two legal -- to overturn the verdict. We reject each of them in turn.

AT&T's first argument goes to the sufficiency of the evidence supporting the jury's verdict.⁴⁶ Specifically, AT&T complains that the evidence was insufficient because Litton failed to itemize its expenses for the charges on an annual basis. AT&T waived this objection by failing to challenge the figures or request that the witness presenting them break them down. [Fed. R. Civ. P. 46](#). Taking another tack, AT&T argues that Litton should have mitigated its damages by removing the interface devices as soon as the tariff requiring them was invalidated.⁴⁷ Aside from being inconsistent with its earlier argument that the jury apportioned the damages without evidentiary support, this argument cannot succeed because Litton's failure to **[**102]** remove the devices is readily explicable on the grounds that the expense of removal -- some of the devices were permanently wired into the equipment -- might have exceeded the savings resulting from removal.

[103]** AT&T's second argument against the verdict for Litton as customer relies on the "filed tariff" doctrine announced in [Keogh v. Chicago & Northwestern Railway Co.](#), *260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)*. There the Supreme Court held that a shipper could not recover under the antitrust laws for injuries sustained as a result of allegedly unreasonable rates that had been filed with and approved by the Interstate Commerce

⁴⁶ AT&T argues that the jury had no rational basis for apportioning damages as it did because "the vast majority" of PCA charges could have occurred in years the jury thought it had excluded from consideration. Brief at 125 & n.117. This could be correct but in the absence of a breakdown we or the jury might just as easily have assumed that the vast majority of charges could have occurred in the six years 1973-78 which AT&T says were the years utilized by the jury. In any event in light of the jury's later finding that the PCA tariffs were filed in bad faith the ultimate award seems to err on the low side, if any. We assume that AT&T does not want a retrial limited to this issue.

⁴⁷ An antitrust plaintiff has a duty to mitigate damages. See [Borger v. Yamaha Int'l Corp.](#), *625 F.2d 390, 398-99 (2d Cir. 1980)*; [Triebwasser & Katz v. American Telephone & Telegraph Co.](#), *535 F.2d 1356, 1360 (2d Cir. 1976)*. But if AT&T is correct that the jury's award reflects a six-year period running only from the beginning of 1973 until the end of 1978, when the FCC order setting aside the last protective circuitry requirement became final, the damage award was fair. Moreover, failing to mitigate was an affirmative defense which AT&T omitted either to plead or prove.

Commission. We have recently held, however, that [HN12](#)[¹²] the *Keogh* doctrine is inapplicable to ultimately "disapproved tariffs . . . when . . . the regulatory agency expressly refuses to commit itself pending investigation." *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981). In reaching this conclusion we relied, in part, upon our decision in *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d at 83-84, which held that a tariff filing does not immunize a regulated entity from antitrust scrutiny, and in part on the lower court's opinion in this case, *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 487 F. Supp. 942, 951 (S.D.N.Y. 1980). See *City of Groton, supra*, at 931. Unless [**104] otherwise advised by higher authority, we do not intend to disavow *City of Groton* or the import of our discussion on the interplay between regulation and antitrust immunity in *Northeastern Telephone Co.*

This case can be distinguished from *Keogh* and decisions holding the filed rate doctrine applicable, see *McLeran v. El Paso Natural Gas Co.*, 357 F. Supp. 329, 331-32 (S.D. Tex. 1972), aff'd without opinion, 491 F.2d 1405 (5th Cir. 1974); *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 769-771 (D. Del. 1979), because the issue here is not the reasonableness of the interface tariff rate as compared to some other rate that might have been charged, but instead whether the PCA requirement itself was reasonable, i.e., whether there should have been any charge at all. We thus [⁸²¹] believe that the concerns expressed in *Keogh* involving the possible inconsistency between the operation of the antitrust laws and an independent regulatory scheme designed to fix reasonable rates under a statute are not implicated here. We therefore affirm the lower court's holding with respect to the inapplicability of the *Keogh* doctrine.

AT&T's third and [**105] final argument goes to Litton's standing to seek damages as a customer. Essentially, AT&T argues that when Litton donned a customer's hat it placed itself outside the "target area" that delineates one plaintiff from another in terms of standing to sue. The "target area" doctrine was first enunciated in *Billy Baxter, Inc. v. Coca Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923, 91 S. Ct. 877, 27 L. Ed. 2d 826 (1971), where we stated that

[A] [HN13](#)[¹³] plaintiff must allege a causative link to his injury which is "direct" rather than "incidental" or which indicates that his business or property was in the "target area" of the defendant's illegal act . . . These terms do not provide talismanic guides to decision but they do indicate the need to examine the form of violation alleged and the nature of its effect on a plaintiff's own business activities.

Customers are not *per se* outside the target area. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979); *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313-15, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, [\[**106\]](#) Inc., 429 U.S. 477, 486 n. 10, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 92 L. Ed. 1328, 68 S. Ct. 996 (1948). The test is ultimately one of directness. We have thus looked to whether the conspiracy was "aimed" at a particular entity in the area of the economy threatened by anticompetitive conduct, see *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), cert. denied, 406 U.S. 930, 32 L. Ed. 2d 132, 92 S. Ct. 1776 (1972), and to whether the injury in question was central to the attainment of the anticompetitive objective rather than a mere incident thereto, see *Schwimmer v. Sony Corp.*, 637 F.2d 41, 48-49 (2d Cir. 1980).

The Supreme Court has recently rejected an argument similar to the one AT&T makes here in connection with Section 4 of the Clayton Act. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149, 50 U.S.L.W. 4723, 4726-27 (1982) the Court recognized standing of a health insurance [**107] subscriber who was denied reimbursement for psychological therapy under a policy term providing reimbursement for such services only if they were rendered by psychotherapists. The petitioners in *McCready* adverted to the "target area" doctrine, citing our decision in *Calderone Enterprises, supra*. In holding that the petitioner's injury was not too remote the Court pointed out that the "target area" test does not "imply that it must have been the purpose of the [defendants] to injure the particular individual claiming damages," [50 U.S.L.W. at 4726 n.15](#) (citing *Schwimmer, supra*).

In this case, as in *McCready*, it avails AT&T little to argue that customers are outside the target area because the anticompetitive effect, if any, of the interface tariff was aimed at terminal equipment manufacturers rather than customers. While an intent to injure a specific entity may well be sufficient to satisfy the target area test, our emphasis in *Schwimmer* on whether the injury was central to the attainment of the anticompetitive objective suggests that this is not always necessary. In this case, the jury found that AT&T imposed the interface tariff in order to maintain its monopoly **[**108]** position in the terminal equipment market. The tariff was "aimed" in the first instance at AT&T's customers in the sense that it applied to every user that chose to interconnect non-AT&T equipment. The tariff was perhaps the only way, and it was **[*822]** certainly the most efficient way, that AT&T could burden competitors seeking to establish themselves in the terminal equipment market. Thus, the injury to Litton as a customer was not remote even if injury to customers was not AT&T's first objective.

G. The Damage Study

AT&T argues that the damage award for Litton as a competitor must be overturned because it was based on a study that incorporated assumptions that were both unsubstantiated in the record and contrary to some of the jury's findings regarding the legality of certain AT&T practices. Litton's damage study, the so-called "Lost Profits Study," was prepared by Richard Hexter, whose substantial qualifications we set forth in the margin.⁴⁸ The two year study used a variety of sources to generate sales, profit, and market share data for Litton's position in the interconnection market from 1972 until 1990.

[109]** We note at the outset that the study was conservative in that it assumed that Litton would forego short term profits to achieve larger market shares and profits from 1979 on. The jury awarded Litton estimated profits up to and including 1978, in keeping with the trial court's instruction that Litton had an obligation to reenter the market when the interface tariff was finally set aside in 1978. We also note preliminarily, in order to provide some perspective on the magnitude of the telephone terminal equipment market and the jury's award, that Litton sustained an out of pocket loss of some \$53 million before it left the market. Although we do not know AT&T's profits, its revenues from the sale of terminal equipment during this period was at one point in excess of \$1.2 billion. By AT&T's own admission, Litton was the "number one formidable adversary" in this market and Hexter testified that if Litton had obtained a market share of even 6.9%, its 1982 profits alone would have been \$37 million. Hexter's Lost Profits Study was typical of its genre in that it was based on an estimate of what Litton's experience would have been in the absence of the interface tariff (the "but for" **[**110]** world) as opposed to Litton's actual experience (the "real world").

As the only evidence introduced in support of Litton's damage claim as a competitor, the Hexter study conveniently provides a single target for the two salvos AT&T fires. The first is that the record fails to support certain assumptions upon which the study is based. The second is that the study incorporated assumptions regarding the absence of pricing and other practices that the jury either did not consider or determined not violative of the antitrust laws. We reject AT&T's argument that Litton's damage study was based on unsupported assumptions or practices held lawful by the jury and affirm the jury's award.

1. Support for the Hexter Study in the Record.

AT&T argues that Hexter's projections -- the heart of the Lost Profits Study -- were based on a host of mutually independent assumptions which find no support in the record. The argument is that the Lost Profits Study should therefore not have been admitted and that the verdict must be set aside. See *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 59 n.19 (2d Cir. 1980); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912-13 (2d Cir.),

⁴⁸ Hexter received his MBA from Harvard University and has taught graduate courses in finance and management at Columbia and Yale Universities. Prior to forming his own firm in 1975, Hexter worked for 15 years with Donaldson, Lufkin & Jenrette, an investment banking firm, where he served first as an industry analyst and later as the head of that firm's corporate financing, investment banking and venture capital division. Hexter was also familiar with the telecommunications industry as a result of his service as a board member of Arcata National Corporation and his study of Litton while he was with Donaldson, Lufkin & Jenrette.

[**111] cert. denied, 369 U.S. 865, 8 L. Ed. 2d 85, 82 S. Ct. 1031 (1962). AT&T specifically attacks six "assumptions" of the Hexter study.

The first of these relates to Hexter's assumption that certification standards would have been adopted by early 1973 "but for" AT&T's opposition. AT&T argues that because various other groups also were opposed [*823] to certification, there is no evidence that AT&T's conduct was responsible for the FCC's failure to implement a certification program any earlier than it did. But Litton demonstrated that various AT&T executives admitted that they could have filed standards within a year of the *Carterfone* decision. This supports the premise, as not unreasonable or contrary to common sense, see *Auto West, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 566-67 (2d Cir. 1970), that if AT&T had behaved legally there would have been no interface device after early 1973.⁴⁹ The validity of this premise is the very heart of the jury's verdict that AT&T filed the interface tariff and opposed certification in bad faith.

[**112] The second assumption AT&T challenges concerns the amount of money Litton would have invested in research and development in Hexter's "but for" world. As support, AT&T points to the Business Opportunity Plan Litton prepared before it entered the market. The plan called for an investment of \$1,452,000 in research and development from 1972 to 1976, but Hexter assumed that Litton would have invested \$14,828,000 in the same period. But of course R & D does not immediately bear fruit; by making a higher estimate of Litton's investment than was contemplated in the Business Opportunity Plan the effect was to decrease profits for Litton's early years in the terminal equipment market.⁵⁰ Because the jury only awarded damages for lost profits in the years from 1972 to 1978, to the extent that Hexter's study might have overestimated R & D investment, Litton rather than AT&T was disadvantaged. In any event, AT&T's reference to the Business Opportunity Plan only substitutes one set of assumptions for another. In fact, there was evidence in the record from the author of the Business Opportunity Plan that Litton had intended from the beginning to spend more on R & D than the plan projected. [**113] There was also testimony to the effect that Litton was ready to invest whatever was needed to make the business succeed. The AT&T argument is thus both irrelevant and mistaken.

AT&T's third argument is that Hexter's assumptions about the size of the total terminal equipment market and Litton's share of that market were not supported by the record. But we note that *HN14*[↑] damages in antitrust cases "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969), thus bringing the elasticity of *Story Parchment Co. v. Paterson* [**114] *Parchment Paper Co.*, 282 U.S. 555, 563, 75 L. Ed. 544, 51 S. Ct. 248 (1931), into play. See also *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65, 90 L. Ed. 652, 66 S. Ct. 574 (1946). Accordingly, "where there is a basis on which a jury can reasonably infer significant antitrust injury, [the court] should be very hesitant before determining that damages cannot be awarded." *Berkey Photo, Inc.*, 603 F.2d at 304. Hexter's estimates were based upon a two year analysis of industry data available from Litton, AT&T, and public sources, and a review of more than thirty terminal equipment studies. His study projected that by 1978 AT&T would still have 79 percent of the terminal equipment market with the remaining 21 percent shared by all non-AT&T competitors. [*824] This estimate was conservative as compared to a study done by General Electric, which estimated that by as early as 1975 competitors would divide 30 percent of the market. Hexter's estimate of Litton's share of the total non-AT&T terminal market was also conservative; his estimates never

⁴⁹ AT&T suggests that because other groups also opposed certification standards, Litton must prove a negative -- i.e., that this opposition had nothing to do with Litton's injury -- in order to recover. Although Litton was required to prove a "causal connection" between its injury and AT&T's illegal conduct, it was sufficient to demonstrate that AT&T's conduct was a substantial or materially contributing factor. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962).

⁵⁰ Indeed, under the profit scheme in Hexter's model, Litton sustained losses in 1972 and 1973. We also note that Litton introduced evidence showing that its early performance in the terminal equipment market exceeded the projections contained in the Business Opportunity Plan and that R & D expenditures were increased accordingly.

exceeded 14.5 percent when in fact Litton's actual share before it left the terminal equipment market was at one point [**115] between 23 and 25 percent.

AT&T also complains about Hexter's treatment of Litton's bad debt costs. The argument is that Hexter ignored Litton's actual experience and postulated these costs on the basis of a composite profile based on six well-run, thriving companies in high technology industries. For the limited time Litton sold and leased equipment, its bad debts amounted to almost 12 percent of its sales, while Hexter's model assumed that they would amount to less than 2 percent. According to Hexter's testimony, however, these companies were the six most comparable; three of them were actually in the terminal equipment business. We believe that Hexter's decision to use these estimated bad debt figures was based on the plausible assumption that Litton's actual experience in the start-up phase of its business was not representative of what those costs would be in later years.⁵¹ We note in any event that Hexter's estimates of Litton's profits for the 1972 to 1976 period averaged less than 1 percent of sales, and the estimated profits of only 6.7 percent of sales for 1977 and 1978, was about half of AT&T's profits on its overall sales. We think that AT&T's argument as to Hexter's [**116] treatment of this single cost factor goes only to the weight of the evidence and does not compel rejection of the damage study or overturning the verdict. *Greene v. General Foods Corp.*, 517 F.2d 635, 665 (5th Cir. 1975), cert. denied, 424 U.S. 942, 47 L. Ed. 2d 348, 96 S. Ct. 1409 (1976).

The fifth Hexter assumption that AT&T challenges is that there would be "tough but equal" price competition and that Litton and other terminal equipment companies "would be able to compete profitably against whatever Bell tariffs were filed." AT&T argues that it had an [**117] inherent pricing advantage and that therefore neither Litton nor any other competitor could compete equally. This court has, of course, emphasized that a monopolist may lawfully take advantage of benefits deriving from its size or integration, see *Berkey Photo, Inc.*, 603 F.2d at 276, but AT&T has completely mischaracterized Hexter's assumption. Hexter's assumption concerning "tough but equal competition between the products and the people in the field" related not only to pricing, but included "price and features." His assumption was that "the companies would compete on their ability to sell, properly install and service the equipment."

The assumption that Litton would have been able to compete successfully was borne out by Litton's initial success in the terminal equipment market and evidence tending to indicate that AT&T itself thought that some of Litton's products possessed desirable features and AT&T's equipment did not. Moreover, Hexter testified at trial that his assumptions as to Litton's ability to meet AT&T's competition in the non-price category of product capabilities were in fact conservative insofar as he assumed only that Litton would stay abreast of the competition [**118] after it had established a position in the market.

The sixth and final assumption AT&T challenges is Hexter's inclusion of lost profits attributable to Litton's leasing operation, Litton Industries Credit Corporation (LICC). AT&T argues that the only commodity essential to an equipment leasing business is money and that Litton's leasing [*825] subsidiary was therefore free to lease any other equipment -- telephone terminal equipment or otherwise -- that it could purchase. But in the real world -- for the limited time that Litton was in it -- Litton did lease as well as sell its equipment and the money that LICC used to purchase the equipment from Litton BTS was obtained by financing. Litton introduced evidence to support the proposition that the leasing operation was essential to its market efforts because many customers preferred a leasing arrangement to outright purchase. AT&T's argument that Litton could have leased any other commodity puts the cart before the horse; Litton operated the leasing subsidiary to sell telephone equipment, and not *vice versa*. AT&T's contention that Litton should have leased another product is equivalent to saying that an antitrust plaintiff's [**119] recovery of lost profits is limited by the highest alternative return that a plaintiff could have secured in another line of business entirely. The leasing operation was part of Litton's terminal equipment business and whatever profits Litton's leasing operation lost as a result of AT&T's conduct are therefore properly included in the measure of damages.

⁵¹ That AT&T's objections go to the weight and not the validity of the evidence used in the study seems plain. From the more than one hundred cost, expense, and other factors Hexter used in his study, AT&T attacks one figure -- bad debts as a percentage of sales -- to challenge Hexter's treatment of costs. AT&T's argument that Hexter's model should have somehow reflected the fact that 80 per cent of all new businesses are unsuccessful is frivolous.

In short, the Hexter study is supported by the record and not based on assumptions as to evidence not in the record. The Hexter study is not rendered inadmissible because AT&T would have calculated the damages in a different manner or used other figures. See, e.g., *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379, 71 L. Ed. 684, 47 S. Ct. 400 (1927); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 843 (7th Cir. 1978); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1207 (9th Cir. 1975), cert. denied, 425 U.S. 959, 48 L. Ed. 2d 204, 96 S. Ct. 1741 (1976). Under *Story Parchment, Bigelow v. RKO Radio Pictures*, and *Zenith Radio Corp.*, the verdict must be sustained. Cf. *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263, 272 (2d Cir. 1959).

2. Litton's Damage Study and AT&T Conduct Found Lawful: Causation.

AT&T argues that the Hexter Lost Profits Study assumed the absence of AT&T practices that the jury either did not consider or did not find unlawful, e.g., pricing practices, disparaging advertising, and copying competitors' products. The argument, stated more simply, is that Hexter could not separate the lost profits related to lawful activity from the lost profits related to the unlawful interface and practices associated therewith. AT&T correctly points out that courts have held that [HN15](#)¹⁵ damage studies are inadequate when only some of the conduct complained of is found to be wrongful and the damage study cannot be disaggregated. E.g., *Momand v. Universal Film Exchanges, Inc.*, 172 F.2d 37 (1st Cir. 1948), cert. denied, 336 U.S. 967, 93 L. Ed. 1118, 69 S. Ct. 939 (1949); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 434, 436 (N.D. Cal. 1978), aff'd sub nom. *Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), cert. denied, 452 U.S. 972, 69 L. Ed. 2d 983, 101 S. Ct. 3126 (1981).

But the record does not sustain the AT&T position. What Hexter assumed [\[**121\]](#) was that "to the extent that there were any marketing practices either related directly or indirectly to the interface device that may have been harassing or uncooperative," that these practices would not be present in the "but for" world. He made an effort to segregate how much in lost profits related to the interface and to pricing or marketing practices, but rejected it because he did not believe that the results were fruitful. He assumed that Bell would know its own costs and would price toughly but competitively and that companies challenging Bell would, everything else being equal, be able to compete and make a profit. He did not assume that any particular AT&T pricing practices would be eliminated. In short, there is no evidence that Hexter assumed AT&T's prices were illegal or that he made specific assumptions about how individual AT&T pricing practices would have changed. AT&T did not submit contrary evidence. How else lost profits can be proved in an antitrust case, we are not told. In short, there was an evidentiary basis for the jury [\[*826\]](#) award which -- all things considered -- was modest in light of the fact that Litton's lost profits were limited to years [\[**122\]](#) prior to 1978. See generally *Lavender v. Kurn*, 327 U.S. 645, 652-53, 90 L. Ed. 916, 66 S. Ct. 740 (1946), *Eastman Kodak Co. v. Southern Photo Material Co.*, *supra*, at 378-79.

H. Sanctions on Litton for Failure to Provide Discovery

The trial court upheld the magistrate's finding ⁵² that Litton's attorneys had engaged in a "pattern of intentional concealment of evidence" relating to the finder's fee investigation in connection with Litton's San Mateo office; the evidence specifically consisted of certain notes that were in the bottom of the drawer of in-house counsel Roberts until the late summer of 1979. See *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 90 F.R.D. 410

⁵² Litton argues that Magistrate Sinclair should have been disqualified from presiding over pretrial discovery because some four to seven years prior to this litigation he worked as an associate on a case that eventually resulted in Litton threatening to sue his law firm for malpractice. Our review of the record leads us to agree with Judge Conner that it "is not reasonably conceivable" that Sinclair was likely to be prejudiced against Litton as a result of this earlier involvement. Litton also argues that it was error to assign Magistrate Sinclair the task of conducting an evidentiary hearing on discovery order violations. While we may agree that it would have been better practice to assign this task to another magistrate, Magistrate Sinclair was clearly in the best position to review compliance with the 122 discovery orders issued in this case. The district court reserved to itself the question of what sanctions would be imposed for any discovery violations; Sinclair's review of the record did not exceed the scope of authority granted to magistrates under *28 U.S.C. § 636(e) (5) (Supp. IV 1980)* (magistrate may certify to the district court facts relating to "act or conduct which if committed before a judge . . . would constitute contempt").

(*S.D.N.Y. 1981*). The court concluded that the Roberts notes were material to preparation for AT&T's defense that Litton BTS went out of business as a result of mismanagement, incompetency and dishonesty, rather than as a result of AT&T's antitrust violations. It found other Litton in-house counsel grossly negligent for stating in connection with the taking of Roberts' deposition that there were no other relevant documents, without having reviewed all of Roberts' files; in representing [**123] in an April 24, 1978 brief that the Bruder investigation (after the then new President of Litton BTS, Robert Bruder) in 1973 was directed only at the San Mateo matter when in fact San Mateo was only one of seven instances of suspected misconduct Bruder wanted investigated; in representing in the same brief that all of Roberts' interview notes had been turned over to the San Mateo County District Attorney when in fact the notes of Roberts' interviews with five Litton BTS employees had not been turned over; in representing in another brief filed December 6, 1978 that Litton had produced all "notes and memorandums of interviews of persons not connected with the San Mateo matter;" in failing to turn over to AT&T Roberts' notes following the court's opinion and order of March 26, 1979, which specifically rejected the argument that work product immunity attached to the interview reports; in representing in a letter of July 6, 1979 that Roberts had taken no notes of his interview with Litton BTS employee Hoxie when in fact Hoxie had testified that he had been interviewed. The court also found "willful misconduct" on the part of Litton's general counsel in this litigation; after receipt of [**124] the complete set of Roberts' interview notes in the late summer of 1979, counsel failed to apprise the magistrate, the district court and the defendants of the existence of the additional notes to correct the earlier erroneous assertions that had been made. Even after production of handwritten copies of Roberts' notes of interviews with certain Litton BTS employees, the entire notes were not produced and it was claimed that the notes withheld involved matters "wholly extraneous" to the case, when in fact they also involved notes on the use of fake finders, finders' fees and other matters. But the court refused Bell's requested sanction of dismissal and instead denied Litton recovery of all costs and attorneys' fees to which [**827] it would otherwise be entitled as a matter of law, including those under Section 4 of the Clayton Act, *15 U.S.C. § 15. Litton Systems, Inc. v. American Telephone & Telegraph Co., 91 F.R.D. 574 (S.D.N.Y. 1981)*.

[**125] Needless to say, the parties disagree entirely on the sanctions imposed. AT&T would have the action dismissed and Litton disentitled to recover one dime, a sanction which is within the court's discretion to impose. See *National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 49 L. Ed. 2d 747, 96 S. Ct. 2778 (1976)* (per curiam); *Penthouse International, Ltd. v. Playboy Enterprises Inc., 663 F.2d 371, 386-92 (2d Cir. 1981)*; *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979)*. Litton argues that a penalty of over \$10 million is excessive, especially where counsel supervised the disclosure of three and one half million documents in a professional manner and where the notes were ultimately turned over without any prejudice to AT&T by virtue of their late production because the notes (a) were inadmissible hearsay, (b) contained no specific information, and (c) were unimportant because the whole subject of finders' fees was mentioned only once in the course of an entire five hour summation by AT&T counsel before the jury. Litton also argues that under *Upjohn Co. v. United States, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)*, decided since the district court's sanctions orders were made, the miscellaneous notes were, in fact, privileged and should never have been turned over to AT&T at all, as Litton had consistently urged the magistrate and district court with the agreement of the magistrate in the first instance.⁵³

[**127] We affirm the district court in this regard. *HN16*⁵⁴ The payment of attorneys' fees is a part of the penalty for violating the antitrust laws. *Illinois v. Sangamo Construction Co., 657 F.2d 855, 859-60 (7th Cir. 1981)*; *Farmington Dowel Products Co. v. Forster Manufacturing Co., 421 F.2d 61, 90 (1st Cir. 1969)*. At the same time there is no doubt that attorneys as officers of the court must operate on an honor system, *Litton Systems, Inc. v.*

⁵³ Litton contends that the Roberts notes should have been protected as attorney work product under *Upjohn Co. v. United States, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)* (when house counsel and general counsel interviewed middle-echelon corporate employees regarding possible foreign government bribes, notes of the interviews held privileged as made between attorney and client). But as Litton concedes, Litton Brief at 121, the internal investigation focused on the employees' own possible misconduct; they were not speaking on behalf of the corporation or in furtherance of its business. The "remote possibility" of criminal litigation involving Litton itself was not sufficient to create a work-product immunity, *Garfinkle v. Arcata Nat'l Corp., 64 F.R.D. 688, 690 (S.D.N.Y. 1974)*.

AT&T Co., 90 F.R.D. at 417 (S.D.N.Y. 1981), and must be appropriately disciplined to provide both specific and general deterrence. Roadway Express, Inc. v. Piper, 447 U.S. 752, 763-64, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980); National Hockey League v. Metropolitan Hockey Club, Inc., supra 427 U.S. at 643. Federal Rule of Civil Procedure 37(b) HN17 [↑] expressly empowers the court to impose a wide range of specified sanctions for failure to obey court orders. See Roadway Express, Inc., supra, at 763-64; Stanziale v. First National City Bank, 74 F.R.D. 557 (S.D.N.Y. 1977). Given the court's express findings of bad faith, it could also have imposed sanctions on Litton as an exercise of its inherent powers. See Roadway Express, Inc., I**1281 supra, at 764-67. It is immaterial that the notes themselves were ultimately ruled inadmissible on the ground that they were hearsay since they were "reasonably calculated to lead to the discovery of admissible evidence." *Fed. R. Civ. P. 26(b) (1)*. Thus HN18 [↑] where there is repeated defiance of express court orders dismissal may be an appropriate remedy. National Hockey League, supra, 427 U.S. at 640 (refusal for 17 months to answer "crucial" interrogatories); Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 666 (2d Cir. 1980) (doing "absolutely nothing at all" to comply with discovery orders or move the case to trial); Cine Forty-Second Street, supra (refusal for three years, without moving for protective order, to comply with specific orders to answer interrogatories on damages).

[*828] At the same time, HN19 [↑] because dismissal denies the party access to justice, if the party has a valid claim, dismissal would, in the case of attorney misconduct such as gross negligence, amount to a windfall to an adversary to be resorted to only when necessary to preserve the integrity of the judicial system, or in similar "extreme circumstances." Interconex, Inc. v. Federal Maritime I**1291 Commission, 572 F.2d 27, 30 (2d Cir. 1978); Israel Aircraft Industries, Ltd. v. Standard Precision, 559 F.2d 203, 208 (2d Cir. 1977); Independent Productions Corp. v. Loew's Inc., 283 F.2d 730, 733 (2d Cir. 1960). See also Cine Forty-Second Street, 602 F.2d at 1064 (dismissal should "be deployed only in rare situations"). Thus the trial court in imposing sanctions expressed its agreement with the concurring opinion in *Cine Forty-Second Street* that it is difficult to "visit upon the client the sins of counsel, absent client's knowledge, condonation, compliance, or causation." Id. at 1069.

We believe that the trial court, thoroughly familiar with the record, the parties, as well as the efforts, conduct and omissions of counsel, quite correctly struck a wise balance between the conflicting interests in imposing antitrust penalties under the Clayton Act on the one hand and preserving the integrity of the discovery process on the other. Dismissal of the case would be inappropriate in the light of the limited ultimate role that the Roberts notes played. The imposition of the sanction of no award of attorneys' fees and costs is expensive for Litton, to be sure, but [**130] the failures and obstructions of house counsel Roberts, house counsel's conduct at the taking of Roberts' deposition, and the conduct of general counsel, found by the district court in its familiarity with the record and these parties to constitute gross negligence and willful misconduct, led to the sanction. Thus while the damages and hence statutory attorneys' fees in this case are so substantial that in effect Litton (or perhaps to some extent counsel) is being penalized in a sum that on its face is larger than 99 percent of the judgments awarded in any court, it is still only a small fraction of the ultimate recovery here involved. Indeed, where the stakes are as high as they are in this case, the penalties for obstruction of the truth must be impressive if they are to be effective, yet they must not be so drastic or unfair as the penalty of dismissal. Indeed, in such a case, dismissal is so unlikely to be imposed that, absent steep penalties, Rule 37 would be at most a "paper tiger." Rosenberg, *New Philosophy of Sanctions*, in *New Federal Civil Discovery Rules Sourcebook* 140, 141 (W. Treadwell ed. 1972). We believe that the trial court acted soundly and correctly, as well [**131] as wisely, in imposing the sanction. We decline to set it aside on behalf of either party.

In view of our disposition of the case we need not reach the issues on Litton's cross appeal.

Judgment affirmed.



JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.

United States Court of Appeals for the Ninth Circuit

December 17, 1982, Argued and Submitted ; February 8, 1983, Decided

Nos. 82-4102, 82-4107

Reporter

698 F.2d 1011 *; 1983 U.S. App. LEXIS 30694 **; 1982-83 Trade Cas. (CCH) P65,199

JBL ENTERPRISES, INC., dba JHIRMACK OF UTAH, JEAN ROBINSON, dba JHIRMACK OF IDAHO and JHIRMACK OF BOISE, LOIS JEAN MILLION, dba JHIRMACK OF NORTH CENTRAL INDIANA, Plaintiffs-Appellants, v. JHIRMACK ENTERPRISES, INC., Defendant-Appellee; AL BOOTH and THELMA R. BEAN, individually, JHIRMACK OF WASHINGTON, D.C., INC., WALTER R. CECCHINI, JR., individually, and JHIRMACK OF SOUTHWESTERN PENNSYLVANIA, INC., Plaintiffs-Appellants, v. JHIRMACK ENTERPRISES, INC., IRENE REDDING, ALBERT L. SCHWARTZ, and GARY McCORD, individually, INTERNATIONAL PLAYTEX, INC., JOEL E. SMILOW, individually, and ESMARK, INC., Defendants-Appellees

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of California. William W. Schwarzer, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

distributors, products, outlets, salons, manufacturer, territory, shampoos, conditioners, district court, price competition, summary judgment, terminated, antitrust, dealer, relevant market, competitor, interbrand, beauty, market share, restrictions, vertical, prices, retail, sales, customers, breached, price-fixing, intrabrand, consumers, foreclose

LexisNexis® Headnotes

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 > Nonprice Restraints

HN1 [down arrow] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

While it did not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition, in general such non-price restrictions imposed by a manufacturer on distributors or retailers must be tested under the Rule of Reason.

698 F.2d 1011, *1011 (1983 U.S. App. LEXIS 30694, **1

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

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

HN2 [down] **Price Fixing & Restraints of Trade, Vertical Restraints**

Per se condemnation of apparently vertical restraints may be appropriate where the purpose and effect of those restraints is to limit horizontal competition.

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

HN3 [down] **Price Fixing & Restraints of Trade, Vertical Restraints**

A manufacturer deliberately withdrawing its product from a distributor that resold it for a price less than its competitor at the request of the competitor, would constitute a per se violation.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

Civil Procedure > Trials > Separate Trials

Civil Procedure > Appeals > Standards of Review > General Overview

HN4 [down] **Regulated Practices, Market Definition**

Antitrust market findings are findings of fact and, thus, subject to a clearly erroneous standard of review.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN5 [down] **Regulated Practices, Market Definition**

Analysis of whether a particular action restrains competition involves a consideration of its impact within the field of commerce in which the plaintiff was engaged and upon those commercially engaged in competition within it. In determining what the field of competition is, courts are not free to accept whatever market is suggested by the plaintiff, but must examine the commercial realities within the industry in question.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6 [down] **Regulated Practices, Market Definition**

Defining the market in an antitrust case is actually a two-step process. First, the field in which the plaintiff is engaged must be defined in geographic and distributional terms. Then the product, or product line, that competes in that field must be determined.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN7 **Regulated Practices, Market Definition**

The standard test of the product market in an antitrust case is that it comprises those commodities reasonably interchangeable by consumers for the same purpose. This principle must be applied with reference to the specific market involved.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN8 **Regulated Practices, Market Definition**

In an antitrust case, the cluster approach is appropriate where the product package is significantly different from, and appeals to buyers on a different basis from, the individual products considered separately.

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

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN9 **Distributorships & Franchises, Remedies**

The elements of a claim of tortious interference are: (1) a valid contract; (2) knowledge of the contract and intent to induce its breach; (3) breach; (4) causation; and (5) damage.

Counsel: For parties: John A. Kithas (argued), of Kithas & Lamont, San Francisco, California, Hugh Latimer (argued), of Bergson, Borkland, Margolis & Adler, Washington, District of Columbia, for JBL Enterprises, Inc.

Eugene Crew (argued), of Khourie & Crew, San Francisco, California, for Internatl. Playtex, Inc.

William Lukens (argued), of Lukens, St. Peter & Cooper, San Francisco, California, for Jhirmack Enterprises, Inc.

Judges: Merrill, Duniway and Ferguson, Circuit Judges.

Opinion by: FERGUSON

Opinion

[*1013] FERGUSON, Circuit Judge:

These appeals arose out of a common scenario. The plaintiffs in both actions are former distributors of defendant Jhirmack Enterprises, Inc. ("Jhirmack"). When their contractual relationships broke down, the disappointed parties sought solace (and treble damages) from the court, alleging various antitrust violations and related contract and tort claims. Following summary judgment in favor of the defendants, the plaintiffs appeal. We affirm.

FACTS:

Jhirmack manufactures hair care and cosmetic [**2] products which are distributed throughout the United States by licensed distributors. The company was founded in 1968 by Jheri and Irene Redding. From 1972 to 1979 Jhirmack followed a marketing strategy of making its products available through beauty salons, barber shops, beauty schools, barber schools and hair styling establishments (the "professional salon trade" or "PST") rather than through other types of outlets, such as drugstores, department stores and the like ("over-the-counter" or "OTC" outlets). Such a limited outlet strategy is often adopted by new firms who wish to avoid the large advertising costs necessary to break into the heavily competitive OTC market in hair care and beauty products. To this end Jhirmack contracted with several independent distributors, including the three *JBL* plaintiffs and the *Booth* plaintiffs, giving each an exclusive geographic territory and requiring each to "exclusively devote its entire time and use its best efforts to promote and sell" Jhirmack's products to PST outlets in their respective territories. The contracts also provide that Jhirmack "will not appoint another distributor within the territory," and set minimum purchase quotas [**3] for each distributor, based on Jhirmack's estimate of potential PST accounts within the assigned territory.

In 1976-77, Jhirmack received complaints from salon owners and distributors that its products were appearing in OTC outlets. Salons charge premium prices for products sold to their customers and prefer the prestige that flows from carrying products not generally available. It is difficult for PST outlets to maintain either prices or prestige if the product can be found in the local supermarket at a substantially lower price. Many PST outlets will therefore refuse to carry products that are generally available OTC. On receiving complaints Jhirmack took steps to determine which distributors [*1014] were "diverting" its products to OTC outlets and to discourage them from doing so.

In 1978, Jhirmack terminated the *JBL* distributors for refusing to follow Jhirmack's marketing plan and for failing to meet its order quotas for their respective territories. *JBL* filed suit, alleging that the terminations were the result of illegal territorial and customer restrictions, resale price maintenance and illegal tying arrangements in violation of federal antitrust law, and fraud or negligent [**4] misrepresentation in setting minimum purchase quotas.

By 1979, Jhirmack had developed sufficient name recognition to move into the OTC market. After negotiations with several companies, it entered an agreement with International Playtex, Inc. ("Playtex") in October, 1979. In exchange for the exclusive right to distribute Jhirmack shampoos and conditioners to OTC outlets, Playtex agreed to conduct a nationwide marketing campaign, pledging to spend seven million dollars the first year and fifteen percent of annual net sales in succeeding years promoting the products. The contract specifically excluded the professional salon trade, and Jhirmack continued to use independent distributors for its PST distribution.

In November 1979, Jhirmack sent new distributor agreements to its PST distributors, requiring them to recognize Playtex as the exclusive OTC distributor of Jhirmack shampoos and conditioners. *Booth* refused to sign the new agreement and so was terminated by Jhirmack in December 1979. *Booth* then filed suit alleging that the contract between Jhirmack and Playtex violated the Sherman and Clayton Acts and breached its own contract with Jhirmack.

The *JBL* and *Booth* actions [**5] were consolidated for a limited trial on the relevant market and tying issues. [JBL Enterprises v. Jhirmack Enterprises, Inc., 509 F. Supp. 357 \(N.D. Cal. 1981\)](#). The definition of the relevant market was crucial to a determination of whether Jhirmack possessed sufficient market power that its vertical nonprice restrictions could amount to an unreasonable restraint of trade. At the time no claims of *per se* antitrust violation had been made except for the tying claim. The district court concluded that the relevant market was the market for the sale of beauty products (including but not limited to shampoos and conditioners) to PST outlets. Under this definition Jhirmack's market share in 1976-78 was found to be 2.3%, 3.2% and 4.2%, respectively.

Jhirmack then moved for summary judgment against the *JBL* plaintiffs on the ground that in light of Jhirmack's insignificant market share the alleged restraints could not as a matter of law have had the requisite adverse effect on competition. *JBL* sought to avoid dismissal on two theories: (1) that Jhirmack's small market share did not establish lack of market power because it faced no interbrand competition; and (2) that Jhirmack engaged [**6] in price-fixing, a *per se* violation. The court rejected both theories. On the fraud claim the court found that *JBL* had

presented no facts on two essential elements. Summary judgment was therefore entered on all counts. [JBL Enterprises v. Jhirmack Enterprises, Inc., 519 F. Supp. 1084 \(N.D. Cal. 1981\)](#).

In the Booth action, in opposition to defendants' motion for summary judgment, the plaintiffs raised a *per se* claim of price-fixing, alleging that Jhirmack and Playtex conspired to foreclose price competition between Playtex and Booth in the OTC market in violation of Sherman Act § 1. The court granted summary judgment for the defendants on this issue, as well as on a claim against Playtex for inducing breach of contract, and a claim that Booth's termination breached an implied covenant of good faith and fair dealing. Summary judgment was denied on the claim that Playtex's appointment breached the exclusive territory clause of the Booth-Jhirmack contracts, but this claim was later dismissed and that dismissal has not been appealed.

Both sets of plaintiffs appeal the respective grants of summary judgment; the JBL plaintiffs also attack the district court's determination of [**7] the relevant market.

ANALYSIS:

I. The JBL Action

A. Per Se Price-Fixing

In [Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 \(1977\)](#), the Supreme Court, [HN1](#) while it did "not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition," [id. at 58](#), held that in general such nonprice restrictions imposed by a manufacturer on distributors or retailers must be tested under the Rule of Reason. The Court found that, while vertical restrictions reduced intrabrand competition, they had redeeming virtues in that they tended to promote interbrand competition. Dealers would be more likely to expend the effort necessary to promote or service a product if they did not have to worry about other dealers of the same product taking a "free ride" on their efforts. Thus the manufacturer who imposed customer or territorial restrictions would be better able to enter the market as a new competitor or maintain its presence as an existing competitor with other manufacturers.

JBL attempts to place itself outside the reach of *GTE Sylvania* by allegations of a conspiracy among [**8] Jhirmack, other distributors, and salons to eliminate JBL as a competitor so as to reduce price competition. Its attempt fails.

First, the district court found "no evidence . . . that Jhirmack fixed the resale prices for its products or enforced compliance with a particular price schedule." [519 F. Supp. at 1088](#). Nor was there any indication that suggested prices were in fact adhered to. Thus JBL cannot rely on [United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 88 L. Ed. 1024, 64 S. Ct. 805 \(1944\)](#), where nonprice restraints were imposed to facilitate a vertical price-fixing scheme.

Second, JBL was not a competitor of the complaining salons. Rather, the salons were customers of distributors like JBL. Although the salons may have been concerned with maintaining the prices they charged consumers, the price competition they faced was not from JBL but from other retailers, especially OTC outlets that carried competing brands.

Third, the other distributors, who would have been in competition with JBL but for the territorial restrictions, were not concerned with eliminating price competition from JBL. There is no indication that the complaining distributors wished (or thought [**9] they were permitted) to make sales to the OTC outlets at all, much less at a higher price than that charged by JBL. Rather, the clear indication is that the complaining distributors were concerned that their customers (the salons) would stop carrying Jhirmack products if the diversion continued.

[HN2](#) *Per se* condemnation of apparently vertical restraints may be appropriate where the purpose and effect of those restraints is to limit horizontal competition. In [Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 \(3d Cir. 1979\)](#), plaintiff claimed it had been terminated as a dealer in United's line of kitchen cabinets because a competing dealer complained to the manufacturer that the plaintiff was discounting the cabinets. The Third Circuit found that

HN3[] "a manufacturer deliberately withdrawing its product from a distributor that resold it for a price less than its competitor at the request of the competitor," [595 F.2d at 166](#), would constitute a *per se* violation. It based its decision on the pernicious effect of the practice -- elimination of possible price competition from the foreclosed dealer -- and the lack of any redeeming virtue. The court noted that generally manufacturers are [**10] free to impose vertical territorial restrictions, but that two factors made United's alleged action unlawful. First, the action was taken at the behest of a competitor *on the same level as the plaintiff*, thus the restraint was horizontal rather than vertical in purpose and effect. Second, the complaining dealer was allegedly seeking to *eliminate price competition*. [595 F.2d at 168](#).

In order to make out a claim under the reasoning of *Cernuto*, JBL would have to allege that a competitor of JBL prevailed on Jhirmack to terminate JBL in order to eliminate either actual or potential price competition from JBL. No such allegation was made, and the district court correctly granted summary judgment on the price-fixing claim.

[*1016] B. Market and Market Share

All parties agreed to a separate trial to determine (a) the relevant product and geographic market, (b) Jhirmack's share of that market, and (c) whether Jhirmack imposed *per se* unlawful tying arrangements. Only the market findings are appealed. **HN4**[] These are findings of fact and thus subject to a clearly erroneous standard of review. [Twin City Sportservice v. Charles O. Finley & Co., 676 F.2d 1291, 1299 \(9th Cir. \[*11\] 1982\)](#). Although market definitions are inherently imprecise, the district court's determination is supported by the available evidence and must be upheld.

As this circuit stated in [Gough v. Rossmoor Corp., 585 F.2d 381, 389 \(9th Cir. 1978\)](#), cert. denied, 440 U.S. 936, 59 L. Ed. 2d 494, 99 S. Ct. 1280 (1979), **HN5**[] analysis of whether a particular action restrains competition involves a consideration of its impact "within the field of commerce in which the plaintiff was engaged and upon those commercially engaged in competition within it." In determining what the field of competition is, "courts are not free to accept whatever market is suggested by the plaintiff," *id. at 389*, but must examine the commercial realities within the industry in question.

HN6[] Defining the market in a case such as this one is actually a two-step process. First the field in which the plaintiff was engaged must be defined in geographic and distributional terms. Then the product (or product line) that competes in that field must be determined. Since the parties stipulated as to the geographic market, the two determinations may be referred to as defining, respectively, the "distributional market" and the [**12] "product market."

The district court defined the relevant market as "the sale of beauty products, including but not limited to shampoos and conditioners, to beauty salons and other professional outlets." [509 F. Supp. at 369](#). Under this definition, Jhirmack's market share was less than 5%. JBL disputes both the product and the distributional market determinations, and argues that the market should be defined as the sale of shampoos and conditioners *alone* either to professional outlets or, alternatively, *by* professional outlets. Although, as stated above, the district court found that the relevant market existed at the wholesale level (sales *to* salons), it carefully considered claims that a distinct submarket existed in the sale of shampoos and conditioners at the retail level (sales *by* salons). The court concluded, however, that *if* the relevant distributional market were to be found at the retail level, PST outlets faced competition from OTC outlets selling similar products, and so the relevant market would be the sale of shampoos and conditioners by all retail outlets. Under this market definition, Jhirmack's market share would have been less than 1% of shampoos [**13] and approximately 2% of conditioners.

We find it unnecessary to address these alternative findings, however, because the district court correctly defined the relevant distributional market. JBL is engaged in the distribution of Jhirmack products to specific retailers, i.e., it operates as a wholesaler. It competes for PST customers with other wholesalers -- some of whom also carry a single (competing) line, others of whom carry the products of many manufacturers.

The court's product market determination must also be upheld. **HN7**[] The standard test of the product market is that it comprises those "commodities reasonably interchangeable by consumers for the same purpose." [United](#)

States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). However, this principle must be applied with reference to the specific market involved. So long as the distributional market is set at the wholesale level, the fact that face creams and shampoos do not have the same use for the consumer is not as relevant as whether a "cluster" or "product line" of one manufacturer is reasonably interchangeable for that of another by the salon that is making the purchase.

HN8[] This [**14] cluster approach is appropriate where the product package is significantly different from, and appeals to buyers on a different basis from, the individual products [*1017] considered separately. Thus the full service features of commercial banks led the Supreme Court to find a cluster of products and services as the relevant product market in United States v. Philadelphia National Bank, 374 U.S. 321, 356, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963), and United States v. Phillipsburg National Bank & Trust Co., 399 U.S. 350, 360, 26 L. Ed. 2d 658, 90 S. Ct. 2035 (1970). The rationale was that consumers do not generally shop for individual banking services, especially because it is usually easier to obtain some services, e.g., loans, at the same bank where other services, e.g., savings accounts, are held. The approach was extended in A.G. Spalding & Bros., Inc. v. FTC, 301 F.2d 585, 604 (3d Cir. 1962), where the court found the relevant market to be "higher priced" athletic goods because each of the major manufacturers promoted and distributed such goods as a line.

In this case, eighty percent of Jhirmack's sales were of shampoos and conditioners. It did, however, manufacture [**15] a full line of beauty products and required each distributor to purchase a small amount of each product for potential sale to PST outlets. The industry generally considers it necessary to carry a full line, and advertising and promotion often group the products. Although salons do purchase individual products, this generally occurs when the particular product is not available in the main product line chosen by the salon. The court thus reasonably concluded that Jhirmack faced competition (at the wholesale level) for PST sales from other product lines, and not only from other shampoos and conditioners.

C. Market Power

The trial court found that Jhirmack's market share was 2.3%-4.2% of beauty products sold to PST outlets (or 1%-2% of shampoos and conditioners sold by all retail outlets). These shares are too small for any restraint on intrabrand competition to have a substantially adverse effect on interbrand competition. See, e.g., Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376, 1379 (9th Cir. 1981) (1.87% or 5.2%); Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620, 627 (9th Cir. 1977) (2% or 3%). JBL's contentions that Jhirmack possessed [**16] sufficient market power to significantly affect interbrand competition despite its insignificant market share are unsupported and were properly rejected at trial.

D. Fraud or Negligent Misrepresentation

JBL's contract with Jhirmack required JBL to purchase a minimum quantity of products each month. The contract states that JBL "acknowledges that the minimum purchase requirements provided herein are fair, just and reasonable." JBL claims that this statement is a fraudulent representation because the quotas were in effect a statement of the minimum revenues JBL could expect from the distributorship.

The district court found it "doubtful that quotas incorporated into a distributor's agreement afford a basis for a later fraud claim based on the distributor's failure to attain them." 519 F. Supp. at 1089. Such a theory would, in effect, make the manufacturer an insurer of the distributor's business. The court found it unnecessary to reach this issue, however, because it concluded that JBL had failed to factually support two elements: (1) that the representations were made negligently or with intent to defraud; and (2) that JBL relied on the representations. We find no error in this conclusion.

II. [**17] *The Booth Action*

Booth contends that Jhirmack's promise to it of an exclusive distributorship meant that if Jhirmack moved into the OTC market within Booth's territory, it would have to do so through Booth. Since the contract also specified that Booth agreed to exclusively devote its full time to the PST outlets, Jhirmack and Playtex contend that the OTC market was excluded from the contract. The district court denied summary judgment on this issue, and Booth has

not [*1018] appealed the later dismissal of the claim. In any event, this contract claim is irrelevant to whether Jhirmack conspired with Playtex to foreclose competition, violated a covenant of good faith and fair dealing, or was induced by Playtex to breach.

A. The Antitrust Claims

Booth claims that Jhirmack and Playtex conspired to foreclose competition in the OTC market for Jhirmack products in order to allow Playtex to fix prices in that market. It alleges, first, that the agreement between Jhirmack and Playtex, by giving Playtex an exclusive OTC license, violated Sherman Act § 1; and second, that its termination for refusing to accede to that agreement likewise violates the Act.

Booth does not dispute that [*18] Jhirmack could, without violating the antitrust laws, decide to appoint only one OTC distributor and refuse to appoint any others, even if the net result of this course of action was to shield the sole distributor from potential price competition. See [GTE Sylvania, 433 U.S. at 54-55; Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d at 1388](#). Booth's position, however, is that there already was competition, or at least potential competition, in the OTC market (i.e., Booth), and that the agreement was designed to eliminate that competition. It is difficult to square the contention that the Jhirmack-Playtex agreement would decrease intrabrand competition without increasing interbrand competition with Booth's position that if Jhirmack wanted to enter the OTC market it would have to do so through Booth, who had an exclusive territorial license. Had Jhirmack taken the route suggested by Booth, it would be Booth, and not Playtex, who would be insulated from price competition from any other OTC distributor in its territory. And Booth would not face any intrabrand competition between PST and OTC outlets, since it would control distribution to both.

Although there are [*19] indications that Jhirmack did not always interpret its contract with Booth as *prohibiting* sales to OTC outlets, it is clear that, as the district court noted, "Jhirmack's products had not theretofore been officially distributed to OTC outlets, having been generally limited to professional outlets except for sporadic diversion." [519 F. Supp. at 1091](#). It is also clear that Jhirmack considered a substantial promotional campaign as a prerequisite to its ability to compete successfully with other shampoos and conditioners available in OTC outlets. Playtex promise to spend seven million dollars on promotion during the first year of its distributorship and substantial amounts thereafter fulfilled that prerequisite. While there is no allegation that Jhirmack would never have entered the OTC market had it not been able to find a distributor able and willing to engage in substantial promotional activity, the admittedly heavy interbrand competition existing in the OTC market for shampoos and conditioners makes it extremely unlikely that it would have entered at the time it did or that it would have been able to add effectively to that interbrand competition if it had chosen to do so without [*20] such a campaign. Jhirmack considered such an arrangement necessary and the realities of the market make that assumption quite reasonable.

The district court was therefore justified in concluding that "the primary effect of the Jhirmack-Playtex agreement on competition in OTC channels was to add the competitive activity of a major distributor and to increase the amount of Jhirmack products available to consumers in OTC outlets. . . . Moreover, the agreement also provided a new source of intrabrand competition for Jhirmack products sold in salons." [519 F. Supp. at 1091](#).

Since the initial agreement between Playtex and Jhirmack did not violate *antitrust law*, Playtex could certainly ask Jhirmack for aid in enforcing it without incurring antitrust liability. Booth, like JBL, seeks to invoke *Cernuto*, but again the situation is not analogous. In *Cernuto*, the manufacturer had not granted an exclusive license to any of its dealers. Rather it was providing kitchen cabinets to both dealers Famous [*1019] and Cernuto. Famous, however, wanted to eliminate competition, and used its influence over the manufacturer to secure Cernuto's termination as a dealer, thereby creating a net [*21] loss of intrabrand competition without any net increase in interbrand competition. Under *Cernuto*'s circumstances, *per se* condemnation may be appropriate; under the circumstances presented here, it is clearly inappropriate.

B. Good Faith and Fair Dealing

Booth claims that Jhirmack breached an implied covenant of good faith and fair dealing by terminating Booth for refusing to recognize Jhirmack's "illegal" contract with Playtex. Since that contract does not violate the antitrust laws, the district court properly rejected this claim.

C. Tortious Interference

The heart of Booth's tortious interference claim parallels its antitrust claims. Booth argues that its contract with Jhirmack conferred on it the right to sell OTC, that Playtex knew Booth had that right, and that Playtex induced Jhirmack to take that right away from Booth and give it to Playtex.

Whether Booth's contract did in fact confer OTC rights on Booth so that Jhirmack could have breached that contract in giving those rights to Playtex is not at issue here. What matters is whether *Playtex* knew that Booth had OTC rights in its territory. [HN9](#)[] The elements of a claim of tortious interference are (1) a valid contract, [\[**22\]](#) (2) knowledge of the contract and *intent to induce its breach*; (3) breach; (4) causation, and (5) damage. [*Richardson v. La Rancherita*, 98 Cal. App. 3d 73, 80, 159 Cal. Rptr. 285 \(1979\)](#). In this case it is clear that Playtex had no reason to believe that Booth and other PST distributors had any OTC rights and therefore could not have intended that they be breached. Playtex was worried that distributors who diverted products to the OTC market had not bound themselves to incur heavy promotion costs, and would be able to "free ride" on Playtex's efforts, and undersell it. But there is no indication that it considered that diversion to be contractually sanctioned.

The district court's judgments are AFFIRMED in all respects.

End of Document



Nesglo, Inc. v. Chase Manhattan Bank, N.A.

United States District Court for the District of Puerto Rico

February 8, 1983

Civil No. 79-1674 GG

Reporter

562 F. Supp. 1029 *; 1983 U.S. Dist. LEXIS 19436 **

NESGLO, INC., et al., Plaintiffs v. THE CHASE MANHATTAN BANK, N.A. et al., Defendants

Core Terms

state court, parties, counterclaim, federal court, res judicata, proceedings, guarantors, collateral, affirmative defense, res judicata effect, litigate, mootness, courts, federal district court, reconsideration motion, state supreme court, cause of action, Tie-in, rights, motion to dismiss, preclusive effect, federal claim, intervening, purposes, court of appeals, pleadings, joined, principal debtor, anti trust law, render moot

Counsel: [**1] Edelmiro Salas Garcia, Esq., Hato Rey, Puerto Rico, for Plaintiffs.

Leopoldo J. Cabassa, Esq., Fiddler, Gonzalez & Rodriguez, San Juan, Puerto Rico, for Defendants.

Judges: Gierbolini

Opinion by: GIerbolini

Opinion

[*1030] FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

In our Opinion and Order of December 2, 1980 we dismissed the complaint in this case, [Nesglo, Inc. v. Chase Manhattan Bank, N.A., 506 F. Supp. 254 \(DCPR 1980\)](#); however, parallel proceedings were being carried out in the state local courts which continued their course. Our dismissal of the complaint was appealed to the United States Court of Appeals for the First Circuit and on September 14, 1981 that court entered the following order:

"This Court, while retaining jurisdiction, remands this matter to the District Court for the purpose of receiving from the parties acceptable translations of such pleadings, docket entries, court actions, and other papers relating to litigation in the courts of the Commonwealth of Puerto Rico as may be relevant to the question whether such litigation may have rendered the instant appeal moot, and for the purpose to expeditiously deciding the issue of mootness and reporting [**2] its findings and conclusions to this court.

The parties have agreed to cooperate in assembling the necessary materials without delay. They are to share equally in advancing such monies as may be necessary, the ultimate allocation of such expenses to abide final decision."

In compliance with the aforementioned order, the parties were instructed to file the necessary documents. We also ordered the parties to brief and argue the related matters of *res judicata* and collateral estoppel.

The case was scheduled for hearing but at that time the parties had not reached an agreement as to the documents to be submitted or the translations required. Disagreements between the parties continued. After substantial delays due to that fact, the parties filed legal memoranda which were examined and again we set all the pending matters for oral argument. For the second time we afforded the parties an opportunity to provide the officially certified translation of the state court documents which were finally filed after extended procrastination. Oral arguments were heard and thereafter the parties requested and were granted an additional opportunity to expand upon the arguments made. The **[**3]** additional memoranda were filed and the case was taken under advisement.

After a careful evaluation of all the documentary evidence, the oral arguments and the extensive legal memoranda filed by the parties, we enter the following basic findings **[*1031]** of fact and conclusions of law which will be supplemented in the Memorandum Opinion.

Findings of Fact

- 1- The parties or their privies in the state court action pending when we initially dismissed the complaint in this case, are the same as those participating in the instant proceedings.
- 2- The claim and/or defenses raised in the state court proceedings are substantially the same as those before this court.
- 3- There is a common nucleus of operative facts giving rise to both the state and federal court claims.
- 4- The plaintiffs in this case, defendants and counterclaimants and their privies in state court, had a full and fair opportunity to litigate their claims against the present defendants (plaintiff and its privies in state court).
- 5- In the exercise of its valid and proper jurisdiction, the state court dismissed plaintiffs' claims and/or defenses with prejudice for their willful and intentional failure to comply with **[**4]** a discovery order under rules of civil procedure identical to those governing civil actions for the federal district court.
- 6- The state court judgment became final, firm and unappealable when the state supreme court denied review.
- 7- No further review of the state court proceedings was sought by the present plaintiffs.

Based on the foregoing findings of fact, we reach the following:

Conclusions of Law

- 1- This court must accord full faith and credit to the state court judgment pursuant to [28 U.S.C. Sec. 1738](#).
- 2- By virtue of the full faith and credit statute, this court must give preclusive effect to the state court judgment.
- 3- In view of the fact that the state court judgment disposes of the pending controversy between the parties, the present action has been rendered moot.

Due to the complex procedural history of the present case, a more detailed analysis of the factual framework and the underlying legal theories -- both local and federal -- upon which it rests, is required. Therefore, we issue the following:

Memorandum Opinion

On or about November 9, 1978, defendant The Chase Manhattan Bank, N.A. (Chase) initiated a collection of monies and factor's lien suit **[**5]** in the Superior Court of Puerto Rico, San Juan Part (the state court) against plaintiffs Nesglo, Inc. (Nesglo), Nestor Cruz Soto (Nestor) and Gloria D. de Cruz (Gloria).

The complaint alleged that Nesglo had defaulted on a loan and factor's lien contract and owed Chase \$460,000 plus interest and \$46,000 in legal fees. It requested entry of judgment against Nesglo, Nestor and Gloria in the aforementioned sums of money and, pursuant to the terms of the loan documents ¹ including the factor's lien contract, that the court order the transfer to Chase of all Nesglo's inventory, account receivables, and related utilities.

Simultaneously with the filing of the complaint, Chase moved for attachment of Nesglo's inventory, account receivables, ledgers, and other assets described in its motion to that effect. Chase also requested the appointment of defendants [**6] Stanley Zych (Zych) and Enrique Fernandez (Fernandez) both officers of the Bank, as custodians of the property to be attached.

On November 15, 1978 the state court issued an attachment order granting Chase's motion to secure the effectiveness of judgment, and appointed Zych and Fernandez as custodians of the property to be attached. The court also issued orders attaching personal real estate and other property belonging to guarantors Nestor [*1032] and Gloria. Corresponding writs were also issued and Chase designated the Nesglo goods to be attached.

The attachment was executed by the state court marshals and an inventory prepared, copy of which was delivered to Fernandez.

On February 17, 1979 Chase moved for summary judgment accompanying a sworn statement by Mr. Luis Ledee, an officer of the Bank.

On February 27, 1979 Nestor and Gloria replied to Chase's motion for summary judgment denying that they or Nesglo owed any money to Chase and that, in any event, Chase collected usurious interest from Nesglo, the latter being a close corporation.

On or around March 26, 1979 defendants Nestor and Gloria filed a motion accompanying a sworn statement by Nestor dated March 19, 1979. [**7] Together with Nesglo, they also filed an answer to Chase's complaint raising a series of affirmative defenses very similar to the allegations found in their complaint before this court. Nestor and Gloria also filed a counterclaim, sworn to by Nestor, as president of Nesglo, and a motion to join Zych and Fernandez as defendants.

Nestor's sworn statement dated March 19, 1979 alleged that there was no credit due to Chase from Nesglo, that Chase had not credited certain amounts to Nesglo, had misappropriated certain funds, had refused to honor certain letters of credit, had not given an accounting to Nesglo, had charged Nesglo illegal interest and had imposed certain burdensome and anticompetitive conditions on Nesglo such as forbidding Nesglo to do business with other financial institutions and favoring competitors of Nesglo, also clients of the Bank.

The answer and affirmative defenses filed by Nesglo, Nestor and Gloria generally deny the allegations of Chase's complaint and raise as affirmative defenses fraud, deceit and material misrepresentations, lack of consideration, lack of compliance by Chase of its own obligations, compensation, novation, estoppel and unjust enrichment. [**8] They also adduce a defense that Chase violated the Commerce Code of Puerto Rico, the Tie-in Amendments to the Bank Holding Company Act of 1970, P.L. 91-607, Title I, Sec. 106(a) et seq., 12 U.S.C. 1971, et seq. (the Tie-in Amendments), the usury statutes of Puerto Rico and those found in the national banking laws, 12 U.S.C. Secs. 85 and 86.

Nestor's and Gloria's counterclaim incorporates the previous affirmative defenses and pleads claims for relief very similar to those pleaded by them and Nesglo before this court. They also name Zych and Fernandez as counterdefendants in the third cause of action of the counterclaim.

¹ They consist of the Factor's Lien Contract (Exhibit A), Note (Exhibit B), Continuous and Unlimited Guaranty (Exhibit C), and Collateral Agreement (Exhibit D).

In essence, the counterclaim seeks damages arising out of the commercial contractual relationship between Nesglo and Chase because of violations of the Tie-in Amendments; usurious interest under both the federal banking and local laws; federal and local civil rights violations arising out of Chase's, Zych's and Fernandez' attachment of Nesglo's goods, account receivables, ledgers and other property; violations of the Commerce Code of Puerto Rico due to the exaction of interest over interest; general breach of contract theories under the laws of Puerto Rico as well [**9] as lack of an accounting by Chase; and false and material misrepresentations relating to the promissory note sought to be collected by Chase.

Simultaneously with the filing of the foregoing pleadings, Nestor and Gloria moved to have Zych and Fernandez joined as party counterdefendants to the suit. The motion asserted that these Chase officers were indispensable parties with respect to the alleged illegality of the attachment.

On April 25, 1979 Chase moved to dismiss Nestor's and Gloria's counterclaim before the state court. Nestor and Gloria opposed Chase's motion to dismiss asserting, *inter alia*, that their counterclaim arose from facts and transactions intertwined with the breach of the factor's lien agreement sought to be enforced by Chase. They also stressed their standing to sue under the federal Tie-in Amendments and the Civil [*1033] Code of Puerto Rico because of their status as sole stockholders and joint and several guarantors of Nesglo by virtue of which they, as guarantors, could interpose against Chase, as creditor, the same defenses and causes of action of debtor Nesglo under the theory that debtors and guarantors are in the same procedural posture *vis* [**10] *a vis* their common creditor.

On August 14, 1979 the state court granted "as requested" ² Nestor's and Gloria's opposition to Chase's motion to dismiss their counterclaim. Chase then filed a petition for certiorari (interlocutory appeal) from the trial court's decision. The Supreme Court of Puerto Rico denied the petition on October 11, 1979.

Contemporaneously with their opposition to Chase's motion to dismiss their counterclaim, Nestor and Gloria also challenged the legality of the attachment sought by Chase at the commencement of the action in the state court. Chase opposed on the basis of the rights it had arising from the factor's lien contract and applicable Puerto Rican law.

On October 10, 1979 the state court granted Chase's opposition "as requested".

Chase also moved for the sale of all attached goods consisting of Nesglo's inventory, account receivables and cash, invoking the powers [**11] that Nesglo had granted it pursuant to the factor's lien contract. The court granted Chase's request and Gloria and Nestor moved, on behalf of Nesglo, for reconsideration of said order attacking the requested sale under federal and local due process grants. This motion for reconsideration was denied.

By this time, Nestor, Gloria and Nesglo had commenced the instant action in federal court. During April 1980 this case was temporarily assigned to the Honorable Ted Dalton, Senior District Judge of the Western District of Virginia, sitting by designation. After a series of unsuccessful settlement conferences, Judge Dalton entered an order suggesting that the parties proceed with the concurrent state action.

After Judge Dalton's suggestion, Nesglo filed in the state court a document containing an answer, affirmative defenses and counterclaim. Together with Nestor and Gloria it also requested that the state court issue summons directed to Zych and Fernandez as potential third party defendants. As part of the grounds advanced for the issuance of summons, Nesglo, Nestor and Gloria referred to this action as it stood at that time (May 6, 1980) before this court, also mentioning identity [**12] of parties and causes of action in both suits. As per such request, the court entered an order on May 29, 1980 directing issuance of summons against Zych and Fernandez, who were duly served with process.

Chase replied and moved to dismiss Nesglo's counterclaim and/or third party complaint. It also objected to Nesglo's amendment to plaintiff's prior answer and affirmative defenses of March 26, 1979.

² "As requested" in the courts of Puerto Rico is the equivalent of "Granted and so ordered" in federal court.

On June 2, 1980 Nesglo, Nestor and Gloria opposed Chase's motion arguing, *inter alia*, that Nesglo had not answered the complaint initially. Chase replied and in due course the state court granted Chase's motion and denied Nesglo's, Nestor's and Gloria's June 2 opposing motion.

Nesglo, Nestor and Gloria then filed a motion for reconsideration of the aforementioned order and Chase opposed. On July 18, 1980 the state court entered an order denying the aforementioned motion for reconsideration. There is no evidence that this order was ever appealed to the state supreme court.

Meanwhile, Chase also moved to dismiss Nesglo's, Nestor's and Gloria's counterclaim and/or third party complaint claiming that since the counterclaim had been dismissed as to Chase, it could not be asserted [**13] against Zych and Fernandez. It was also claimed that as a third party complaint it was procedurally incorrect. The state court agreed.

On September 9, 1980, Nesglo, Nestor and Gloria filed a sworn informative motion before [*1034] the state supreme court in a pending collateral incident before said court,³ [**14] wherein they represented that as of September 9, 1980⁴ Nesglo was a defendant and counterdefendant in the state court proceedings. Thereafter, on October 15, 1980, the state court granted Chase's opposition to a partial motion for summary judgment filed by Nesglo, Nestor and Gloria.

On December 2, 1980 we entered an opinion and order dismissing the instant action and Nesglo, Nestor and Gloria appealed to the United States Court of Appeals for the First Circuit. While said appeal was pending, one very important event took place in the local proceedings. The state court issued an Opinion and Judgment dated May 15, 1981, striking all of Nesglo's, Nestor's and Gloria's answers and affirmative defenses and dismissing with prejudice Nestor's and Gloria's counterclaim against Chase. The court also entered the default of defendants and rendered judgment in favor of Chase for the full amount of outstanding indebtedness plus interest, costs and attorney's fees.

In its opinion, the state court, after an extended recitation of the deplorable history of the discovery proceedings, found as a matter of fact that Nesglo, Nestor and Gloria had willfully failed to comply with its discovery orders and had, through their misconduct, abused the state adjudicatory [**15] process. (See Document No. 49).

Nesglo, Nestor and Gloria then filed a motion for reconsideration and simultaneously petitioned the state supreme court for a writ of certiorari to review the state court's order of October 15, 1980 denying their partial motion for summary judgment. They emphasized that concurrently with the state court proceedings, they had

"/filed a Complaint in the United States District Court for the District of Puerto Rico, in which the same parties and basically the same facts are involved, and have also filed and /sic/ appeal before the First Circuit Court in Boston for which said court has set September 2 for oral argument as to the legal basis for said appeal. Exhibit 2".

The state court denied this motion for reconsideration on June 3, 1981.

The petition for certiorari having failed, Nesglo, Nestor and Gloria filed a petition for review again before the state supreme court. In this last petition they referred to some exhibits in their motion for reconsideration and stated that it consisted of:

* * *

³The incident involved a motion to intervene filed by a creditor of Nesglo, Albert E. Rebel & Associates, Inc. ("Rebel") that claimed a preference in its credit to that of Chase. Nesglo, Nestor and Gloria intervened to correct some alleged factual misrepresentations made by Chase in its petition for certiorari. The supreme court finally issued an opinion on November 1981 clarifying the criteria to determine whether Chase's factor's lien credit was of superior rank to that of Rebel. In passing, the court considered the state court judgment against Chase to be final, firm and unappealable. The court did not take into consideration Nesglo's averments in its informative motion. See, *Nesglo, Inc. v. Chase Manhattan Bank*, 81 JTS 108 (1981).

⁴By this date, the state court had dismissed Nesglo's May 6, 1980 counterclaim and had denied reconsideration of its order.

562 F. Supp. 1029, *1034L 1983 U.S. Dist. LEXIS 19436, **15

"(b) Copy of appellants brief filed before the United States Court of Appeals for the First Circuit in Boston, *in a case* [**16] *between the same parties resulting from the same controversies; . . .*" (Emphasis supplied).

Meanwhile, on June 22, 1981, the state supreme court denied the petition for certiorari from the interlocutory order of October 15, 1980 denying Nesglo's, Nestor's and Gloria's motion for partial summary judgment. The court considered the petition to be frivolous and imposed sanctions on petitioners consisting of \$500.00 for attorney's fees.

Two motions for reconsideration of this supreme court resolution were filed and both were denied. The petition for review was likewise denied on August 6, 1981 and a motion to reconsider said denial was also rejected on September 4, 1981.

[*1035] Mandates from all state supreme court proceedings were issued and the case returned to the state court on October 13, 1981 (Petition for Review) and on October 19, 1981 (Certiorari).

No evidence in the record exists that Nesglo, Nestor and Gloria perfected an appeal or petition for certiorari to the Supreme Court of the United States from the state supreme court decisions during the pendency of the proceedings before us, as authorized by [28 U.S.C. 1257](#).

We shall now discuss the legal significance [*17] of the aforementioned findings of fact and their bearing on the ultimate issue of mootness.

Plaintiffs initially contend that they have not been afforded an adequate opportunity to argue the issue of mootness because defendants should have been required to state their position first. This contention is frivolous. While it is true that initial memoranda of law were filed simultaneously by both parties, we later held oral argument on all issues raised therein, and plaintiffs were afforded a reasonable opportunity to rebut defendants' assertions. Indeed, at the close of argument, we invited the parties to file additional memoranda so that each could have one last opportunity to discuss the issues raised in their respective briefs and motions.

As to the issue of mootness, we start with the often cited definition given in [Powell v. McCormack, 395 U.S. 486, 496, 23 L. Ed. 2d 491, 89 S. Ct. 1944](#):

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."

Proper disposition of the mootness issue in this case is thus governed by those Supreme Court cases recognizing that an intervening judicial [*18] decision in a collateral proceeding may moot a parallel action pending in another court. [Murphy v. Hunt, 455 U.S. 478, 71 L. Ed. 2d 353, 102 S. Ct. 1181 \(1982\)](#) (civil rights suit brought in federal district court by sex offender challenging a state's constitutional provision restricting bail, on basis of Eighth Amendment's prohibition of excessive bail, held to have been rendered moot by intervening state court conviction); [Patterson v. Warner, 415 U.S. 303, 39 L. Ed. 2d 343, 94 S. Ct. 1026 \(1974\)](#) reh. den. 416 U.S. 952, 94 S. Ct. 1962, 40 L. Ed. 2d 302 (upholding constitutionality of state statute vacated on direct appeal to Supreme Court and case remanded for district court's initial consideration of whether action was rendered moot by an intervening state court decision);⁵ [Aikens v. California, 406 U.S. 813, 32 L. Ed. 2d 511, 92 S. Ct. 1931 \(1972\)](#) reh. den. 406 U.S. 978, 92 S. Ct. 2407, 32 L. Ed. 2d 677 (court dismisses writ of certiorari on the ground that issue on which writ was granted had been rendered moot by an intervening state court decision); [Lowe v. Duckworth, 663 F.2d 42 \(7th Cir. 1981\)](#) (federal habeas corpus petition rendered moot on appeal by intervening [*19] state court decision ordering a new trial. Since the court granted the relief sought, there was termination of the live controversy between the parties).

The argument of "voluntary cessation" urged by plaintiffs and expounded in [County of Los Angeles v. Davis, 440 U.S. 625, 59 L. Ed. 2d 642, 99 S. Ct. 1379 \(1979\)](#) and followed in [Free v. Landrieu, 666 F.2d 698 \(1st Cir. 1981\)](#), is

⁵The procedure used by the Supreme Court in this case to determine mootness -- whether a live case or controversy has ceased to exist between the parties on appeal -- closely resembles the procedure used herein by the First Circuit Court of Appeals. 415 U.S. at 306.

562 F. Supp. 1029, *1035L 1983 U.S. Dist. LEXIS 19436, **19

not applicable to the facts of this case. As previously stated, we will decide the issue on whether the intervening state judgment fully disposed of the pending controversy between the parties and if so, whether we must accord said judgment full faith and credit pursuant to [28 U.S.C. 1738](#).

The state court judgment of May 15, 1981 is now final, firm and unappealable. **[**20]** We will now determine whether it should be accorded full *res judicata* effects in this court by virtue of the federal full-faith-and-credit statute. As the Supreme Court recently observed:

[*1036] "As one of its first acts, Congress directed that all United States Courts afford the same full-faith-and-credit to state court judgments that would apply in the State's own Courts. Act of May 26, 1790, Ch. 11, 1 Stat. 122, [28 U.S.C. Sec. 1738](#)." [Kremer v. Chemical Construction Corp.](#), [456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 \(1982\)](#) reh. den. [458 U.S. 1133, 103 S. Ct. 20, 73 L. Ed. 2d 1405 \(1982\)](#).⁶

[21]** If in Puerto Rico a court would give preclusive effects to the state court judgment of May 15, 1981 and the other ancillary decisions made by both the state and supreme courts, then [Section 1738](#) commands that this court do likewise. As we have said earlier, the end effect, consistent with one of the cardinal purposes behind *res judicata*, would be to obliterate any case or controversy hitherto extant between opposing parties to the suit.

In assessing the effects of the state court proceedings we follow the rules laid down by the United States Court of Appeals for the First Circuit in [General Foods v. Mass. Dept. of Public Health](#), [648 F.2d 784, 785-786 \(1st Cir. 1981\)](#) for cases falling within the federal question jurisdiction of federal courts (challenge to state regulations on federal grounds in federal court by members of association previously litigating the issue in state court).

". . . /w/here the State Court rendering the judgment would give it preclusive effect, federal courts must give it such preclusive effect. /Citations omitted / . . . /and/ . . . /w/here the State Court rendering the judgment would not give it preclusive effect, the federal courts would **[**22]** not give it such preclusive effect."

Furthermore, it is now well settled that in Puerto Rico, "the doctrine of *res judicata*, *res judicata pro veritate habetur*, is . . . part of /its/ Civil Law, and except, for comparative purposes /the courts / need not resort to other sources for its analysis". [Republic Security Corporation v. The Puerto Rico Aqueduct and Sewer Authority](#), [674 F.2d 952, 955-956, n. 4 \(1st Cir. 1982\)](#) quoting from [Lausell Marquach v. Diaz de Yanez](#), [103 D.P.R. 533, 535 \(1975\)](#).

As recently described by this court, after a remand from the First Circuit of Appeals,⁷ quoting from a leading Puerto Rico Supreme Court case:⁸

"In general terms, it may be affirmed that the rule of *res judicata* is based on considerations of public policy and necessity: on the one hand, the interest of the State in terminating litigations in order that judicial issues may not be perpetuated, . . . , and, on the other hand, the desirability of not submitting a citizen twice to the inconveniences which the litigation of the same cause entails . . . *In its origin it presupposed an adversative or litigious proceeding and an adjudication on the merits. However, the complexities* **[**23]** *of the modern proceeding and the increase in litigation have resulted in its extension -- by statutory channels -- even to*

⁶ In [Kremer](#) the Court held that a state court judgment upholding a state agency's rejection of an employment discrimination claim, which would have *res judicata* effects in the state's own courts, precludes a federal action under Title VII of the 1964 Civil Rights Act on the same claim of employment discrimination. In so doing, the Court considerably narrowed the scope of judicial exceptions to the preclusive command of 28 U.S.C. Se. 1738 in the context of relitigation of federal claims originally filed and disposed of in state courts.

⁷ [Rodriguez v. Baldrich](#), [628 F.2d 691 \(1st Cir. 1980\)](#) (judgment of dismissal on *res judicata* grounds vacated and remanded to district court for clarification of Puerto Rican law on *res judicata* effect in federal court of a state court dismissal for failure to post a nonresident cost bond).

⁸ [Perez v. Bauza](#), 83 P.R.R. 213, 217-218 (1961).

decisions which have not adjudicated the controversies on its merits. (Emphasis in original)." [*Rodriguez v. Baldrich, 508 F. Supp. 614, 616 \(D.P.R. 1981\)*](#).⁹

[**24] [*1037] The court quoted another passage from *Perez v. Bauza, supra*, which is relevant to the issue in this case, namely: a willful failure to comply with a discovery order must be accorded full *res judicata* effect in this court. The Supreme Court of Puerto Rico fully endorses the view that an involuntary dismissal under Rule 39.2 of the Rules of Civil Procedure of Puerto Rico of 1958¹⁰ (equivalent to [*Fed. R. Civ. Proc. 41\(b\)*](#)) operates as an adjudication on the merits:

"T/he pertinent part of the rule reads as follows:

'(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence, in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this [**25] rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.

* * *

"[*Rule 41\(b\)*](#) is consistent with the inherent power of courts to relieve the congestion of their calendars . . . , and likewise *it is undoubtedly consistent with the laudable purpose of discouraging delinquent litigants or those who utilize the judicial channel to cause inconveniences to the adverse party by initiating untenable proceedings.*" (Emphasis in original quotation of [*Rule 41\(b\)*](#) other emphasis, ours). *Id.*

[**26] Clearly a Puerto Rican court would accord full *res judicata* effect, as a matter of statutory law, to a dismissal of claims filed by a recalcitrant party who willfully disregards discovery orders issued by the court, much the same way as a federal court would do in similar circumstances.¹¹ Compare, [*Nasser v. Isthmian Lines, 331 F.2d 124 \(2d Cir. 1964\)*](#) (involuntary dismissal of seaman's complaint for failure to answer interrogatories operates as *res judicata* in subsequent federal suit) with *Souchet v. Cossio*, 83 P.R.R. 730 (1961) (prior involuntary dismissal of action seeking declaration of nullity of a sale, replevin and other remedies for failure to prosecute, accorded full *res judicata* effect in subsequent identical action between the same parties).

[**27] The pronouncements of the Supreme Court of Puerto Rico echoed in *Baldrich*, to the effect that public policy requires that procedural or "penalty dismissals"¹² be accorded full *res judicata* effect in subsequent litigation

⁹ According to *Perez v. Bauza, supra*, as interpreted by *Baldrich*, *res judicata* in Puerto Rico has the same contours that it has in federal law for it "relieve/s/ parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions, encourages reliance on adjudication". [*Allen v. McCurry, 449 U.S. 90, 94, 66 L. Ed. 2d 308, 101 S. Ct. 411 \(1980\)*](#).

¹⁰ As pointed out in [*Baldrich, supra, 508 F. Supp. at 615, n. 1*](#), the Puerto Rico Rules of Civil Procedure of 1958 were repealed in 1979 by the Rules of Civil Procedure of 1979. Rule 39.2 was reenacted as Rule 39.2(c) and its text, insofar as pertinent here, is identical to that of its predecessor. See, 32 L.P.R.A. App. 111, p. 162 (1980). This rule is virtually identical to [*Fed. R. Civ. Proc. 41\(b\)*](#) governing involuntary dismissals. In 1943 it was also known as [*Rule 41\(b\)*](#) of the Rules of Civil Procedure of Puerto Rico, 1943, and such is the reference in the *Bauza* passage reproduced above.

¹¹ In dismissing complaints for failure to comply with discovery orders the trial courts of the Commonwealth of Puerto Rico seem to enjoy the same discretionary latitude as federal district courts. Orderly administration of justice in this sense is identical both in the state and federal systems. See, e.g., [*Corchado v. Puerto Rico Marine Management, 665 F.2d 410 \(1st Cir. 1981\)*](#) (circuit court underscores that dismissals with prejudice for failure to comply with discovery orders will ordinarily be upheld as being within sound discretion of trial court).

¹² See, generally, 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, Civil: Sec. 4440, at 362-365 (1981).

initiated by the parties affected by such dismissals, is not inconsistent with recent pronouncements on the subject by the Supreme Court of the United States.

In [Allen v. McCurry, 449 U.S. 90, 66 L. Ed. 2d 308, 101 S. Ct. 411 \(1980\)](#), the Court accorded full *res judicata* effect to state court determinations made in the course of criminal proceedings in the context of a **[*1038]** subsequent federal civil rights action brought in federal court by the criminal defendant. The Court made it very clear that litigants have no "unencumbered opportunity to litigate a /federal/ right in federal district court, regardless of the legal posture in which the **[**28]** federal claim arises". [449 U.S. at 103](#). It is only necessary that a particular litigant have a "full and fair opportunity" to present the particular claim or issue in state court. [Id. at 95](#).

The Court has recently stated that the contents of "what a full and fair opportunity to litigate entails is the procedural requirements of due process", [Kremer v. Chemical Construction Corp., supra, 102 S. Ct. at 1898, n. 24](#), and the fact that a particular litigant "fail/s/ to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy" /citations omitted /. [Id. at 1899](#).

Considering the above, we have no doubt that the courts of the Commonwealth of Puerto Rico would give full preclusive or *res judicata* effects to a dismissal for willful failure to comply with discovery orders, such as was entered here by the state court on May 15, 1981. Notwithstanding, we must now determine whether we should give full preclusive effect to said judgment by virtue of the federal full-faith-and-credit statute, [28 U.S.C. Sec. 1738](#).

Plaintiffs strenuously argue that there is no identity of parties between this suit and the prior state court proceedings. **[**29]** They contend that even though Chase sued Nesglo, Nestor and Gloria in state court, only Nestor and Gloria filed a "permissive and independent counterclaim" and "Nesglo did not file an answer and was not a counterclaimant". We disagree.

An examination of the answer and affirmative defenses filed in the state court on March 26, 1979 reveals that they were filed on behalf of "defendant" (la parte demandada). ¹³ Furthermore, in the portion of the counterclaim (reconvencion) the appearing defendants are singled out and identified as "defendant-counterclaimant Mr. Nestor Cruz and Mrs. Gloria D. de Cruz" (la parte demandada-reconveniente don Nestor Cruz y dona Gloria D. de Cruz). But aside from party identification in connection with the pleadings, there are other indicia that Nesglo, in fact, appeared and made allegations in the state court. In the answer, practically all of the allegations refer to the business relationship between Chase and Nesglo. The same is true as to the affirmative defenses.

[30]** With respect to the counterclaim, while it may be true that it is filed by Nestor and Gloria, it still incorporates the affirmative defenses previously set forth by Nesglo, and sets forth claims for relief properly belonging to Nesglo and not just Nestor and Gloria as joint and several guarantors of the latter. Indeed, a comparison between the counterclaim and the amended complaint filed before this court reveals a substantial similarity, if not identity of, material operative facts underlying the various claims for relief stated in both documents.

Physical identity of parties is not necessary for *res judicata* purposes under Puerto Rican substantive law. As Article 1204 of the Civil Code provides, *in fine*:

"It is understood that there is identity of persons whenever the litigants of the second suit are legal representatives of those who litigated in the preceding suit, or when they are jointly bound with them or by the relationships established by the indivisibility of prestations among those having a right to demand them, or the obligation to satisfy the same." 31 L.P.R.A. Sec. 3343 (Emphasis supplied).

¹³ In Puerto Rico it is common practice to refer to all defendants or the defendants in general as "the party defendant" (literal translation). If a particular defendant or plaintiff is to be singled out then he or she or it (if a corporation) is expressly identified in the pleadings.

The state court record reveals that Nestor and Gloria [**31] were the joint and several ¹⁴ [**32] guarantors of Nesglo's contractual obligations [*1039] to Chase. As such, their prestations were indivisible with those of Nesglo towards Chase and hence they had "a right to demand them, or the obligation to satisfy the same". ¹⁵ Indeed, a close examination of Nestor's and Gloria's counterclaim in state court, and their opposition to Chase's motion to dismiss the same, reveals that Nestor and Gloria are the functional privies of Nesglo within the scope and intendment of the "identity" definition found in the last paragraph of Article 1204.

The contents of the aforementioned opposition to Chase's motion to dismiss establish that Nestor and Gloria asserted standing on their own behalf and that of Nesglo, to prosecute their federal and state claims against Chase, including those arising out of the Tie-in Amendments, relying on their status as joint and several guarantors of Nesglo, entitled to oppose or interpose against the creditor /Chase/ the same defenses and/or causes of action that Nesglo would have opposed or interposed. Nestor and Gloria are therefore bound by the Judgment of May 15, 1981 as privies of Nesglo, for purposes of the identity required under Puerto Rican *res judicata* doctrine. ¹⁶

[**33] Moreover, Nesglo has expressly admitted on the record that it was a party to the state court answer and counterclaim of March 26, 1979.

Plaintiffs' reliance on *A & P General Contractors v. Asociacion Cana, Inc.*, 110 D.P.R. 753 (1981), is misplaced. In *A & P*, a guarantor sued to recover a pledge it had given to the creditor of the principal debtor. When such action was initiated, the principal debtor had already commenced suit against the creditor because of the latter's breach of its contractual obligations to advance money to the former for construction purposes. In the guarantor's suit, as a condition for release of the pledge -- a certificate of deposit -- the court had to determine whether the creditor had indeed breached the contractual obligations to the principal debtor for then, said breach would not only extinguish the principal debtor's obligations to the creditor, but would also terminate the accessory surety agreement binding the guarantor-pledgor. Upon extinguishment of the prime obligation, the guarantor would thus become automatically entitled to return of the certificate of deposit pledged to the creditor, and this is exactly what happened in the guarantor's [**34] suit.

The state supreme court reversed the lower court ruling that had allowed the principal debtor in his separate suit against the creditor, to invoke successfully the doctrine of "offensive collateral estoppel" by judgment on the issue of the creditor's liability for breach of contract. The court advanced two grounds for its decision: (1) that the principal debtor being represented by the same attorneys as the guarantor, could have intervened but had voluntarily chosen not to do so in the guarantor's suit, and (2) that there was really no identity of [*1040] parties between the principal debtor and guarantor since the latter was merely suing *qua* guarantor to recover the pledge. *A & P General Contractors, supra*.

¹⁴ As explained by this court in *Wong v. Key Finance Corporation*, 266 F. Supp. 149, 153, 154 (D.P.R. 1967), the words "joint" or "jointly" in English are the equivalent of "solidaria" or "solidariamente" in Spanish, which in the case of multiple debtors or guarantors, means that *any* of them are liable for the entire sums owed. The Code also confers standing on solidary debtors to "utilize, against the claim of the creditor, all the exceptions arising from the nature of the obligation and those which are personal to him". Article 1101, **31 L.P.R.A. Sec. 3112**. Sureties binding themselves jointly (solidarily) with the principal debtor are treated, according to the Code, as principal solidary debtors subject to the provisions found in Article 1090-1101, 31 L.P.R.A. Secs. 3101-3112. *Wong, supra, Id.*

¹⁵ They also had the right to utilize against the claim of Chase, as creditor, all exceptions arising from the nature of the obligation. Article 1101.

¹⁶ The same result would be obtained under the federal *res judicata* principle as the Supreme Court of the United States indicated in a similar context in *Montana v. United States*, 440 U.S. 147, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979). The Court at page 154 quoting from *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-487, 54 L. Ed. 846, 30 S. Ct. 608, observed that "/O/ne who prosecutes or defends a suit in the name of another to establish and protect his own right or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record."

As commentator Manresa points out, in discussing the requirement of "identity" of parties for the presumption of *res judicata* to be successfully invoked:

"With reference to solidarity and indivisibility of obligations, we will note that the extension of the first judgment to all those interested therein shall have full application concerning the totality of the obligation, to its essence or validity, and to the acts wherein its origin is found; but [**35] not concerning the very personal circumstances of someone who may not have litigated before, except in the event that they /such circumstances / may have been utilized with respect to the *exclusive portion of said interested person by one of his co-obligees*.

"It is to be noted, and it has great importance, that the requirement of identity of parties is in practice satisfied when the two suits are in all other respects *exactly* the same, and, presenting the same question, and exercising the same actions, /they are / ground/ed/ on the same cause and refer/red/ to the same objects."

(Emphasis supplied) (Translation ours). Manresa, *Comentarios al Codigo Civil*, Tome 8 Vol. II, pp. 242-243 (Reus, 5th Ed. 1950).

Scaevara takes the same position on this "identity" issue and concludes that, when two or more persons bound solidarily appear as such in a first suit, their personalities merge or they establish such a procedural unity, that what is done by one or against one binds all the rest, for purposes of *res judicata*. Scaevara, *Codigo Civil*, Tome XX, p. 450 (Madrid 1904). See also, Puig Brutau, *Fundamentos de Derecho Civil*, Tome I, Vol. 2, p. 146, n. 41 (Bosch. [**36] 1959). The Supreme Court of Puerto Rico has adopted these doctrinal views. *Heirs of Zayas Berrios v. Berrios*, 90 P.R.R. 537, 551-552 (1964). (Control of first action by real party defendants, sufficient to bar second suit by said defendants due to their juridical solidarity with nominal party defendant appearing in first suit); Cf. *General Foods v. Mass. Dept. of Public Health, infra*, 648 F.2d at 787-789 and note 6; [*Pan American Match, Inc. v. Sears Roebuck Co.*, 454 F.2d 871, 874 \(1st Cir.\)](#), cert. den. 409 U.S. 892, 34 L. Ed. 2d 149, 93 S. Ct. 113 (1972).

Plaintiffs next contend that the state court proceedings did not involve the same claims as those pressed before this court. They collaterally attack the state court's jurisdiction over the federal Tie-in Amendment violations they voluntarily raised there as affirmative defenses and counterclaim.¹⁷ Their argument is premised on the theory that Congress vested federal courts with exclusive jurisdiction to entertain this type of claim to the exclusion of state courts. With respect to their federal constitutional and civil rights claims, they contend that Judge Dalton, sitting by designation, somehow reserved plaintiffs' [**37] rights to come back to this court.

Upon examining the state court claims pressed by plaintiffs-defendants-counterclaimants therein -- and comparing them to the amended complaint filed before this court¹⁸ in September 1979, we find that all of the causes of action pleaded in the state court have their roots in the [**38] same nucleus of operative facts comprising the business [*1041] contractual relationship between Chase and Nesglo dating back to 1972. It may be that particular theories, bolstered by statutory citations, vary somewhat, but the essential facts giving rise to the claims asserted are a constant factor in both the state and federal pleadings.

In requesting the state court to issue summons to serve Zych and Fernandez as third party defendants, plaintiffs in May 1980 made reference to the federal action and its similarities to the state court proceedings. Later, they even

¹⁷ Plaintiffs themselves characterize Nestor's and Gloria's state court counterclaim as permissive. Though it is not necessary for us to decide whether such counterclaim is permissive or compulsory for purposes of this opinion, certainly this characterization shows that plaintiffs were not involuntary defendants hauled into state court against their wishes. They freely chose their state forum and must abide by their conduct even if it implies waiver of a federal forum and its protections. See, [*Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484, 492 \(4th Cir. 1981\)](#), cert. den. **454 U.S. 878, 70 L. Ed. 2d 188, 102 S. Ct. 359**, reh. den. **454 U.S. 1117, 102 S. Ct. 692, 70 L. Ed. 2d 654**.

¹⁸ A complete description of the claims set forth in this amended complaint of September 1979 is set out in our original reported opinion and order dismissing this action. See, [*506 F. Supp. 254 \(D.P.R. 1980\)*](#).

attached an order of this court as part of their opposition to Chase's request for dismissal of Nesglo's counterclaim filed in state court.

In their motion for reconsideration of the judgment entered by the state court on May 15, 1981, [**39] and apparently aware of the *res judicata* effect that said judgment would have in the federal proceedings, plaintiffs Nesglo, Nestor and Gloria advanced as a ground in support of their request, the concurrent "complaint in the United States District Court for the District of Puerto Rico, *in which the same parties and basically the same facts are involved*" (emphasis added) as well as the appeal pending before the United States Court of Appeals for the First Circuit. They attached as exhibits copies of the brief filed before the First Circuit Court of Appeals.

In Puerto Rico, strict identity between causes of action in the first and second suits is not required. The cause or grounds for the claim or request should not be confused with the remedies actually sought in one or the other action. *Mercado Riera v. Mercado Riera*, 100 P.R.R. 939, 950-51 (1972).

In *Mercado Riera*, *res judicata* was applied by the court to a new action for damages arising out of the dissolution of a partnership because in the previous action plaintiff had failed to claim them. The court expressly overruled two prior cases ¹⁹ which had rejected the defense of *res judicata* "because, despite [**40] the fact that the second action could be joined to the first, the failure to join it did not constitute a waiver of the claim for damages because the right to join several causes of action is discretionary with the plaintiff" /citations omitted /. *Id.* at 953. The trend in Puerto Rico, therefore, is to preclude in the subsequent suit whatever could have been claimed or joined with the first one but was not. This, of course, includes all grounds or defenses that could have been raised either prior to or after judgment in the first suit. And, ordinarily, failure to correct an error in the first action either by motion or on appeal will result in preclusion in the subsequent action, even if the first judgment can be branded as erroneous. Cf. *A.S.A. v. Belendez*, 98 P.R.R. 506, 510-512 (1970) (failure to appeal first ruling that plaintiff had not exhausted his administrative remedies precludes him from raising lack of jurisdiction of an administrative board in second suit even if jurisdictional theory had changed between suits).

[**41] [Lawlor v. National Screen Service Corp., 349 U.S. 322, 99 L. Ed. 1122, 75 S. Ct. 865 \(1955\)](#), advanced by plaintiffs in support of their theory that the state and federal claims are not the same, is distinguishable from the case at bar for there a state court judgment ²⁰ was not involved and under federal principles of *res judicata* new operative facts giving rise to new claims for relief had arisen, as well as new parties joined when the second suit was filed.

In light of the foregoing legal principles, and on the basis of the state court record, we conclude that there is "identity" of claims for *res judicata* purposes between the claims advanced by plaintiffs in this court and those previously advanced in the state court.

Interestingly, [**42] plaintiffs seem to attack the state court's jurisdiction over the claims [*1042] they voluntarily presented there and which were the subject of extensive discovery, contending that the state court lacked subject matter jurisdiction because Congress granted exclusive jurisdiction to federal courts to entertain private treble damage suits based on violations of the Tie-in Amendments prohibitions found in the federal banking laws.

As we pointed out in our original decision in this case, it was not the intention of Congress to preempt state court jurisdiction over activities otherwise covered by the federal banking tie-in amendments. If so, there would not have been any reason for Congress to have inserted the language in [12 U.S.C. Sec. 1978](#)²¹ acknowledging the parallel

¹⁹ *Blanco v. The Capital*, 77 P.R.R. 607 (1954) and *Capo v. A. Hartman & Co.*, 57 P.R.R. 190 (1940).

²⁰ As [General Foods v. Mass. Dept. of Public Health, supra, 648 F.2d at 785-786](#) makes clear, in the case of a state court judgment deciding federal questions, federal courts must refer to state law on *res judicata* to comply with the command of [28 U.S.C. Sec. 1738](#).

²¹ [12 U.S.C. Sec. 1978](#) provides as follows:

power of the states to afford relief to any citizen suffering business injury as a consequence of the conduct prohibited by the preceding sections of the act. This congressional concern for preserving intact concurrent state jurisdiction over banking, is reflected in the abridgment of the original prohibition of anticompetitive practices envisioned in the original Senate Bill, so as not to interfere with traditional, [\[**43\]](#) localized banking customs and customer credit extension practices. [*Nesglo, Inc. v. Chase Manhattan Bank, N.A., supra, 506 F. Supp. at 261-264.*](#)

Indeed, the plain statutory language of [12 U.S.C. Secs. 1975](#)²² and [1978](#), is fully compatible with, and does not implicitly repeal or carve an exception to, the full-faith-and-credit mandate found in [28 U.S.C. Sec. 1738](#). In [*Kremer v. Chemical Construction Corporation, supra*](#), the Supreme Court of the United States refused [\[*44\]](#) to construe the statutory grant of a right to federal court access granted to victims of employment discrimination under Title VII of the Civil Rights Act of 1964, as impliedly repealing the mandate of [28 U.S.C. Sec. 1738](#). Likewise, the deference to state court jurisdiction over banking affairs embodied in [12 U.S.C. Sec. 1978](#), as supported by the legislative history of the bank Tie-in Amendments, should disprove such implied repeal of or exception to a time-tested federal statute of such practical significance for present-day comity and federalism.

[\[**45\]](#) Plaintiffs brought upon themselves the natural consequences of their own voluntary acts before the state court. So much is apparent from the state court Opinion and Judgment of May 15, 1981. In this sense, the state court judgment is, in principle, no different from the state court judgment by stipulation entered and given full *res judicata* effect by a federal court in [*Nash County Board of Education v. Biltmore Co., 640 F.2d 484 \(4th Cir. 1981\)*](#), cert. den. 454 U.S. 878, 70 L. Ed. 2d 188, 102 S. Ct. 359, reh. den. 454 U.S. 1117, 102 S. Ct. 692, 70 L. Ed. 2d 654.

In *Nash* a state county board of education sued in federal district court various milk producers seeking treble damages for a price fixing conspiracy in violation of the federal antitrust laws. However, the State Attorney General had previously entered into a consent decree with the milk producers in a prior state action he had brought under the state antitrust laws. The federal district court gave full *res judicata* effect to the state court judgment and dismissed the action. The U.S. Court of Appeals for the Fourth Circuit affirmed, holding that [28 U.S.C. Sec. 1738](#) barred the second suit. The court used [\[**46\]](#) various alternative theories [\[*1043\]](#) to support its conclusion that the state court judgment was entitled to full-faith-and-credit in the federal court even though the antitrust laws had been judicially construed to confer exclusive federal jurisdiction on federal courts.²³ In comparing the state and federal claims, it focused on the operative facts giving rise to both claims rather than on the statutory source for each, and attached significant consequences to the conduct of plaintiffs' representative in prosecuting the claims in state court:

". . . the plaintiff, by choosing to file the state action on the same cause of action, had voluntarily waived the benefits if any, of a federal forum and both *res judicata* and collateral estoppel should be available to bar a

"Nothing contained in this chapter shall be construed as affecting in any manner the right of the United States or any other party to bring an action under any other law of the United States or of any State, including any right which may exist in addition to specific statutory authority, challenging the legality of any act or practice which may be proscribed by this chapter. No regulation or order issued by the Board under this chapter shall in any manner constitute a defense to such action."

²² [12 U.S.C. Sec. 1975](#) provides as follows:

"Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee."

²³ In so doing, the court adopted Moore's comments on [*Connelly v. Balkwill, 174 F. Supp. 49, 11 Ohio Op.2d 289, 83 Ohio L. Abs. 513 \(N.D. Ohio 1959\)*](#), aff'd. [279 F.2d 685 \(6th Cir. 1960\)](#). [*Nash, supra, 640 F.2d at 488, n. 10.*](#) The Supreme Court of the United States has noted the *Nash* method of ascertaining whether there is identity of claims in [*Kremer v. Chemical Construction Corp., supra.*](#)

cause of action, even though the federal action was within the exclusive jurisdiction of a federal court." (Emphasis supplied).

Nash, supra, 640 F.2d at 497.

[**47] As the Supreme Court stated in Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981), a party who has litigated in a prior action will be held to his conduct therein, and if he fails to pursue a remedy within the prior action that could have preserved his rights, he may not thereafter seek collateral relief in the federal courts. The virtues of *res judicata* were further stressed in *Moitie* as an important tool for the even handed administration of justice within the federal system. Petitioners - retail purchasers of clothing -- Moitie and Brown -- had initially filed an antitrust suit in a California federal district court alleging a price fixing conspiracy among retail chain stores in California. The action was dismissed because, at that time, ultimate consumers or purchasers of products were considered not to have standing to sue under federal antitrust laws. They did not appeal the decision of the district court whereas other plaintiffs *did* appeal. While the latter appeal was pending, the Supreme Court issued an opinion recognizing retail purchasers standing to sue under federal antitrust law,²⁴ and the appeals [**48] court reversed and remanded. Meanwhile, Moitie and Brown had refiled their antitrust claims in state court under California's antitrust laws. Defendants removed the same to the federal district court that had previously entertained the action and now had it on remand from the court of appeals, which had vacated the dismissal in light of the intervening Supreme Court decision on standing. Defendants then moved for dismissal and the court granted it considering its prior decision to be *res judicata* as to Moitie and Brown. An appeal was taken, and the court of appeals reversed because it considered the district court's initial decision to be erroneous, and hence, unjust for Moitie and Brown to suffer the consequences of a dismissal while those in their same procedural posture were allowed to prosecute identical claims. Defendants finally appealed to the Supreme Court and the latter reversed the court of appeals.

[**49] The Supreme Court underscored the conduct of Moitie and Brown in the first action and the fact that they *failed to appeal* the initial district court decision, even though the same was later reversed as being erroneous. Whether the decision was correct or not was considered by the court to be immaterial for *res judicata* purposes,²⁵

²⁴ Reiter v. Sonotone Corp., 442 U.S. 330, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979) held that retail purchasers can suffer an "injury" to their business or property within the meaning of section 4 of the Clayton Act, which grants a private treble damage remedy to persons suffering business injury as a consequence of an antitrust violation.

²⁵ Defendants read the *Moitie* decision as signaling the demise of the judicially created doctrine of exclusive federal judicial jurisdiction in antitrust cases. See Nash, supra, 640 F.2d 492, n. 13. They argue that inasmuch as the Supreme Court acted on an action removed from state court, if the pleadings, as the court stated, merely reproduced the initial federal antitrust claims originally filed in the district court, then the state court had no subject matter jurisdiction over the action and the district court could acquire none on removal. General Investment Co. v. Lake Shore & M.S.R. Co., 260 U.S. 261, 288, 67 L. Ed. 244, 43 S. Ct. 106 (1922) (federal court must dismiss for want of jurisdiction federal antitrust action originally filed in state court and subsequently removed to the former court). See also, Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U.S. 436, 64 L. Ed. 649, 40 S. Ct. 385 (1920); Freeman v. Machine Co., 319 U.S. 448, 451, 87 L. Ed. 1509, 63 S. Ct. 1146, n. 6 (1943); but see, Testa v. Katt, 330 U.S. 386, 389-394, 91 L. Ed. 967, 67 S. Ct. 810 (1947) (state court is obligated under supremacy clause, to enforce private treble damage remedy -- similar to that in antitrust laws -- found in Emergency Price Control Act of 1942, as amended, regardless whether it be considered "penal" in nature). A remand was thus in order and the *res judicata* question need not have been decided. A careful review of the *Moitie* Supreme Court decision reveals that indeed the court was aware of the removal problem, but nevertheless chose to entertain the *res judicata* arguments. Moitie, supra, 452 U.S. at 397, n. 2.

While defendants' arguments certainly bear weight, we find it unnecessary to reach this issue on the present record. Whether or not the state court here had subject matter jurisdiction of the federal claims before this court, is really immaterial in view of the opportunities available to the plaintiffs to redress any jurisdictional errors within the state court system.

We remain unpersuaded that Congress intended to vest federal courts with jurisdiction exclusive of that of state courts to entertain private treble damage actions under the Tie-in Amendments, especially, under the criteria set forth in Gulf Offshore Co. v. Mobil Oil Corp., 449 U.S. 1033, 66 L. Ed. 2d 494, 101 S. Ct. 607, to determine whether a congressional grant of federal jurisdiction displaces state court jurisdiction over the same federal claims:

because [*1044] Moitie and Brown had foregone an initial appeal when their original federal action had been dismissed. They had available an appellate procedure, which they should have used regardless of the settled antitrust doctrine prevalent at that time (prior to the *Sonotone* decision).

[**50] The reasoning in *Moitie* is fully applicable here. Plaintiffs Nesglo, Nestor and Gloria had a full and fair opportunity to present their case in state court, including any objections they may have had to the subject matter jurisdiction of the state court. They voluntarily chose not to avail themselves of that opportunity and they seek further prosecution of their claims in this court under the theory, rejected in *Allen v. McCurry, supra*,²⁶ that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the claim arises". *449 U.S. at 103*.

Let us now examine plaintiffs' assertion that they preserved their federal rights in this [**51] court pursuant to Judge Dalton's Order of April 22, 1980. Plaintiffs' reliance on *England v. Louisiana State Bd. of Med. Exam.*, *375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964)* is again misplaced. Contrary to the *England* situation, where plaintiffs [*1045] first sought relief in federal court (*375 U.S. at 412*), plaintiffs herein and their privies first pressed their federal claims in state court and then refiled them in federal court. See, *Partido Nuevo Progresista v. Barreto Perez*, *639 F.2d 825, 826, n. 2 (1st Cir. 1980)*, cert. den. *451 U.S. 985, 68 L. Ed. 2d 842, 101 S. Ct. 2318* and cases cited. In these circumstances, plaintiffs would seem foreclosed from invoking the doctrine of federal right preservation announced in *England*.

Moreover, while it is true that *England* reversed the lower court dismissal, it did so because it considered appellants to have relied in good faith on prior case law. Hence, it made the requirement of explicit reservation of federal rights in state court prospective in nature, explicitly warning that the mistaken view of the appellants in that case "will not avail other litigants who rely upon it after today's decision". [**52] (*375 U.S. at 422*) Plaintiffs here are therefore not entitled to the relief afforded the *England* plaintiffs, for they actively prosecuted their claims in state court, and voluntarily invoked, as well as used, the state court process, fully and unreservedly submitting to it. Now they are and should be bound by the judgment entered by said court. The fact that the claims pressed in state court were never actually litigated is immaterial for, by operation of law, the state court dismissal here is the equivalent of a trial on the merits,²⁷ [**53] the same way it would have been in this court under *Fed. R. Civ. Proc. 41(b)*. Consequently, all of the federal claims,²⁸ even those allegedly arising under the Tie-in Amendments, were

- 1) an explicit statutory directive;
- 2) an unmistakable implication from legislative history, and
- 3) a clear incompatibility between state court jurisdiction and federal interests.

Aside from the fact that in the case of Tie-in Amendments, there is no explicit statutory directive or legislative history permitting an inference of exclusive jurisdiction -- the contrary is just the situation as embodied in *12 U.S.C. Sec. 1978* -- we fail to perceive a clear incompatibility between state court jurisdiction and the commercial interests sought to be protected by Congress in the amendments. The broad traditional regulatory power of banking by the states, taken into consideration by Congress in enacting the Tie-in Amendments, certainly makes entertainment of such federal claims by state courts conducive to the enforcement of federal rights. *Kremer v. Chemical Construction Corp., supra*; *Dowd Box Co. v. Courtney*, *368 U.S. 502, 507-508, 7 L. Ed. 2d 483, 82 S. Ct. 519 (1962)* (concurrent jurisdiction of state courts upheld in actions under Section 301 of the Labor Management Relations Act). Certainly, the courts of the Commonwealth of Puerto Rico are not foreign to broad antitrust private treble damage remedies to redress unfair methods of competition of the type pressed by plaintiffs in this court. See, the Puerto Rico Monopoly Act, Act No. 77 of June 25, 1964, as amended, *10 L.P.R.A. Secs. 257 et seq.*, especially Secs. 259(a) and 262 (Unfair Methods of Competition and Exclusive Dealing). The act explicitly vests on the Superior Court of Puerto Rico jurisdiction to entertain private treble damage suits in *10 L.P.R.A. Sec. 268(a)*.

²⁶ The U.S. Court of Appeals for the First Circuit had already held *pro tanto* in the context of a state civil proceedings in *Lovely v. Laliberte*, *498 F.2d 1261, 1263-64 (1st Cir. 1974)*, cert. den. *419 U.S. 1038, 42 L. Ed. 2d 316, 95 S. Ct. 526 (1974)*.

²⁷ See *Rodriguez v. Baldrich, supra*.

properly dismissed by the state court. See, [*Key v. Wise, 629 F.2d 1049 \(5th Cir. 1980\)*](#), cert. den. 454 U.S. 1103, 70 L. Ed. 2d 647, 102 S. Ct. 682 (federal claim over which federal courts had exclusive jurisdiction by explicit congressional grant held barred by state court judgment entered after federal court erroneously abstained from entertaining federal claims originally brought to its attention).

Even if the assumption of jurisdiction by the state court over these claims were erroneous, and we remain unpersuaded that this is so,²⁹ we are not at liberty to collaterally review such an implicit exercise of jurisdiction. [*Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 \(1923\)*](#) (subject matter jurisdiction underlying bill in equity to collaterally review state court judgment because of federal prohibitions, held impermissible); [*Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 84 L. Ed. 329, 60 S. Ct. 317 \(1940\)*](#) (erroneous assertion of jurisdiction by first court not collaterally reviewable); [*Erspan v. Badgett, 659 F.2d 26, 28-29 \(5th Cir. 1981\)*](#), cert. den. 455 U.S. 945, 102 S. Ct. 1443, 71 L. Ed. 2d 658 (no jurisdiction found, on the basis of *Moitie*, to collaterally [*54] review a state court judgment of doubtful binding force after a U.S. Supreme Court decision); [*Key v. Wise, supra, 629 F.2d at 1055-1057, 1061-1068*](#)) (state court assumption of jurisdiction over federal claims within exclusive jurisdiction of federal court after erroneous abstention by federal district court, held to bar collateral review of state court judgment sought by plaintiffs upon return to federal court); Cf. [*Kremer v. Chemical Construction Corporation, supra, Underwriters National Assurance Company v. North Carolina Life & Accident & Health Insurance Guaranty Association, supra*](#) (state court collateral review of sister state court judgment is very [*1046] narrow and otherwise subject to *res judicata* and full-faith-and-credit constraints).

[**55] In view of the above findings and conclusions, we hold that on the basis of the record before us,³⁰ the courts of Puerto Rico would give full preclusive effects to the state court Judgment of May 15, 1981. This being so, we find that [*28 U.S.C. Sec. 1738*](#) commands this court to do likewise.

Inasmuch as the issues pending appellate review before the U.S. Court of Appeals for the First Circuit have been fully disposed of by the courts of Puerto Rico, we further consider this case to have been rendered moot for interim events or collateral judicial proceedings have fully disposed of the live case or controversy [*56] that at one time may have existed between opposing parties to the litigation. Based on the foregoing, our prior opinion and order entered December 2, 1980 and accompanying judgment, should be substituted³¹ by the present opinion, and a judgment of dismissal on grounds of mootness should be entered. [*United States v. Munsingwear, Inc., 340 U.S. 36, 39-41, 95 L. Ed. 36, 71 S. Ct. 104 \(1950\)*](#); [*Gomes v. Rhode Island Interscholastic League, 604 F.2d 733, 736 \(1st Cir. 1979\)*](#); and [*Duke Power Co. v. Greenwood, 299 U.S. 259, 267, 81 L. Ed. 178, 57 S. Ct. 202 \(1936\)*](#) (when controversy becomes moot on appeal it is duty of appellate court to set aside decision below and remand cause with directions to dismiss).

²⁸ There is no question that state court jurisdiction over the federal constitutional and civil rights claim is concurrent with that of federal courts. See, *Diaz v. Collazo*, 82 JTS 30 (March 10, 1982) and cases cited; see, also, [*Lovely v. Laliberte, supra, note 26*](#).

²⁹ Even if this were a case of exclusive federal judicial jurisdiction, the equities would tend to favor enforcement of traditional *res judicata* preclusion inasmuch as there is simply no need to assess whether uniform national policy in antitrust enforcement would be affected given the voluntary conduct of plaintiffs in state court in refusing to comply with state judicial procedure. If anything, an interest in uniform and proper administration of justice should prevail, and in this instance, the state court judgment fosters this interest the same way as any federal judgment in similar circumstances would.

³⁰ As mentioned previously, in arriving at our findings and conclusions, we have relied in part on our familiarity with Puerto Rican substantive and procedural law. In any event, as respects civil procedure, the Puerto Rican rules are very similar to and sometimes identical with the Federal Rules of Civil Procedure. This identity exists in the area of dismissals for failure to comply with discovery orders.

³¹ Given the retention of appellate jurisdiction by the United States Court of Appeals for the First Circuit, we may not vacate our prior judgment at this stage of the proceedings. However, this should not be construed as a rejection or departure from the views expressed in our original opinion to which we still adhere.

562 F. Supp. 1029, *1046L 1983 U.S. Dist. LEXIS 19436, **56

[**57] The Clerk is ordered to remit forthwith the instant Findings of Fact, Conclusions of Law and Memorandum Opinion, as well as the supplementary record upon which they are based, to the Clerk of the United States Court of Appeals for the First Circuit.

SO ORDERED.

End of Document



Lee v. Cercoa

District Court of Appeal of Florida, Fourth District

February 9, 1983; Rehearing Denied July 7, 1983.

No. 81-1716.

Reporter

433 So. 2d 1 *; 1983 Fla. App. LEXIS 20062 **

David Ching LEE, Appellant, v. CERCOA, INC., a Florida corporation, Appellee.

Core Terms

trade secret, secret, polishing, manufacture, compound, glass, manufacturing process, disclosing, former employee, restraining, injunction, processes, utilize, argues

LexisNexis® Headnotes

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Trade Secrets Law > Employee Duties & Obligations > Employee Nondisclosure

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN1[] Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements

Where an employee acquires, during the course of his employment, a special technique or process developed by his employer, the employee is under a duty, even in the absence of an express contractual provision, not to disclose such skills, techniques, or processes in his new employment for his own or another's benefit to the detriment of his previous employer.

Torts > Business Torts > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Property Rights

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

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Federal Versus State Law > **Antitrust Law**

Trade Secrets Law > Misappropriation Actions > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Use

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

HN2[Torts, Business Torts

A trade secret, whether it be a secret formula, process, pattern, device, or compilation of information is property which its owner makes use of to the exclusion of others. As a property right, the trade secret is protected against its appropriation or use without the owner's consent. The secret is of value only so long as it remains a secret. In an action based upon a secret process, the plaintiff must establish that (a) the process is a secret, (b) the extent to which the information is known outside of the owner's business, (c) the extent to which it is known by employees and others involved in the owner's business, (d) the extent of measures taken by the owner to guard the secrecy of the information, (e) the value of the information to the owner and to his competitors, (f) the amount of effort or money expended by the owner in developing the information, and (g) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Counsel: [**1] Edward F. O'Connor of O'Connor, Baylor, Callas & Elliott, Palm Beach Gardens, for appellant.

Dennis J. Powers of Gunster, Yoakley, Criser & Stewart, P.A., Palm Beach, for appellee.

Judges: Before OWEN, WILLIAM C., Jr., Associate Judge. BERANEK and DELL, JJ., concur.

Opinion by: OWEN

Opinion

[*1] OWEN, WILLIAM C., Jr., Associate Judge.

Appellee, Cercoa, Inc., a corporation engaged in the business of manufacturing and marketing polishing compounds for glass and plastic materials, obtained injunctive relief against its former employee, appellant David Ching Lee, restraining him from utilizing the corporation's trade secrets. We affirm.

For over two years, Lee worked for appellee as a production manager. During that period, Lee became familiar with the manufacturing processes used by his employer. There was no express agreement preventing Lee from disclosing or using appellee's [*2] manufacturing process. When appellee received information that Lee was going to use its trade secrets to start his own business to manufacture glass polishing compound, appellee terminated Lee and initiated this action.

The initial question for determination is whether a valid cause of action [**2] exists to protect an employer's trade secrets from disclosure or use by an employee (or former employee) absent an express contract restraining the employee from disclosing or using such secrets. We answer this in the affirmative. **HN1[]** Where an employee acquires, during the course of his employment, a special technique or process developed by his employer, the employee is under a duty, even in the absence of an express contractual provision, not to disclose such skills, techniques or processes in his new employment for his own or another's benefit to the detriment of his previous employer.¹ *Unistar Corp. v. Child, 415 So.2d 733 (Fla. 3d DCA 1982); Ferroline Corp. v. General Aniline & Film*

¹ However, this does not preclude a former employee from using, in competition with his former employer, methods of doing business and processes which are but skillful variations of general processes known to the particular trade.

Corp., 207 F.2d 912 (7th Cir. 1953); International Election Systems Corp. v. Shoup, 452 F. Supp. 684 (D.C.E.D.Pa.1978); Greenberg v. Croydon Plastics Co., 378 F. Supp. 806 (D.C.E.D.Pa.1974); Microbiological Research Corp. v. Muna, 625 P.2d 690 (Utah 1981); Packard Instrument Co. v. Reich, 89 Ill.App.3d 908, 45 Ill.Dec. 266, 412 N.E.2d 617 (1980); Capsonic Group, Inc. v. Plas-Met Corp., 46 Ill.App.3d 436, 5 Ill.Dec. 41, 361 N.E.2d 41 (1979); Ungar Electric Tools, Inc. [*3] v. Sid Ungar Co., 13 Cal.Rptr. 268, 192 Cal.App.2d 398 (1961).

Appellant next contends that the appellee failed to sustain its burden of proof that trade secrets were involved in the manufacture of glass polish compound.

HN2 A trade secret, whether it be a secret formula, process, pattern, device, or compilation of information is property which its owner makes use of to the exclusion of others. 2 Callman, Unfair Competition, Trademarks & Monopolies (3rd Ed.), Sec. 51.1, pp. 349-350. As a property right, the trade secret is protected against its appropriation or use without the owner's consent. The secret is of value only so long as it remains a secret. In an action based upon a secret process, the plaintiff must establish that (a) the process is a secret, (b) the extent to which the information is known outside of the owner's business, (c) the extent to which it is known by employees and others involved in the owner's business, (d) the extent [**4] of measures taken by the owner to guard the secrecy of the information, (e) the value of the information to the owner and to his competitors, (f) the amount of effort or money expended by the owner in developing the information, and (g) the ease or difficulty with which the information could be properly acquired or duplicated by others. International Election Systems Corp. v. Shoup, supra, Restatement of Torts § 757, comment b.

The trial court here found that appellee had a trade secret in the manufacture of glass polish. These secrets were identified as certain formulations of chemicals and certain techniques in the manufacturing process. Appellant argues that appellee failed to sustain its burden to establish that the foregoing were trade secrets, since, so he argues, all the information was published in literature or patented and the techniques and processes were known to others in this field. While the evidence to which appellant points would support an inference that many of the major elements of the appellee's process are the same as those known to others in this field, it is also sufficient to support the court's factual findings that the *combination of elements* [**5] into a complicated production process amounted to a trade secret and not merely a variation of a general process, see Ferroline Corp. v. General Aniline & Film Corp., supra, and that the appellant made a reasonable attempt to safeguard its process.

As a caveat, we point out that neither the injunction nor this court's decision prohibits [*3] appellant from developing a polishing compound solely through the exercise of his training and experience possessed from working in his profession, so long as it does not utilize appellee's trade secrets nor copy appellee's process.

AFFIRMED.

BERANEK and DELL, JJ., concur.

Suburban Restoration Co. v. ACMAT Corp.

United States Court of Appeals for the Second Circuit

December 3, 1982, Argued ; February 9, 1983, Decided

No. 82-7539, No. 466 -- August Term, 1982

Reporter

700 F.2d 98 *; 1983 U.S. App. LEXIS 30651 **

SUBURBAN RESTORATION CO., INC., Plaintiff-Appellant, v. ACMAT CORPORATION, Laborers' International Union of North America, Local 665 AFL-CIO and Robert D. Witte, Defendants-Appellees

Prior History: [\[**1\]](#) Suburban Restoration Co., Inc. appeals from judgment of the United States District Court for the District of Connecticut, T. F. Gilroy Daly, J., enforcing order of Magistrate Thomas P. Smith dismissing appellant's complaint against defendants ACMAT Corporation, Laborers' International Union of North America, Local 665 AFL-CIO, and Robert D. Witte. Suit under Connecticut Unfair Trade Practices Act and common law of tortious interference with a business expectancy for damages resulting from defendants' filing of lawsuit in Connecticut state court held barred by Noerr-Pennington doctrine.

Disposition: Judgment affirmed.

Core Terms

Sherman Act, courts, lawsuit, sham exception, common law, antitrust, unfair, bid

LexisNexis® Headnotes

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

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Governments > Legislation > Interpretation

[HN1](#) [] Antitrust & Trade Law, Federal Trade Commission Act

The Connecticut Unfair Trade Practices Act (CUTPA), [Conn. Gen. Stat. § 42-110b\(a\)](#), is expressly modeled on the Federal Trade Commission Act (FTCA) § 5(a) (1), [15 U.S.C.S. § 45\(a\) \(1\)](#), and directs the state courts and the state commissioner to be guided by federal interpretations of FTCA in interpreting CUTPA. [Conn. Gen. Stat. § 42-110b\(b\), \(c\)](#).

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

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2 [Regulated Practices, Trade Practices & Unfair Competition]

The filing of a single non-sham lawsuit cannot form the basis of a claim under the Connecticut Unfair Trade Practices Act, [Conn. Gen. Stat. § 42-110b\(a\)](#), or Connecticut's common law of tortious interference with a business expectancy.

Counsel: Lawrence W. Kanaga, Bridgeport, Connecticut (Zeldes, Needle & Cooper), for Plaintiff-Appellant.

Robert D. Witte, Bronxville, New York (Witte & Lestz, P.C., Alan M. Lestz, of counsel), for Defendants-Appellees ACMAT Corporation and Robert D. Witte.

James M. Kearns, Bridgeport, Connecticut (for Defendant-Appellee Laborers' International Union of North America, Local 665 AFL-CIO).

Judges: Feinberg, Chief Judge, Mansfield and Kearse, Circuit Judges.

Opinion by: FEINBERG

Opinion

[*99] FEINBERG, Chief Judge:

Suburban Restoration Co., Inc. appeals from an order of the United [*2] States District Court for the District of Connecticut, T. F. Gilroy Daly, J., enforcing Magistrate Thomas P. Smith's order dismissing Suburban's complaint against defendants ACMAT Corporation (ACMAT), Laborers' International Union of North America, Local 665 AFL-CIO (the Union), and Robert D. Witte. Magistrate Smith and Judge Daly concluded that Suburban's suit under the Connecticut Unfair Trade Practices Act (CUTPA), [Conn. Gen. Stat. § 42-110b\(a\)](#), and the common law of tortious interference with a business expectancy, for damages resulting from defendants' filing of a lawsuit in a Connecticut state court, was barred by the [*first amendment to the United States Constitution*](#) as interpreted in the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine refers to a trilogy of Supreme Court cases, [*Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#), [*United Mine Workers v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#), and [*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#), holding that activities attempting to influence legislative, [*3] executive, administrative or judicial action to eliminate competition are wholly immune from federal antitrust liability unless the conduct falls within the "sham exception" to the doctrine. Because we find that Connecticut would interpret its law to exempt from liability activities excluded from the ambit of the Sherman Act by the *Noerr-Pennington* doctrine, we affirm the dismissal.

I. Background

This case arises out of an invitation to bid issued by the City of Bridgeport, Connecticut, on October 3, 1980, seeking proposals for a contract to renovate and remove asbestos from a school building. Appellant Suburban and appellee ACMAT were among the bidders; Suburban submitted the lowest bid, and the city began the process of awarding the contract to Suburban. ACMAT, as a disappointed bidder, and appellee Union, as a city taxpayer, then brought suit against officials of the city in the Connecticut Superior Court, through their attorney, appellee Witte. Suburban was not a party to the suit. ACMAT and the Union sought a writ of mandamus and an injunction against the award of the contract to Suburban on the ground that Suburban's bid was deficient. The suit was settled when the [*4] city agreed not to award the contract to Suburban, but to resubmit the project to bidding. Suburban was not successful in the second round of bidding.

This lawsuit, in the federal courts because of diversity, ensued. Appellant Suburban claims that the state court action was a groundless suit constituting an unfair method of competition and an unfair and deceptive trade practice

under CUTPA and a tortious interference with a business expectancy under the common law that caused appellant to lose \$700,000. Appellees moved to dismiss for failure to state a cause of action and for summary judgment. These motions presented several issues of state law, including whether filing a groundless lawsuit can be an unfair trade practice under CUTPA. Magistrate Smith, however, granted the motion to dismiss on a ground not raised by the parties. He found that the threshold issue in the case was whether the complaint alleged conduct falling within the sham exception to the *Noerr-Pennington* doctrine, and he concluded that it did not, so that the doctrine barred Suburban's [*100] suit. Judge Daly adopted this position in his order enforcing the dismissal.

The *Noerr-Pennington* doctrine [**5] and the sham exception were developed by the Supreme Court in a series of cases in which it was alleged that defendants' attempts to obtain commercially favorable actions from different branches of government violated the Sherman Act. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., supra* (seeking legislation); *United Mine Workers v. Pennington, supra* (attempting to influence executive actions); *California Motor Transport Co. v. Trucking Unlimited, supra* (instituting administrative and judicial proceedings). In *Noerr* and *Pennington* the Court held that the activity alleged was outside the scope of the Sherman Act; in *California Motor Transport*, the Court recognized that the act of filing a legitimate lawsuit was within the *Noerr-Pennington* doctrine, i.e., not covered by the Sherman Act, but held that the Act can reach sham litigation such as the multiple baseless proceedings alleged in *California Motor Transport*. Since Suburban concedes that the state court suit does not fit into the sham exception, *California Motor Transport* would clearly have required dismissal if Suburban had brought suit under the Sherman Act, instead of under [**6] CUTPA and the common law. But the question remains whether the result must be similar under state law. The parties have focused their arguments on appeal on the question raised by the magistrate's decision, namely, whether the *Noerr-Pennington* doctrine is mandated by the United States Constitution. This issue apparently has not been definitively resolved by the Supreme Court and has not been squarely addressed in this circuit. See generally Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the *Noerr-Pennington* Doctrine, 45 U.Chi.L. Rev. 80, 94-104 (1977).

Magistrate Smith concluded without much discussion that the doctrine is constitutionally mandated, and that therefore it must apply to Connecticut's law as well as to the Sherman Act. There is some support for this position in the cases, but it is not conclusive. *Noerr* expressly refrains from deciding whether the activities complained of are protected under the *first amendment*, basing its holding solely on a construction of the Sherman Act. 365 U.S. at 132 n.6. The Court discerns an "essential dissimilarity between an agreement jointly to seek legislation or law enforcement [**7] and the agreements traditionally condemned by [the Sherman Act]," such as "price-fixing agreements, boycotts, market-division agreements, and other similar arrangements." *365 U.S. at 136* (footnote omitted). This construction is bolstered by two considerations with constitutional overtones: the need in "a representative democracy" for "the people to make their wishes known to their representatives," *365 U.S. at 137*, and the spectre of "important constitutional questions" that would be raised if the Sherman Act were read to regulate the activity alleged. *365 U.S. at 138*. Thus, the *first amendment* lurks in the background of a holding that, strictly speaking, is simply an interpretation of the Sherman Act.

The decision in *Pennington* four years later adds nothing that is inconsistent with limiting *Noerr* to statutory construction. Indeed, Justice White's majority opinion states that *Noerr* held that "the Sherman Act . . . was not intended to bar concerted action of this kind . . ." *381 U.S. at 669*. But *California Motor Transport*, six and a half years later, presents *Noerr* and *Pennington* as resting on the two constitutionally related considerations described [**8] above, with no mention of the preceding statutory construction. Furthermore, Justice Douglas's majority opinion is filled with broad language suggesting that the *first amendment* forbids application of the Sherman Act to activities protected by the *Noerr-Pennington* doctrine. The majority opinion's conclusion that the doctrine applies to actions in the courts as well as to petitions of the legislative and executive branches, while not explicitly based on the constitution, is grounded in the perception that "the right of access to [*101] the courts is indeed but one aspect of the right of petition." *404 U.S. at 510*. And the holding that the activities at issue in the case are nevertheless not exempt from the antitrust laws, because they are "sham," depends on the recognition that "it is well settled that *First Amendment* rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *404 U.S. at 514*. Thus, the magistrate's assumption that appellant's cause of action could not survive unless it fit the sham exception is not without substantial support. If

indeed the *Noerr-Pennington* doctrine is mandated by the *first amendment*, then the doctrine must also apply to Connecticut's statute and common law.

Courts in other jurisdictions have taken this position. In *Pennwalt Corp. v. Zenith Laboratories, Inc.*, 472 F. Supp. 413 (*E.D. Mich. 1979*), appeal dismissed, 615 F.2d 1362 (6th Cir. 1980), counterclaims for violation of the Sherman Act, interference with business relationships, abuse of trademark and abuse of process were dismissed because the lawsuits complained of were not sham, and therefore were protected by the *first amendment* as embodied in the *Noerr-Pennington* doctrine. 472 F. Supp. at 423-24. Similarly, in *Sierra Club v. Butz*, 349 F. Supp. 934, 936-39 (*N.D. Cal. 1972*), a state law counterclaim for inducing the United States government to break a contract with defendant was dismissed in a decision treating the *Noerr-Pennington* doctrine as a *first amendment* standard analogous to the "malice" standard established for defamation by *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).

This circuit has not gone so far as to apply the *Noerr-Pennington* doctrine to state law causes of action. But it has, in the process of applying *Noerr-Pennington* [**10] and the sham exception to Sherman Act claims, explicitly described the doctrine as an application of the *first amendment*. See *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 895-96 (2d Cir. 1981) (issue is whether the conduct alleged "is immunized by the *First Amendment* from antitrust liability under the *Noerr-Pennington* doctrine"); *Miracle Mile Associates v. City of Rochester*, 617 F.2d 18, 20 (2d Cir. 1980) ("Under *Noerr*, mere solicitation of governmental action through legislative processes . . . is an activity which is fully protected by the *First Amendment* and is immune from Sherman Act liability"); *Mountain Grove Cemetery Assoc. v. Norwalk Vault Co.*, 428 F. Supp. 951, 956 (D. Conn. 1977) ("*Noerr* and *California Motor Transport* teach that when antitrust objectives and the right to petition for government action are in conflict, the scales must tip in favor of the *First Amendment*."). See also *Taylor Drug Stores, Inc. v. Associated Dry Goods Corp.*, 560 F.2d 211, 214 (6th Cir. 1977) (per curiam) (referring to "rights under the *First Amendment* . . . as those rights have been described in [*Noerr*] and [*Pennington*]").

We are [**11] not bound to follow the language of *Landmarks Holding* and *Miracle Mile* quoted above, since it was not necessary to the holdings of those cases, and since the *first amendment* basis of the doctrine was not treated as an issue by the court or by the parties. But we find it unnecessary to decide this constitutional issue at all. It remains an open question whether, as a matter of statutory construction, filing a groundless lawsuit is the sort of "unfair trade practice" that CUTPA was intended to prohibit. Apparently the Connecticut courts have never addressed the issue. In the absence of Connecticut precedent construing CUTPA, we must "do the best we can in estimating 'what the state court would rule to be its law.'" *Bailey Employment System, Inc. v. Hahn*, 655 F.2d 473, 477 (2d Cir. 1981) (quoting *Holt v. Seversky Electronatom Corp.*, 452 F.2d 31, 34 (2d Cir. 1971)). **HN1**[¹] CUTPA is expressly modelled on section 5(a) (1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1), and it directs the state courts and the state commissioner to be guided by federal interpretations of the federal act in interpreting the state statute. *Conn. Gen. Stat. § 42-110b(b), (c)*. At [**12] least one court has held the *Noerr-Pennington* doctrine applicable to the [*102] Federal Trade Commission Act. *Rodgers v. FTC*, 492 F.2d 228 (9th Cir.), cert. denied, 419 U.S. 834, 42 L. Ed. 2d 60, 95 S. Ct. 60 (1974). Moreover, it seems likely that Connecticut's courts would also look to federal interpretations of the Sherman Act to help determine the extent of antitrust regulation under CUTPA. We believe that Connecticut's courts would be guided by the strong suggestions from the federal courts that imposing liability for the act of filing a non-sham lawsuit would present serious constitutional problems, and would construe Connecticut law to avoid those problems. Especially since *Noerr-Pennington*'s statutory exemption is defined in terms of *first amendment* activity, we are confident that Connecticut's courts would carve out a similar exception to CUTPA and the common law, whether or not they believed that they were required to do so by the Constitution. In short, we conclude that the activity complained of here -- **HN2**[²] the filing of a single non-sham lawsuit -- cannot form the basis of a claim under CUTPA or Connecticut's common law of tortious interference with a business [**13] expectancy.

We affirm the judgment of the district court.



Honolulu v. Hawaii Newspaper Agency, Inc.

United States District Court for the District of Hawaii

February 10, 1983

Civil No. 79-0138

Reporter

559 F. Supp. 1021 *; 1983 U.S. Dist. LEXIS 19335 **; 1983-1 Trade Cas. (CCH) P65,327; 9 Media L. Rep. 1382

THE CITY AND COUNTY OF HONOLULU, etc., Plaintiff, v. HAWAII NEWSPAPER AGENCY, INC., et al., Defendants

Core Terms

Advertiser, newspapers, damages, antitrust, financially sound, circulation, defendants', sales, statute of limitations, editorial, exemption, continuing violation, operating agreement, cause of action, good faith, conspiracy, four year, accrues, directed verdict, anticompetitive, statistical, edition, lineage, laches, managing officer, rational basis, speculative, enterprise

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] Exemptions & Immunities, Exempt Cartels & Joint Ventures

Congress passed the Newspaper Preservation Act, [15 U.S.C.S. § 1801, et seq.](#), in 1970, which, among other things, granted antitrust immunity to newspapers having previously entered into joint operating agreements where those agreements met the standards set forth in the Newspaper Preservation Act. As to any future combinations, Congress granted immunity only upon the consent of the Attorney General.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

HN2[] Exemptions & Immunities, Exempt Cartels & Joint Ventures

See [15 U.S.C.S. § 1803\(a\)](#).

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

[**HN3**](#) Statute of Limitations, Time Limitations

The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is commenced within four years after the cause of action accrued, [15 U.S.C.S. § 15b](#). Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

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

Governments > Legislation > Statute of Limitations > General Overview

[**HN4**](#) Antitrust & Trade Law, Sherman Act

A continuing conspiracy to violate the antitrust laws has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to plaintiff to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. However, each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which plaintiff has suffered at the date of accrual, but also those which plaintiff will suffer in the future from the particular invasion, including what plaintiff has suffered during and will predictably suffer after trial.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

[**HN5**](#) Statute of Limitations, Time Limitations

If a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, the plaintiff must sue within the requisite number of years from the accrual of the action. Whereas future damages may not be recovered if they are speculative or cannot be proved, they may be recovered in future actions if they do in fact occur.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

[**HN6**](#) Statute of Limitations, Time Limitations

Where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeatable, and suit must be brought within the limitations period and upon the initial act.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN7 Trials, Judgment as Matter of Law

A directed verdict is only appropriate when the court finds that viewing the evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party and without weighing witnesses' credibility, a reasonable jury could reach but one conclusion as to the verdict. There is abundant authority to the effect that directed verdicts may be granted when appropriate, even in complex antitrust cases involving issues of motive, intent and the like. Furthermore, the use of the motion for directed verdict in cases where the jury has failed to reach a decision has been held appropriate.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

HN8 Exemptions & Immunities, Exempt Cartels & Joint Ventures

Congress provided that the determination of whether or not a newspaper company should enter into a joint operating agreement with another newspaper company should be made by the Attorney General as to all joint operating agreements made after the Newspaper Preservation Act, [15 U.S.C.S. §§ 1801, et seq.](#), went into effect, and the attorney general's approval was required before any new or amended joint operating agreements could become effective. But as to joint operating agreements entered into before the Newspaper Preservation Act, [15 U.S.C.S. §§ 1801, et seq.](#), went into effect no such approval was required.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

HN9 Exemptions & Immunities, Exempt Cartels & Joint Ventures

The court held that the business judgment rule should apply to all joint operating agreements entered into before the Newspaper Preservation Act, [15 U.S.C.S. §§ 1801, et seq.](#), effective date because such a judgment was in the nature of a business judgment, a judgment made by management in the regular course of business, a judgment generally held to be conclusive.

Counsel: [\[**1\]](#) Josef D. Cooper, Esq., Tracy R. Kirkham, Esq., Kirk A. McKinney, Esq., Cooper, Kirkham, Hainline & McKinney, P.C., San Francisco, California, Gary M. Slovin, Esq., Corporation Counsel, Honolulu, Hawaii, J. Michael Hennigan, Esq., Bretz and Hennigan, A Law Corporation, Los Angeles, California, for Plaintiff.

William M. Swope, Esq., William A. Cardwell, Esq., Cades, Schutte, Fleming & Wright, Honolulu, Hawaii, Martin Anderson, Esq., David J. Reber, Esq., Lani L. Ewart, Esq., Vincent A. Piekarski, Esq., Goodsill, Anderson, Quinn & Stifel, Honolulu, Hawaii, John Stuart Smith, Esq., Nixon, Hargrave, Devans & Doyle, Rochester, New York, for Defendants.

Judges: Curtis

Opinion by: CURTIS

Opinion

[*1022] The City and County of Honolulu as plaintiff¹ brings this antitrust action against the Star-Bulletin and the Honolulu Advertiser,² two daily newspapers published in Honolulu. The complaint alleges that in 1962 the two newspapers entered into a contract, combination and conspiracy to unreasonably restrain trade in violation of section 1 of the Sherman Act, Title 15 U.S.C. § 1, and in a conspiracy to monopolize trade and commerce in violation of section 2 of the Sherman Act, Title 15 U.S.C. [**2] § 2. The roots of this alleged combination and conspiracy extend back to May 31, 1962 when these newspapers entered into a Joint Operating Agreement (JOA), merging their commercial and mechanical operations under the terms of which, among other things, they set combined circulation and advertising rates.

By way of defense, the defendants contend that such agreement comes within the exemption provisions of the Newspaper Preservation Act (NPA), Title 15 U.S.C. § 1801, et seq., and in any event the action is barred by the statute of limitations or laches.

The court bifurcated the issues and proceeded to try the issues of laches and the applicability of the exception. This trial resulted in a mistrial as the jury was unable to [*3] reach a unanimous verdict. However, prior to submitting the case to the jury the defendants moved for a directed verdict on both the issues of laches and immunity, which motion the court took under submission, announcing its intention to withhold a ruling thereon until after the jury had returned a verdict. The parties agreed that the motion might be deemed a motion for judgment notwithstanding the verdict should the jury return a verdict unfavorable to the defendants. The court now has before it defendants' motion for judgment on these issues and for reasons which will hereinafter appear, the court concludes that this action is barred by the statute of limitations, and that the defendants are entitled to judgment as a matter of law on the exemption issue.

FACTUAL BACKGROUND

Let me begin with a brief review of the facts which have given rise to this controversy.

On May 31, 1962, the defendant newspapers entered into a JOA providing for the merger of their respective commercial and [*1023] mechanical departments for a period of thirty years, pursuant to which agreement subscription and advertising rates were jointly determined and profits were pooled and distributed according [*4] to an agreed formula. However, their respective editorial departments remained separate and independent. This was the type of arrangement which the Supreme Court in Citizen Publishing Co. v. United States, 394 U.S. 131, 22 L. Ed. 2d 148, 89 S. Ct. 927 (1969), held violated sections 1 and 2 of the Sherman Act. This Supreme Court decision in *Citizens*, however, alerted Congress to the rash of newspaper failures occurring throughout the United States, especially in those larger cities unable to support multiple daily newspapers. Congress was concerned with the resulting diminution in editorial output caused by this trend, and it feared that many localities would be left with only one editorial voice if the trend were to continue. In some communities daily newspapers rescued themselves from extinction by merging their commercial operations with those of a competing paper, while leaving their respective editorial staffs independent and competitive. In an attempt to preserve editorial competition within such communities, even at the risk of suffering some commercial anticompetitive impact, HN1³ Congress passed the NPA in 1970, which, among other things, granted antitrust immunity [*5] to newspapers having previously entered into such agreements where those agreements met the standards set forth in the Act.³ As to any future combinations, Congress granted immunity only upon the consent of the Attorney General.

¹ The City and County of Honolulu is a municipal corporation, a single entity.

² This action was originally brought by the City as a class action on behalf of all advertisers, but no class was ever certified and at this point, at least, the City is proceeding on its own account.

³ HN2⁴ 15 U.S.C. § 1803(a) provides:

It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into,

STATUTE OF LIMITATIONS

Early in this litigation, this court ruled that the statute of limitations was not a bar to this action. However, defendants request this court to again consider that issue and, having done so, I have a different view from that which I have previously expressed.

This action was filed on **[**6]** March 23, 1979, some seventeen years after the JOA was entered into, and some nine years after the effective date of the NPA. Defendants urge again that this action is barred by the provisions of 15 U.S.C. § 15b,⁴ which establishes a limitation period of four years on antitrust actions. The plaintiff urges that in light of the allegations of continuing anticompetitive conduct the statute is not applicable on the theory of "continuing violations," citing Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971). The Zenith Court explained the applicability of this theory as follows:

HN3 [↑] The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is "commenced within four years after the cause of action accrued," 15 U.S.C. § 15b, . . . Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. See, e.g., Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., 185 F.2d 196, 208 (CA9 1950); Bluefields S.S. Co. v. United Fruit Co., 243 F. 1, 20 (CA3 1917), appeal dismissed, 248 U.S. 595, 63 L. Ed. 438, **[**7]** 39 S. Ct. 136 (1919); 2361 State Corp. v. Sealy, Inc., 263 F. Supp. 845, 850 (ND Ill. 1967). This much is plain from the treble-damage statute itself. **HN4** [↑] 15 U.S.C. § 15. In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to **[*1024]** him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. See, e.g., Crummer Co. v. Du Pont, 223 F.2d 238, 247-248 (CA5 1955); Delta Theaters, Inc. v. Paramount Pictures, Inc., 158 F. Supp. 644, 648 (ED La. 1958); Momand v. Universal Film Exchange, Inc., 43 F. Supp. 996, 1006 (Mass. 1942), aff'd, 172 F.2d at 49. However, each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial. See, e.g., Farbenfabriken Bayer, **[**8]** A.G. v. Sterling Drug, Inc., 153 F. Supp. 589, 593 (NJ 1957); Momand v. Universal Film Exchange, Inc., *supra*, at 1006. Cf. Lawlor v. Loewe, 235 U.S. 522, 536, 59 L. Ed. 341, 35 S. Ct. 170 (1915). Thus, **HN5** [↑] if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action.

401 U.S. at 338-39.

The Court then goes on to point out that whereas future damages may not be recovered if they are speculative or unprovable, they may be recovered in future actions if they do in fact occur.

In In re Multidistrict **[**9]** Vehicle Air Pollution, 591 F.2d 68 (9th Cir. 1979), the court refused to apply the continuing violation theory. In that case AMF, the plaintiff, brought a treble damage antitrust action against the automobile manufacturers alleging conspiracy not to produce plaintiff's air pollution control device. In that case the court held that the refusal of the defendants constituted a single irrevocable act which, if unlawful, would have given rise to a cause of action at the time of the refusal, and since the action had not been brought within the time allowed, thereafter, it was barred by the statute of limitations. In *Multidistrict* the court said:

regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication.

⁴ Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall forever be barred unless commenced within four years after the cause of action accrued.

In *Poster Exchange Inc. v. National Screen Serv. Corp.*, 517 F.2d 117 (5th Cir. 1975) *supra*, the Fifth Circuit clearly distinguished between injury final at its inception and a continuing wrong. A conspiracy had excluded Poster Exchange from access to supplies for a period stretching beyond the four-year limitations period. The court, unable to determine whether during the limitations period there was "a mere absence of dealing, or whether there was some specific act or word" of a wrongful nature, remanded for a determination [**10] of whether such acts or words occurred within the period. [517 F.2d at 128](#). Nevertheless, the court recognized: "Where [HN6](#)[] the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeatable, and suit must be brought within the limitations period and upon the initial act."[""]

[591 F.2d at 72](#).

With the teachings of these cases in mind we now turn to an analysis of the facts. Admitting, as I think we must, that the alleged anticompetitive conduct is continuous within the meaning of *Zenith*, nevertheless, this conduct must be shown to be unlawful before we can apply the continuing violation rule, for unless the continuing conduct is unlawful the rule has no meaning. In *Zenith*, *In re Multidistrict Vehicle Air Pollution*, *Poster Exchange*, and their progeny dealing with the continuing violation rule, all assume the alleged anticompetitive conduct to be unlawful. Here the issue of whether the conduct is unlawful or not lies at the very heart of the problem. [Section 1803](#) provides that the [**11] conduct complained of by the plaintiff here is "not unlawful" if carried on by a newspaper which qualifies for the exemption. Our first task, therefore, [**1025] before considering the application of the continuing violation rule is to determine whether or not the newspapers qualify for the exemption. This inquiry takes us back to 1962 when the JOA was entered into. The formation of this agreement and the negotiations which led up to it constitute a single episode which had an immediate and permanent impact upon the plaintiff, for its avowed purpose was to engage in anticompetitive activity which could affect the plaintiff. The plaintiff could have brought an action challenging such a combination any time after its creation in 1962 up until 1970 without respect to the limiting statute, for during this period the theory of continued violations would have been applicable.

However, with the passage of the NPA, plaintiff's potential claim took on a somewhat different aspect. After the NPA, the theory of continuing violation could not be used to prevent the statute from running without a determination that the newspapers did not qualify for the exemption, for if they did, the [**12] alleged conduct was not unlawful and its continuation could not give rise to new causes of action.

When, then, did the cause of action which plaintiff here asserts first accrue? In my view, although the eligibility requirements contained in [section 1803](#) are based upon conduct which was final in 1962, plaintiff's right to challenge defendants' eligibility first occurred upon the passage of the NPA.

For example, an airline passenger buys a ticket for a specific flight in the future and on the day of departure finds that the airline has oversold the plane and is honoring tickets in the order of their issuance until the plane is filled. Although the airline's acceptance of the passenger on that flight depends upon when the passenger purchased the ticket, which occurred at an earlier time, his entitlement to board depends upon the application of a regulation which went into effect at the time of departure. It is at the time of departure that either he or other passengers have the first opportunity to challenge the application of the regulation. Similarly, the plaintiff's opportunity to challenge the defendants' eligibility for the exemption occurred for the first time the day the [**13] NPA went into effect. For four years thereafter, the plaintiff could have brought this action which would have determined whether the JOA, by its terms and considered in the light of the circumstances surrounding its creation, was such as to entitle the defendant newspapers to the exemption provisions of [section 1803](#). Nothing has accrued since which could give rise to a new cause of action on this issue. It seems clear therefore that there can be no reliance upon the continuing violation rule. Since this action was not brought until nine years after the cause of action first arose, it is barred by the four year statute of limitations.

Furthermore, this ruling is consistent with the purposes of the limitation statutes. The Professors Areeda and Turner in their authoritative antitrust treatise discussed the importance of limitations in the antitrust field as follows:

Limitations serve the same functions here as elsewhere in the law: to put old liabilities to rest and to relieve courts and parties from "stale" claims where the best evidence may no longer be available. Repose may seem especially valuable in the antitrust world where tests of legality are often rather vague, **[**14]** where liability doctrines change and expand, where damages are punitively trebled, and where duplicate treble damages for the same offense may be threatened. In addition, the disappearance of relevant evidence over time is often particularly pertinent in antitrust cases. Legality depends not only on the parties' acts but on many surrounding circumstances, including the behavior of rival firms and general market conditions -- matters which may be hard to reconstruct long afterwards.

II P. Areeda & D. Turner, Antitrust Law para. 325a at 119 (1978).

Plaintiff complains that this solution is illogical and cites as an example: Litigant A sues the newspapers in 1973, a time clearly within any statutory period. He assumes that the case results in a determination of **[*1026]** liability and damages for advertising purchased up through the time of the trial. Future damages would have been disallowed as speculative. He then supposes that Litigant B opens a business in Hawaii in 1976, and immediately begins to pay illegally fixed prices for advertising, from which he concludes that regardless of the fact that he sustained no previous damages and therefore had no earlier opportunity **[**15]** to sue, his action might nevertheless be barred. In the first place it is clear that if Litigant A sued the newspapers in 1973, which resulted in a finding of liability and damages for advertising purchased up through the time of the trial, although the plaintiff might not be entitled to future damages because they would be speculative and unprovable, in any subsequent action he could rely upon the previous ruling in his favor establishing liability which would then permit the continuing violation theory to apply, thus permitting him to recover any future damage from continuing unlawful competitive conduct. Insofar as Litigant B is concerned, the statute of limitations begins to run from the first time he has an opportunity to sue, and would therefore begin to run from the first occasion he suffers damage from illegal anticompetitive conduct.

CONCLUSION

For eight years, from 1962 until 1970, the plaintiff sat idly by and failed to complain of the defendants' conduct at a time when such a complaint might have been meritorious. For some nine years, from 1970 until this action was filed in 1979, it failed to assert a cause of action which, if it exists at all, arose in 1970. For **[**16]** a period of four years from 1970 there existed an appropriate forum in which plaintiff's complaints could have been heard and determined. In the event a court during that period had determined the defendants' conduct to be illegal, plaintiff's prayer for injunctive relief would undoubtedly have been granted. The separation of the complex merger of the commercial operations of these two newspapers could have been undone and damages, if any, would have been minimized. Plaintiff's delay in bringing this action has compelled the defendants to face the very difficulties which the limitation statutes are intended to prevent. As was said in *Poster Exchange*:

The function of the limitations statute is simply to pull the blanket of peace over acts and events which have themselves already slept for the statutory period, thus barring the proof of wrongs embedded in time-passed events.

517 F.2d at 127.

I hold therefore that this action is barred by the four year statute of limitations.

LACHES

As an additional defense, the defendants urge laches. Although the evidence overwhelmingly supports this defense, having found that there is an applicable statute of limitations, **[**17]** the defense of laches is unavailable. Straley v. Universal Uranium & Milling Corp., 289 F.2d 370 (9th Cir. 1961).

MOTION FOR DIRECTED VERDICT

We come now to a consideration of defendants' motion for a directed verdict. This court is well aware of the well established principle that [HN7](#) a directed verdict is only appropriate when the court finds that viewing the evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party and without weighing witnesses' credibility, a reasonable jury could reach but one conclusion as to the verdict. [*Marquis v. Chrysler Corp.*, 577 F.2d 624, 639 \(9th Cir. 1978\)](#). There is abundant authority to the effect that directed verdicts may be granted when appropriate, even in complex antitrust cases involving issues of motive, intent and the like. See [*Santa Clara Valley Distributing Co. v. Pabst Brewing Co.*, 556 F.2d 942 \(9th Cir. 1977\)](#). Furthermore, the use of the motion for directed verdict in cases where the jury has failed to reach a decision has been held appropriate. See, [*Noonan v. Midland Capital Corporation*, 453 F.2d 459, 463 \(2d Cir. 1971\)](#), cert. denied, 406 U.S. 945, 32 L. Ed. 2d 333, 92 S. Ct. [\[**18\]](#) 2044 [\[*1027\]](#) (1972); [*O'Brien v. Thall*, 283 F.2d 741 \(2d Cir. 1960\)](#); [*Daniels v. Pacific-Atlantic S.S. Co.*, 120 F. Supp. 96 \(E.D.N.Y. 1954\)](#).

In this phase of the case the jury was confronted with the issue of whether or not the newspapers were qualified for the exemption provided in [section 1803](#). More specifically, was the Honolulu Advertiser, at the time the joint operating agreement was entered into, likely to remain or become a financially sound publication.

FACTUAL ISSUE

In framing the issue for submission to the jury, this court concluded that the "likelihood of the Advertiser remaining or becoming financially sound" was not a question of fact since it had not nor could it ever occur. It appeared rather to be a matter of judgment as to what might occur in the future. Being a matter of judgment, reasonable people might well disagree, in which case, whose judgment controls?

[HN8](#) Congress provided that such judgment should be made by the Attorney General as to all JOA's made after the NPA went into effect, for his approval was required before any new or amended JOA's could become effective. But as to JOA's entered into before the NPA, no such approval was required.

[\[**19\]](#) In the absence then of any indication from Congress as to whose judgment should control in such instances, we must fall back on such inferences as seem reasonable under the circumstances. Congress must have anticipated that such judgments would have been made by the managing officers of the newspapers as those most knowledgeable and most concerned. Since no procedural review was provided, Congress must have assumed that that judgment made by the management would have been controlling, certainly if it were made in good faith and with a reasonable basis in fact.

[HN9](#) In my view, therefore, such a judgment is in the nature of a business judgment, a judgment made by management in the regular course of business, a judgment generally held to be conclusive.

There is ample authority for the business judgment rule and it has been recognized recently in this circuit. [*Shivers v. Amerco*, 670 F.2d 826, 832 \(9th Cir. 1982\)](#). See also, [*Financial Industrial Fund, Inc. v. McDonnell Douglas Corp.*, 474 F.2d 514](#) (10th Cir.), cert. denied, 414 U.S. 874, 38 L. Ed. 2d 114, 94 S. Ct. 155 (1973); [*State Teachers Retirement Bd. v. Fluor Corp.*, 500 F. Supp. 278 \(S.D.N.Y. 1980\)](#), aff'd in relevant [\[**20\]](#) part, [654 F.2d 843 \(2d Cir. 1981\)](#). Accordingly, the jury was instructed as follows:

The decision as to whether the Honolulu Advertiser was likely to remain or become financially sound is a business judgment, the kind of judgment which business men in management positions are called upon to make in directing the affairs of their respective enterprises. The soundness of such decisions when made in good faith and with a reasonable basis cannot ordinarily be challenged in a court of law. If, after considering the facts in this case you find that the managing officers of the Honolulu Advertiser entered into the joint operating agreement in the honest belief that otherwise the Honolulu Advertiser was not likely to remain or become financially sound, and that belief had a rational basis in fact, you must find that the defendants are qualified for the exemption provided in the Newspaper Preservation Act and render your verdict in favor of the defendants.

REASONABLE BASIS IN FACT

This case is rather unusual in that although the facts are voluminous and complex, few are in dispute. The controversy here arises from the differing conclusions and inferences which the parties would **[**21]** have the jury draw from these largely uncontested facts.

For instance, working from exactly the same undisputed raw material, plaintiff's expert, a member of a widely known accounting firm with impressive credentials, after he and his staff had expended **[*1028]** some 3,000 hours and incurred a fee of some \$300,000, concluded that the Honolulu Advertiser was not only sound, but was prospering and was in fact on its way to becoming an outstanding successful enterprise, while the defendants' expert, also a member of a widely known accounting firm with equally impressive credentials, after spending some 2,500 hours and charging a fee of \$250,000, concluded that the Advertiser had experienced a long period of diminishing success and without the help of a joint operating agreement had no hope of future success. Both sides have supported their contentions with graphs, charts, statistical comparisons and accounting adjustments which, by reason of some mysterious legerdemain for which the accounting profession is well known, have given both of these contrary contentions an aura of credibility which is completely beyond the ability of lay persons to comprehend, let alone weigh. Fortunately, **[**22]** it is not necessary in this case to decide which contention is more likely to be correct, for we need only to determine whether the managing officers of the Advertiser acted in a good faith belief that their newspaper was not likely to remain or become financially sound and whether that conclusion had a rational basis in fact.

Basically, it seems that the testimony of experts as well qualified as those testifying for the defendants, after 2,500 hours of research, concluding that the Advertiser was not financially sound and was not likely to become sound at the time the joint operating agreement went into effect, would be sufficient to compel a finding that the managing officers of the Advertiser had a rational basis for such belief. The fact that plaintiff's expert, whose credentials may be equally impressive, comes to an opposite conclusion does no more than suggest that there may be a rational basis for both conclusions, each one of which is just as probable as the other. Since the JOA was in fact entered into, there is no way of proving which conclusion would have been correct.

In fact, the expert testimony in this case has been of doubtful value. The testimony of the experts **[**23]** for both sides has been of necessity speculative and conclusional. They have used seventeen years of hindsight and present day sophisticated techniques to arrive at their own respective reconstructions of the same undisputed raw data only to reach diametrically opposed conclusions. They have largely neutralized, if not destroyed, the persuasiveness of each others testimony.

Furthermore, we must not lose track of the fact that the judgment we are testing here was formed by the management of the Advertiser in 1961-62 without the help of expensive specialists in the field. So, especially in dealing with the question of good faith, we must view the facts as they appeared to the management group in 1961-62.

DEFINITION OF FINANCIAL SOUNDNESS

Before discussing the evidence, we must establish some definition of "financial soundness" as used in [section 1803](#). In this connection, the court instructed the jury as follows:

You may consider the phrase "financially sound" as meaning "earning a reasonable profit." The phrase "likely to remain financially sound" means likely to earn a reasonable profit for a reasonable period of time. The phrase "likely to become financially sound" **[**24]** means likely to become able to earn a reasonable profit within a reasonable period of time. "Likely" means probable. Something is likely if it looks as if it would happen. [Court's Jury Instruction No. 23.]

Defendants' economist Rosse stated without contradiction that a "return on sales" was a proper measure of economic soundness,⁵ and further testified that a normal return on sales for a going newspaper business was in the neighborhood of 12 to 16% before taxes. Although plaintiff's expert Stone used a 6% net return after taxes as a

⁵ Stone, however, preferred "return on equity" as a proper measure of economic soundness.

standard, this would translate into a rate of [*1029] 12% before taxes so that the difference between the two conclusions in this respect is insubstantial.

ANALYSIS

I shall not attempt to treat all of the mass of statistical evidence with which the record is filled, much of which I consider irrelevant. I shall confine myself to a few undisputed facts which were known to the [**25] Advertiser's managers and were relied upon by them, facts which I find relevant and persuasive. As a starting point, a comparison between the Advertiser's return on sales and that of the Star-Bulletin for the years immediately preceding the JOA seems appropriate. Although the experts could not agree precisely on these profit figures, after making such adjustments as each thought appropriate, their differences were so insubstantial as to be irrelevant. The following is such a comparison for the years 1956 through 1959, showing the net income before taxes for each year as calculated by defendants' expert Rosse with the corresponding return on sales. It also shows the calculation as made by plaintiff's expert Stone and a comparison with the return on sales by the Star-Bulletin.

Net Income (Losses) Before Tax

	Advertiser (Rosse)	Return On Sales	Advertiser (Stone)	Return On Sales	Star- Bulletin	Return On Sales
1956	\$142,618	4.91%	\$156,171	5.37%	\$560,119	11.31%
1957	20,537	.66%	30,204	.96%	658,528	12.37%
1958	138,530	4.29%	157,613	4.88%	922,782	15.55%
1959	(51,796)	(1.39%)	16,271	.49%	891,089	13.26%

[**26] The greatest disparity between the calculations of Rosse and Stone appears for the year 1959; whereas, Rosse shows a loss of \$51,796, Stone shows a profit of \$16,271. During this year the Advertiser put out a statehood edition, commemorating Hawaii's admission to the Union. This edition was widely sold and produced a substantial amount of money. Mr. Rosse considered such an edition a one-of-a-kind event which was not likely to reoccur and, therefore, should not be considered in demonstrating statistical trends. Mr. Stone, on the other hand, included it. But, in any event, even taking Mr. Stone's figures during this period of four years, the Advertiser's return on sales varied from .49% to 5.37%; whereas, the Star-Bulletin ranged from 11.31% to 15.55%. Furthermore, it is apparent that the Advertiser was showing a downward trend; whereas, the Star-Bulletin was showing an upward trend. Defendants' position that even during this period the Advertiser was not financially sound has considerable support in the evidence.

But the worse was yet to come. In 1960, the Advertiser suffered a net loss of \$110,615; whereas, the Star-Bulletin had a net income of \$888,591. In 1961, the Advertiser [**27] suffered a net loss of \$72,395; whereas, the Star-Bulletin had a net income of \$896,973.

The joint operating agreement went into effect May 31, 1962. Consequently, there were five months of independent operation by the Advertiser in 1962, prior to the JOA. It is this so called "stub" period which forms the principal basis for the difference of opinion of the two experts. Plaintiff contends that the statistics during this period indicate that the Advertiser had turned the corner and was on its way to an improved financial condition. The defendants, on the other hand, contend that such statistics are entirely irrelevant as they are incomplete and form no reliable basis for future projections. But even if they are relevant, defendants argue, when adjusted to reflect the true circumstances in which the statistics arose, they completely fail to support Mr. Stone's conjecture that the Advertiser had turned the corner and was on its way to success and prosperity.

During this stub period, it appears that the Advertiser made a net profit of \$22,348, [*1030] which represents a return on sales of only 1.35%. This figure was not arrived at by the Advertiser's auditors until March [**28] of 1963, after the JOA was formed. During the first five months of 1962, the management only had before it monthly statements which were inconclusive. In three of the five months, the operation resulted in a loss, and in two profits were earned. Mr. Stone, by making various adjustments, arrives at a profit of \$40,742 for the stub period, a return of 2.48% on sales, still far below the percentage of profit expected by a sound newspaper enterprise.

Furthermore, the defendants contend that the operating profit of \$22,348 as shown by their auditors for the five-month period, if used at all, is subject to certain normalizing adjustments. It appears that their circulation manager, when he heard of the probability of the JOA, resigned as of the first of the year and was not replaced, which caused a saving of \$6,000. Also, the promotion director likewise was terminated at an additional saving of \$6,270. This, together with other normalizing adjustments totaling \$31,510, indicates that had the Advertiser been operating in a normal fashion, and after a proper allocation of expenses on an annual basis, it would have sustained a loss during the five-month period of \$14,666. As these facts **[**29]** are uncontested, they tend to refute plaintiff's contention that the fortunes of the Advertiser had turned for the better.

It is a well established fact that the life blood of the newspaper business is its advertising revenue. This in turn is dependent upon its circulation. Plaintiff contends that during the five-month period both advertising lineage and circulation showed an increase, which indicated that the Advertiser's financial position had turned the corner, and that it was on the way to a profitable operation.

It is uncontradicted that beginning in 1956 a strenuous effort was made on the part of management to improve the Advertiser. New personnel was brought in in an effort to improve the newspaper in all of its aspects. It was also admitted that the editorial content of the newspaper was greatly improved to the point that in the opinion of one witness, at least, the Advertiser was superior editorially to the Star-Bulletin. During this same period an intensive campaign was launched to increase both circulation and advertising lineage by the use of generous discounts, contests and other promotional devices. Although this effort did increase both the circulation and advertising **[**30]** lineage for the Advertiser, it did not produce a comparable increase in revenue. The effort, nevertheless, continued during the latter days of 1961 in order to enhance the Advertiser's negotiating position with the owners of the Star-Bulletin in forming a JOA, the necessity of which by that time had become apparent. The defendants point out that the slight increase in the circulation and advertising lineage during the stub period was the after effect of the high pressure promotion which was terminated at the end of 1961, and that such increased circulation and advertising lineage could not have been maintained without continuing the highly expensive promotional activity which produced it.

But beyond all this, the Advertiser was faced with an event which was to have a permanent, devastating effect upon its future. Prior to 1960, the Advertiser had one distinctive advantage over the Star-Bulletin in that it published a Sunday edition; whereas, the Star-Bulletin did not. Since many merchants preferred Sunday advertising, the Advertiser's Sunday edition had been an important source of revenue. In 1960, however, the Star-Bulletin management decided to put out a Sunday edition. This **[**31]** had a profound effect upon the market. Whereas, the Advertiser had a Sunday circulation during the last quarter of 1959 of 92,520, in the first quarter of 1960 after the Star-Bulletin came into the market with a Sunday circulation of 110,670, the Advertiser's Sunday circulation dropped for that quarter to 84,798, and during 1961 it continued to drop further. According to the testimony of the defendants' witnesses, at that time it became apparent to them that the Advertiser would continue to lose advertising lineage to the Star-Bulletin in the future **[*1031]** and that the Advertiser could no longer successfully compete. The Advertiser's managers then concluded that the only hope for their enterprise was to enter into some joint operating agreement with the Star-Bulletin.

There can be little question but that the evidence establishes, without serious conflict, a rational basis for the belief on the part of the management of the Advertiser that the only hope to maintain an editorial voice in the community was by combining the commercial portions of the two newspapers, as many other newspapers in similar financial conditions had done, and which was thought then to be permissible.

[32] GOOD FAITH**

The management personnel of the Advertiser testified under oath that they believed in good faith that the Advertiser was not financially sound nor would become financially sound without entering into a joint operating agreement with the Star-Bulletin, and there is no hard evidence to the contrary. The plaintiff's charges of a lack of good faith are based entirely upon inferences which it seeks to have the jury draw from facts which neither warrant nor permit such inferences. It is abundantly clear that the finder of fact can draw only such inferences as are *reasonable* in the light of the evidence taken as a whole. The evidence here simply will not support those inferences of bad faith

which the plaintiff suggests. I shall not attempt to discuss all which plaintiff mentions, but only a few where their unreasonableness may not be readily apparent.

Plaintiff points out that two members of the Board of Directors testified that they were unaware that the Advertiser was in bad financial condition and that the minutes of the meeting gave no such indication. These two members were Loren Thurston and Katsuro Miho, neither of whom were active in the management. The minutes [**33] of the meetings merely showed that the financial position of the company "was reported," but stated no details. These facts fall short of furnishing a basis for an inference of lack of good faith.

Plaintiff then refers to the evidence indicating that the matter of a possible JOA had been mentioned many times in previous years, obviously as a method of rescuing the Advertiser's operations, and that an expert in the field of antitrust law had been consulted in connection with a JOA. This is thoroughly consistent with the testimony as a whole, that the Advertiser had been in bad financial condition for some time, that the JOA had been considered as a possible solution, and that in accomplishing it the management did not wish to violate any antitrust law. Certainly these facts can give no support to an inference of bad faith.

Plaintiff makes much of Twigg-Smith's "goal" memorandum of March 21, 1961, wherein, Mr. Twigg-Smith indicated that he hoped for a larger share than was ultimately realized in the JOA, and in which he indicated an intention to continue the intensive promotion of advertising and circulation in order to strengthen the Advertiser's negotiating strength. Any inference [**34] from these facts of bad faith could not possibly be supported by these facts.

Plaintiff relies heavily upon the fact that during the years 1960-61, Twigg-Smith and his friends made various purchases of Advertiser stock, from which plaintiff would have us infer that these purchases were motivated entirely because of their desire to make an immediate profit. Mr. Chapman testified without contradiction that he bought the stock because of his interest in the enterprise of which he was a part, and that he believed he would not lose anything in the long run since the value of the assets, in the event of liquidation, would be sufficient to cover his investment. This testimony was supported by Mr. Chin Ho who said that the newspaper was more valuable dead than alive.

On one occasion, it appears that Mr. Twigg-Smith's brother told Mrs. Thurston, in an attempt to urge her to vote affirmatively for the JOA, that "we are going to make nothing but money." This statement is nothing more than an expression of optimism [*1032] which would not be unexpected from a stockholder who had endured through many of the corporation's unproductive years and finally has hopes of profit if the JOA goes [**35] into effect. This is completely irrelevant on the issue of good faith.

Plaintiff suggests that the Advertiser was not broke, as it could borrow money. One banker testified, however, that he had refused to loan the Advertiser money because he could see no way in which it could pay it back. Plaintiff speculates as to where and how loans could have been obtained. However, there is no evidence to indicate that a mere loan of money would have turned a losing operation into a profitable one. As the evidence indicates, one of the main reasons that the Advertiser could not be expected to become financially sound was that it was losing circulation and advertising to the much stronger Star-Bulletin, a trend which no loan would have reversed.

In my view, the evidence shows here without substantial conflict that the Advertiser had been in serious financial trouble for many years, in that it was not making a reasonable profit for a newspaper publishing company. In 1960-61, it suffered severe financial losses. Its managing officers, justifiably concerned with the future of the Advertiser, decided in 1961 to seek a JOA with the Star-Bulletin. It is further my view that the evidence shows [**36] without substantial conflict that the management negotiated and effected the creation of the JOA in the good faith belief that it was necessary in order to preserve the Advertiser's editorial staff as an editorial voice in the community separate and apart from that of the Star-Bulletin. The evidence further indicates without conflict that there was a reasonable basis in fact for such a belief. I conclude that no jury composed of reasonable people who understood and followed my instructions could come to any other conclusion in the light of the evidence taken as a whole.

I hold, therefore, that the defendant newspapers are entitled to the exemption from antitrust prosecution afforded by section 1803, and that they are therefore entitled to judgment as a matter of law.

End of Document



Transamerica Computer Co. v. International Business Machines Corp.

United States Court of Appeals for the Ninth Circuit

October 14, 1981, Argued; February 10, 1982, Submitted ; February 15, 1983

No. 80-4048

Reporter

698 F.2d 1377 *; 1983 U.S. App. LEXIS 30529 **; 1982-83 Trade Cas. (CCH) P65,218; 1983 WL 962825

TRANSAMERICA COMPUTER COMPANY, INC., a corporation, Appellant, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, a corporation, Appellee

Prior History: [\[**1\]](#) Appeal from the United States District Court Northern District of California. Hon. Robert H. Schnacke, Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

prices, predatory, total cost, peripherals, variable, antitrust, district court, monopolist, costs, monopolize, marginal, products, lease, monopoly power, design change, models, predation, clearly erroneous, pricing policy, redesign, damages, per se rule, Sherman Act, plug-compatible, competitors, output, cases, burden of proof, price reduction, cost-based

LexisNexis® Headnotes

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

[HN1](#) [down arrow] Standards of Review, Clearly Erroneous Review

See [Fed. R. Civ. P. 52\(a\)](#).

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

[HN2](#) [down arrow] Monopolies & Monopolization, Actual Monopolization

To establish monopolization, a plaintiff must prove: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal "antitrust" injury.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[**HN3**](#) [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

Predatory pricing occurs when a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[**HN4**](#) [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

To establish predatory pricing under the Inglis test, a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a *prima facie* case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[**HN5**](#) [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

The appellate court has already recognized that prices exceeding average total cost might nevertheless be predatory in some circumstances.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Evidence > Burdens of Proof > Clear & Convincing Proof

[**HN6**](#) [down] **Actual Monopolization, Anticompetitive & Predatory Practices**

If the challenged prices exceed average total cost, the plaintiff must prove by clear and convincing evidence -- i.e., that it is highly probably true -- that the defendant's pricing policy was predatory.

Civil Procedure > Appeals > Standards of Review

[**HN7**](#) [down] **Appeals, Standards of Review**

The appellate court may uphold correct conclusions of law even though they are reached for the wrong reason or for no reason, and may affirm a correct decision on any basis supported by the record.

Counsel: For Appellant: Richard J. Lucas (argued), of Orrick, Herrington & Sutcliffe, San Francisco, California.

For Appellee: William W. Voughn (argued), Los Angeles, California.

Judges: Pregerson and Canby, Circuit Judges, and Lucas, * District Judge. Lucas, District Judge, concurring.

Opinion by: PREGERSON

Opinion

[*1380] OPINION PREGERSON, Circuit Judge:

Appellant Transamerica Computer Company (Transamerica), a wholly owned subsidiary of Transamerica Corporation, alleges that Appellee International Business Machines (IBM) violated [Section 2](#) of the Sherman Act, [15 U.S.C. § 2](#), when it took various actions to combat emerging competition in the "plug-compatible" peripherals market. The district court held that IBM's actions did not violate the antitrust laws.

On appeal, Transamerica challenges the district court's ruling that IBM's acts did not "unreasonably restrict" competition and, in particular, challenges the court's [*2] test for predatory pricing. We affirm the district court's decision but modify its test for predatory pricing.

BACKGROUND

At the heart of a computer system is the central processing unit (CPU), which houses arithmetical and logical electronic circuits. Attached to the CPU are devices called "peripherals," which perform input, output, storage, and control functions. IBM, long the dominant force in the computer industry, was, and remains, the major supplier of both CPUs and peripherals.

In 1967, a number of companies began offering plug-compatible peripherals -- devices which could be attached to IBM's CPUs. These plug-compatible manufacturers (PCMs) enjoyed immediate market success because they offered, at substantial discounts, plug-compatible peripherals that performed as well as or better than IBM's peripherals.

Transamerica was formed to supply needed capital to PCMs. In financing transactions central to this case, Transamerica purchased millions of dollars of peripherals from two PCMs, Marshall Industries and Telex Corporation, which had previously leased these items to end users. Under this arrangement, these PCMs raised substantial capital, and Transamerica, in addition to [*3] acquiring the equipment and underlying leases, received substantial tax advantages.

IBM responded to vigorous competition from the PCMs by engaging in a number of programs which Transamerica characterizes as violations of the Sherman Act. These challenged programs included:

(1) *Leasing Program* -- Prior to May 1971, IBM customers could either buy peripheral equipment or lease it on a month-to-month basis. In May 1971, IBM announced an additional method of leasing peripheral equipment -- a Fixed-Term Lease Plan under which customers could lease peripheral equipment for one year at an eight percent discount below the month-to-month rate, or for two years at a sixteen percent discount.

(2) *Design Changes* -- In the early 1970s, IBM redesigned the interface between the CPU and the peripherals of three tape drive systems so that PCM's peripherals would no longer be [*1381] compatible with IBM's CPUs. IBM also removed an optional selector channel from two CPU models, the System 370 Models 115 and 125, so that PCM's peripherals could no longer be used with those models.

(3) *Pricing Behavior* -- Also in the early 1970s, IBM introduced several "new" products [*4] -- basically repackaged versions of prior peripherals -- at lower prices.

* The Honorable Malcolm Lucas, United States District Judge for the Central District of California, sitting by designation.

Whether one characterizes IBM's actions as "meeting" competition or "precluding" competition, there is no doubt that IBM's strategy worked. Transamerica, along with fifteen out of seventeen companies involved with plug-compatible peripherals, left the market after suffering huge losses.

Because of IBM's actions in the peripherals market, Transamerica sued IBM for violations of the antitrust laws. Several other companies involved with plug-compatible peripherals also brought suits against IBM. Although initially consolidated, the actions were tried separately. Two of those actions, involving issues and facts similar to those presented here, have already been before this court. In both instances we upheld directed verdicts for IBM. [California Computer Products, Inc. v. IBM, 613 F.2d 727 \(9th Cir. 1979\)](#) (CalComp); [Memorex Corp. v. IBM, 636 F.2d 1188 \(9th Cir. 1980\)](#), cert. denied, 452 U.S. 972, 69 L. Ed. 2d 983, 101 S. Ct. 3126 (1981) (Memorex).

The instant case went to trial before a jury in December 1978. The trial consumed 120 days. After deliberating for ten days, the jury deadlocked and [**5] was discharged. Under a pretrial stipulation, the district judge then became the trier of fact. He ruled for IBM on all major issues. He held that (1) IBM was not a monopolist in either the general computer systems market or the peripherals market; (2) assuming, arguendo, that IBM possessed monopoly power, its leasing program, its design changes -- with the exception of the design of the System 370 Models 115 and 125 -- and its pricing behavior did not unreasonably restrain competition; (3) IBM had not attempted to monopolize the general computer systems market or the peripherals market; and (4) assuming that Transamerica established antitrust liability, it had not proved that it suffered antitrust damages. The district court also found that IBM's redesign of the System 370 Models 115 and 125 would have unreasonably restricted competition had IBM been a monopolist, but since IBM was not a monopolist and since Transamerica suffered no damages resulting from that design change, IBM's redesign of the two CPUs did not render IBM liable for antitrust damages. [In re IBM Peripheral EDP Devices Antitrust Litigation, Transamerica Computer Co. Inc. v. IBM, 481 F. Supp. 965 \(N.D. Cal. 1979\)](#) [**6] (Transamerica Computer).

STANDARD OF REVIEW

Transamerica challenges several of the district court's findings of fact.¹ The district court's findings may not be reversed unless clearly erroneous. [Fed. R. Civ. P. 52\(a\)](#). Under this standard

[\[HN1\]](#) a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence 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, 92 L. Ed. 746, 68 S. Ct. 525 \(1948\)](#).

[**7] [*1382] MONOPOLIZATION AND ATTEMPT TO MONOPOLIZE

Transamerica charges that IBM either monopolized or attempted to monopolize certain segments of the computer market. These separate offenses are governed by different tests. [\[HN2\]](#) To establish monopolization, a plaintiff must prove:

- (1) possession of monopoly power in the relevant market;
- (2) willful acquisition or maintenance of that power; and
- (3) causal "antitrust" injury.

¹ Transamerica also challenges a number of jury instructions, arguing that

because this was a jury trial and because there was no waiver of the jury, this Court has the same duty to review the instructions and if erroneous and prejudicial, to reverse the judgment below as it would in any other jury trial.

Transamerica Brief at 27.

Transamerica, however, freely and unconditionally stipulated before trial that the district court would decide the case if the jury was unable to reach a verdict. The stipulation was intended to avoid the expense of a retrial. 10/20/78 Tr. 8-10; 11/17/78 Tr. 18-20. By so stipulating, Transamerica agreed to a court trial if the jury deadlocked, and thus instructions given to the deadlocked jury are irrelevant to this appeal.

CalComp, 613 F.2d at 735.

To establish that a defendant attempted to monopolize, a plaintiff must prove:

- (1) specific intent to control prices or destroy competition with respect to a part of commerce;
- (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose;
- (3) a dangerous probability of success; and
- (4) causal "antitrust" injury.

Id. at 736.

There is an important relationship between the second elements of these two offenses. Conduct that does not constitute "willful acquisition or maintenance" of monopoly power (thus precluding establishment of the offense of monopolization) *cannot* constitute the "predatory or anticompetitive conduct" required to establish [**8] the offense of attempt to monopolize. See *CalComp, 613 F.2d at 738*, quoting 3 P. Areeda & D. Turner, ***Antitrust Law*** P 828, at 321 (1978) ("conduct lawful for a monopolist must, *a fortiori*, be excluded as a basis for the attempt offense."). We will analyze IBM's conduct with this principle in mind. We will assume that IBM possessed monopoly power. If IBM's conduct proves lawful despite that assumption, then, *a fortiori*, IBM's conduct could not constitute an attempt to monopolize, thereby eliminating the need to consider this offense.

LEASING PRACTICES

Transamerica alleges that IBM's Fixed Term Lease Plan (FTP) unreasonably restrained competition. Plaintiffs in both *CalComp* and *Memorex* challenged the legality of the FTP. Both times, this court upheld directed verdicts in favor of IBM on that issue. *CalComp, 613 F.2d at 741-42; Memorex, 636 F.2d at 1188*. The district court here also concluded that the FTP was legal. *Transamerica Computer, 481 F. Supp. at 1001-02*.

Transamerica asserts that this court's previous decisions on the FTP are not controlling because they were based on findings of fact proved erroneous in the instant trial. The district [**9] court's findings of fact, however, are indistinguishable from the findings in *CalComp* and *Memorex*. Transamerica has not demonstrated that the district court's findings in the instant case are clearly erroneous. Therefore, the holdings of *CalComp* and *Memorex* control our disposition of this issue, and the district court's holding must be affirmed. See also *Greyhound Computer Corp. v. IBM, 559 F.2d 488, 498-99 (9th Cir. 1977)*, cert. denied, 434 U.S. 1040, 54 L. Ed. 2d 790, 98 S. Ct. 782 (1978).

DESIGN CHANGES

IBM's design changes challenged in this case -- redesign of the interface between the CPU and certain peripherals -- are of the same type as those previously contested in *CalComp* and *Memorex*. Those cases upheld the legality of IBM's design changes. The district court here made a similar ruling, finding that the contested changes were improvements in the products, were not unreasonably restrictive of competition, and hence did not violate the *Sherman Act*.² *Transamerica Computer, 1*13831 481 F. Supp. at 1003-05*. Transamerica has not demonstrated how the design changes in this case can be distinguished from the changes in the two other cases [**10] or how the district court's findings are clearly erroneous. Again, on the authority of *CalComp* and *Memorex*, we affirm the district court's ruling that the interface changes were not unreasonable. See also *Telex Corp. v. IBM, 510 F.2d 894, 902, 906 (10th Cir. 1975)*, rev'd *367 F. Supp. 258 (N.D. Okla. 1973)*, cert. dismissed, 423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975).

²This court has stated that in determining whether a defendant's conduct constitutes the willful acquisition or maintenance of monopoly power required for the offense of monopolization, "the test is whether the defendant's acts, otherwise lawful, were unreasonably restrictive of competition." *CalComp, 613 F.2d at 735-36* (footnote omitted) (emphasis in original). Likewise, we have said that to determine whether defendant's conduct constitutes the kind of predatory or anticompetitive action required for the offense of attempt to monopolize, "individual conduct is measured against the same 'reasonableness' standard." *Id. at 737.*

[**11] Transamerica also charges that IBM's redesign of the System 370 Model 115 and 125 CPUs unreasonably restricted competition. The 115 and 125 models were the smallest of IBM's System 370 CPUs. The models included a channel for attaching slower speed devices. The district court found that IBM redesigned the models to operate just short of the speed that would have enabled peripherals manufactured by PCMs to attach, and thus that the change unreasonably restricted competition. [Transamerica Computer, 481 F. Supp. at 1006-08.](#)

The district court, however, refused to award Transamerica damages for two reasons. First, it found that IBM did not possess monopoly power in the requisite market. Second, it found that Transamerica did not suffer any injury as a result of IBM's conduct because

the market for the tapes excluded by this conduct was insignificant. Only tape drives with data rates between 30 and 50KB were affected. Those were older, low performance technology devices that would only have been competitive at prices far below those contemplated in Transamerica's damage claim. Transamerica probably owned some of them, but its President didn't know how many, and any Transamerica [**12] owned were purchased in the second Telex tape contract. Because that contract was not an arms-length transaction, this Court would be reluctant to award Transamerica any damages on the equipment purchased thereunder. Also, there is no evidence that Transamerica in the past supplied peripherals for the 115/125 migrator systems, or that it intended to, or took any steps to supply peripherals for the 115 and 125 systems.

[Transamerica Computer, 481 F. Supp. at 1008 n. 109.](#)

We need not consider the first of these findings -- that IBM lacked monopoly power -- because we hold that the district court's finding that Transamerica suffered no damages attributable to the redesign of the Models 115 and 125 is not clearly erroneous. Without proving antitrust injury, Transamerica cannot recover for the antitrust violation if, in fact, any violation occurred. [CalComp, 613 F.2d at 732.](#) We affirm the district court's holdings on IBM's design changes.

PREDATORY PRICING

A. *The District Court's Findings*

In response to the challenge from the PCMs, IBM introduced several "new" products which actually were repackaged versions of existing products. The "new" products were priced below [**13] the older versions. Transamerica asserts that these lower prices were predatory.

The district court carefully examined these price cuts. [Transamerica Computer, 481 F. Supp. at 996-1002.](#) It concluded that IBM expected the new products to "return substantial profits," [id. at 997](#); that, in fact, the products were profitable; and that the prices at issue exceeded the average total cost of producing the products. [Id. at 1002.](#) After an extensive analysis, the court concluded that IBM's pricing policy was legal.

The district court's finding that the challenged prices exceeded IBM's average cost is not clearly erroneous.³ The district [*1384] court, however, applied an incorrect test in deciding whether such prices are predatory. We set out the correct test below, apply that test to this case, and conclude that IBM's pricing policy was legal.

³ At trial, IBM presented evidence that the prices challenged by Transamerica were above average total cost. Transamerica contended that IBM's prices, after application of several accounting adjustments, were below average total cost. The district court held that the adjustments were inappropriate. [Transamerica Computer, 481 F. Supp. at 998-1001.](#) Transamerica does not appeal this ruling.

Transamerica also asked the district court to include "impact costs" in calculating IBM's profits. Impact costs are the "reduction in anticipated future profits on an existing product line caused by the introduction of a new product line." [In re IBM Peripheral EDP Devices Litigation, Transamerica Computer Co. Inc. v. IBM, 459 F. Supp. 626, 631 \(N.D. Cal. 1978\).](#) The district court ruled before trial that impact costs should not be included in calculating total costs because to do so would create a disincentive to research and innovation and because impact costs are difficult to calculate. *Id.* Despite this pre-trial ruling, Transamerica was

[**14] B. *The Economic and Legal Background*

We differ with the district court on the proper analysis of situations where a defendant's prices are alleged to be predatory even though they exceed the defendant's average total cost. To analyze such situations, a preliminary discussion of economic terminology and legal precedents is helpful.

HN3 [↑] Predatory pricing occurs when a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1031-32 (9th Cir. 1981), cert. denied, 459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61 (1982); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 856 (9th Cir. 1977), cert. denied, 439 U.S. 829, 58 L. Ed. 2d 122, 99 S. Ct. 103 (1978); L. Sullivan, *Handbook of the Law of Antitrust* 109 (1977). It can be difficult, however, to distinguish predatory price cuts intended to eliminate competition from legitimate price cuts designed to meet or beat competition. An influential attempt to clarify the distinction was made by Professors Phillip Areeda [**15] and Donald Turner, who proposed a "cost-based" test for predation.⁴ Under such a test, the relation between the cost of producing a product and the price charged for it is the criterion for determining whether the price is predatory.

Economists, however, measure a firm's costs in a number of ways, and these measures are relevant in understanding the Areeda-Turner proposal and this court's reaction to it. Costs are divided into *fixed costs* (those that do not vary with changes in output) and *variable costs* (which do so vary). *Total cost* is the sum of fixed and variable costs. *Marginal cost* is the increment to total cost that results from producing an additional unit of output. *Average cost*, or *average total cost*, is obtained by dividing total cost by output. Likewise, *average variable cost* is the sum of all variable costs divided by output. Average cost [**16] [*1385] is thus higher than average variable cost for all output levels.⁵

Areeda and Turner suggest that prices be considered *per se* lawful (i.e., non-predatory) if they exceed the defendant's marginal cost or average variable cost,⁶ [**17] and that prices be considered *per se* illegal (predatory) if they are below marginal or average variable cost.⁷ The rationale for this cost-based *per se* test is the belief that a company that makes a profit, however small, on each additional product does so because it is efficient, and should

allowed to introduce evidence of impact costs. Transamerica Brief at 21, 50; 72 Tr. 12445-519, 73 Tr. 12541-47, 12568-97, 12614-19, 12645-50, 12666-87. Transamerica does not contend on appeal that it was precluded from introducing any evidence on impact costs. Although evidence of impact costs was before the district court, it did not discuss such costs in reaching its findings of fact on Transamerica's predatory pricing claim. On appeal, Transamerica contends the district court committed prejudicial error in foreclosing consideration of impact costs.

Our review of the record indicates that these costs were speculative. IBM's old products were also being displaced by products produced by PCMs. While IBM might have "lost" profits through the introduction of new products, it arguably would have lost more without the new products. The profits that Transamerica claims IBM could have reaped from its old products might never have been realized by IBM because of competition from the PCMs. In these circumstances, we cannot say that the district court was clearly erroneous in not including impact costs in its calculations. *But see* Ordover and Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 Yale L.J. 8, 26 n. 49 (1981). We do not foreclose the possibility that impact costs ought to be considered when appropriate.

⁴ Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975).

⁵ See 3 P. Areeda & D. Turner, *Antitrust Law* P 712, for a full discussion of these terms.

⁶ Areeda and Turner favor using marginal cost as "the economically sound division between acceptable, competitive behavior and 'below-cost' predation." Areeda & Turner, *supra* note 4, at 716. They recognized, however, that marginal cost is usually difficult or impossible to compute and suggested using average variable cost -- which is likely to approximate marginal cost -- as a surrogate. *Id.* at 716-18.

⁷ Areeda and Turner make an exception where marginal cost exceeds average total cost. In this rare case, the price "floor" for permissible pricing is average total cost. Areeda & Turner, *supra*, note 4, at 713.

not face antitrust challenges, whereas a company that loses money on the sale of an additional product is doing so presumably for anti-competitive reasons.

The Areeda-Turner test has provoked much judicial and academic comment.⁸ [**19] This court has been influenced by the Areeda-Turner test without unqualifiedly embracing it. In a series of opinions during the three years preceding the district court's decision reviewed here,⁹ we approved the use of marginal or average variable cost in establishing predation without making that mode of proof exclusive, as Areeda and Turner advocate. Indeed, we adopted neither the Areeda-Turner test's conclusive presumption that prices above marginal or average variable cost are legal, nor its conclusive presumption that prices below that cut-off point are predatory. It is true that in *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 [*1386] n.6 (9th Cir. 1976), cert. denied, 429 U.S. 1074, 50 L. Ed. 2d 792, 97 S. Ct. 813 (1977), we spoke of "proof of pricing below marginal or average variable [**18] cost" as a "prerequisite to a *prima facie* showing of an attempt to monopolize." Nevertheless, we suggested that prices above marginal or average variable cost might, in appropriate circumstances, be found predatory, *id. at 1358 n.5*, and we reiterated that point in *CalComp*, 613 F.2d at 743. We also explicitly denied that prices below marginal or average variable cost were *per se* unlawful. *Hanson*, 541 F.2d at 1359 n.6. In short, the closest we were willing to move to the Areeda-Turner approach was to acknowledge that a "price set at or above marginal cost should not *ordinarily* form the basis for an antitrust violation." *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d at 857 (footnote omitted) (emphasis added).

Any doubt that this circuit rejects the *per se* aspects of the Areeda-Turner test was dispelled in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014 (9th Cir. 1981), cert. denied, 459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61 (1982), decided after the district court's decision in the instant case. In *Inglis* we

⁸ While no courts have explicitly adopted the Areeda-Turner test in its entirety for all cases, a number of courts have adopted elements of the Areeda-Turner test. See, e.g., *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 87-88 (2d Cir. 1981), cert. denied, 455 U.S. 943, 102 S. Ct. 1438, 71 L. Ed. 2d 654 (1982); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 431-32 (7th Cir. 1980); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), cert. denied, 434 U.S. 879, 98 S. Ct. 234, 54 L. Ed. 2d 160 (1977); *National Ass'n of Regulatory Util. Comm'r's v. FCC*, 173 U.S. App. D.C. 413, 525 F.2d 630, 637-38 & n.34 (D.C.Cir.), cert. denied, 425 U.S. 992, 96 S. Ct. 2203, 48 L. Ed. 2d 816 (1976); *International Air Indus. Inc. v. American Excelsior Co.*, 517 F.2d 714, 723-25 (5th Cir. 1975), cert. denied, 424 U.S. 943, 47 L. Ed. 2d 349, 96 S. Ct. 1411 (1976).

The Areeda-Turner test also generated a number of counter proposals for evaluating predatory pricing. Sullivan, for example, suggests that courts look to "human animus" in market conduct. He would focus on the "traces" a predator leaves behind, such as documents containing information about competitors. Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 127 U. Pa. L. Rev. 1214, 1229-30, 1232 (1977).

Joskow and Klevorick suggest a complex cost-based test in which market structure is considered and the defendants have a greater burden to produce documentation of their costs. Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979).

Williamson considers output a more important factor than cost or price. He would prohibit a monopolist confronted with a new competitor from increasing its output for twelve to eighteen months. This restraint would diminish as the entrant gained experience and economies of scale. Williamson, *Predatory Pricing*, 87 Yale L.J. 284 (1977).

For the most recent discussion of these ideas and the Areeda-Turner test see Note, *Predatory Pricing: The Retreat From the AVC Rule and the Search for a Practical Alternative*, 22 B.C.L. Rev. 467 (1981).

See also Ordover and Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 Yale L.J. 8 (1981); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 Yale L.J. 1 (1979); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977).

⁹ *California Computer Products, Inc. v. IBM*, 613 F.2d 727 (9th Cir. 1979); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), cert. denied, 439 U.S. 829, 58 L. Ed. 2d 122, 99 S. Ct. 103 (1978); *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), cert. denied, 429 U.S. 1074, 50 L. Ed. 2d 792, 97 S. Ct. 813 (1977).

explained that prices are predatory when their justification rests, "not on their effectiveness in minimizing losses, but on their tendency to eliminate rivals and create a market structure enabling the seller to recoup his losses." *Id.* at 1035.¹⁰ We emphasized that this standard, "and not rigid adherence to a particular cost-based rule . . . must govern our analysis of alleged [**20] predatory pricing." *Id.* Yet *Inglis* did not, as Transamerica contends here, repudiate all cost-based tests. Rather, it laid down a cost-based test for allocating the burden of proof on the predation issue in place of one designed (like the Areeda-Turner test) to resolve that issue conclusively:

HN4[] To establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a *prima facie* case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

Id. at 1035-36.

[**21] C. The Treatment of Prices Above Average Total Cost

The *Inglis* test, quoted above, addresses only two categories of prices -- those below average variable cost (which, under burden shifting, the defendant must prove are non-predatory)¹¹ and those above average variable cost but below average total cost (which the plaintiff has the burden of proving are predatory). The *Inglis* test says nothing about how to evaluate prices for antitrust purposes that exceed average total cost. Indeed, *Inglis* explicitly left this question open. *668 F.2d at 1035 n.30.*

In the instant case, the district court, which did not have the benefit of *Inglis* and its clarification of our previous discussions of the Areeda-Turner test, held that prices above average total cost "should be conclusively presumed legal." *Transamerica Computer, 481 F. Supp. at 991.*¹² We disagree [**22] for several reasons.

[*1387] First, **HN5[]** this court has already recognized that prices exceeding average total cost might nevertheless be predatory in some circumstances. The specific example we discussed was "limit pricing," in which a monopolist sets prices above average total cost but below the short-term profit-maximizing level so as to discourage new entrants and thereby maximize profits over the long run. See 3 P. Areeda & D. Turner, *supra* P 714b. We explained that "limit pricing by a monopolist might, on a record which presented the issue, [**23] be held an impermissible predatory practice." *CalComp, 613 F.2d at 743.* A similar pricing strategy would be for a monopolist to make *temporary* reductions to a level above average total cost but below the profit-maximizing price whenever a new entrant appears ready to enter the market. One or two such reductions could discourage potential entrants in a market that requires sizable initial investments, leaving the monopolist free to raise his prices to monopoly levels. See 3 P. Areeda & D. Turner, *supra* P 714c. Such a pricing strategy, like limit pricing, could well be found predatory.¹³

¹⁰ See also *D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co., 692 F.2d 1245, 1249 (9th Cir. 1982).*

¹¹ Of course, plaintiff initially bears the burden of proving that defendant's price did in fact fall into this category of suspect prices.

¹² To this extent the district court was, as it noted, agreeing with Areeda and Turner. *Transamerica Computer, 481 F. Supp. at 991.* It disagreed with them, however, by concluding that prices below average total cost are not *per se* lawful even if they exceed average variable cost. *Id. at 991-95.* The treatment of prices between average total cost and average variable cost has since been settled in this circuit by *Inglis* and is not at issue here.

¹³ We do not mean to suggest that all pricing that is not profit maximizing in the short run is illegal. As we stated in *Inglis*, prices below the level at which profit is maximized "may legitimately be justified on long-term considerations, as long as those do not include the anticipation of enhanced market power as a result of predation." *Inglis, 668 F.2d at 1034 n.29.*

Second, the district court's **[**24]** *per se* test rests on the notion that price reductions to average total cost result from efficient production and harm only less efficient competitors. *Transamerica Computer, 481 F. Supp. at 991*. But companies may lower their prices for temporary strategic reasons as well. One critic of the Areeda-Turner test points out that a monopolist can employ price strategies that jeopardize consumers' long-run welfare without lowering prices below average total cost and concludes that "it is unrealistic and even analytically wrong to apply a simple short-run price-cost rule for determining whether exclusionary pricing by a monopolist is socially undesirable and therefore predatory." Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869, 890 (1976). It may be difficult in many or most instances to assess the long-run consequences of challenged pricing policies.¹⁴ But where those difficulties can be overcome, the law should not prevent plaintiffs from proving antitrust violations.

[25]** Third, the uncertainty and imprecision inherent in determining "costs" counsel against basing conclusive presumptions on the relation between prices and costs. Assessing those relations for the products of a multi-product firm requires allocating known and estimated costs and revenues among various products. While accounting problems do not warrant ignoring cost figures completely, they do make it unwise to rely exclusively on such figures.

Finally, we should hesitate to create a "free zone" in which monopolists can exploit their power without fear of scrutiny by the law. A rule based exclusively on cost forecloses consideration of other important factors, such as intent, market power, market structure, and long-run behavior in evaluating the predatory impact of a pricing decision.¹⁵

[26] [*1388]** For these reasons, we disagree with the district court's conclusion that prices above average total cost should be legal *per se*. Rather, we believe that *Inglis* adopted the proper approach to the use of cost figures in determining whether prices are predatory: cost categories should be used to allocate the burden of proof on the issue of predation. By this approach, we give due weight to the economic considerations which suggest that prices are presumptively lawful if they exceed marginal or average variable cost and presumptively predatory if they do not. And, of course, this approach does not preclude a litigant from introducing evidence sufficient to overcome these presumptions. *Inglis* followed this approach in evaluating prices below average variable cost and prices between average variable cost and average total cost. The logic of the *Inglis* approach applies with equal force in evaluating prices above average total cost.

The test for determining the antitrust legality of prices that exceed average total cost should be consistent with the *Inglis* approach and with our view that cost-price relations should not be the exclusive method of proving predation. **[**27]** In addition, the test should be consistent with the economic analysis of Areeda and Turner. Their analysis indicates that prices above average total cost will rarely be predatory.¹⁶ Therefore, it is appropriate to impose on

¹⁴ Cf. Areeda & Turner, *Scherer on Predatory Pricing: A Reply*, 89 Harv. L. Rev. 891, 897 (1976); 3 P. Areeda & D. Turner, *supra* note 5, P 715, at 166-67.

¹⁵ The Seventh Circuit also recognizes the importance of considering non-price factors in evaluating whether a pricing policy is predatory. *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980); see also *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, slip op. at n.58 (7th Cir. 1983). Cf. *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), cert. denied, 434 U.S. 879, 98 S. Ct. 234, 54 L. Ed. 2d 160 (1977).

This is also the position of the National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General (Jan. 22, 1979). As the Deputy Attorney General for the Antitrust Division noted, cost-based tests do not "truly reflect marketplace realities and provide for anticompetitive behavior." He also noted that even Areeda and Turner "are now troubled by excluding factors like direct evidence of intent." Remarks of Ky P. Ewing, Jr., Deputy Assistant Attorney General, Antitrust Division, before the Fifth Annual Symposium on *Antitrust Law*, The Southwestern Legal Foundation, Dallas, Texas, on May 9, 1980. [1980] Trade Reg. Rep. (CCH) P 55,936. The report recommends that the Sherman Act should be amended to provide that, although marginal cost should be considered in determining whether prices are predatory, showing of pricing below marginal cost should not be a prerequisite to make out an attempt to monopolize based on pricing practices. Report to the President at 40.

the plaintiff a greater burden of proving that prices above average total cost are predatory than the burden imposed by *Inglis* to prove that prices between average variable and average total cost are predatory. We therefore hold that **HN6**¹⁶ if the challenged prices exceed average total cost, the plaintiff must prove by clear and convincing evidence -- i.e., that it is highly probably true -- that the defendant's pricing policy was predatory.

D. ****28** *The Proper Test Applied to This Case.*

While we modify the test applied by the district court, we affirm the court's decision that IBM's pricing policy did not violate the antitrust laws.¹⁷

The district court found that IBM's prices were above its average total cost. *Transamerica Computer*, 481 F. Supp. at 1002. This finding was not clearly erroneous. Thus, to prevail on its claim of predatory pricing, Transamerica must prove by clear and convincing evidence that IBM's pricing policy unreasonably restricted competition. The exhaustive trial record, containing a plethora of evidence on pricing behavior, market structure, production ****29** costs, marketing strategies, and other related information, fails to provide any clear and convincing evidence of predatory pricing.¹⁸ ****30** Transamerica did not, for example, introduce evidence that IBM's prices rose once competition had left the market. The only price increases cited by Transamerica were modest increases in the mid-1970's. During that ***1389** inflationary period, however, IBM increased prices on all its products, not just those involved in this case. Transamerica did not prove that IBM engaged in limit pricing.¹⁹ Transamerica simply introduced evidence of an initial price cut, hardly an unusual act in the computer industry or unusual in the face of competition. Transamerica's evidence of predatory pricing falls far short of the type of clear and convincing evidence that would permit the trier of fact to find predatory pricing when prices are above average total cost.

****31** CONCLUSION

¹⁶ Predatory pricing should not be countenanced merely because it would be difficult to detect in situations where price exceeds average total cost. See *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 432 (9th Cir. 1980) ("Section 2 of the Sherman Act makes no exceptions for cases involving administrative difficulty.").

¹⁷ **HNT**¹⁷ "We may uphold correct conclusions of law even though they are reached for the wrong reason or for no reason, and we may affirm a correct decision on any basis supported by the record." *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981), cert. denied sub nom. *Duwamish Indian Tribe v. Washington*, 454 U.S. 1143, 71 L. Ed. 2d 294, 102 S. Ct. 1001 (1982).

¹⁸ At trial, Transamerica was not precluded from introducing evidence of predatory pricing. The district court's ruling that prices above average total cost are *per se* legal was made after the trial concluded.

¹⁹ While Transamerica contends that it proved that IBM engaged in limit pricing, the evidence suggests otherwise. Limit pricing exists where entry barriers are "great enough to prevent other entry," *Hanson*, 541 F.2d at 1358 n.5, or are "extremely high," *Pierce Packing Co. v. John Morrell & Co.*, 633 F.2d 1362, 1366 (9th Cir. 1980). Here, the district court found that the entry barriers to the peripherals market were "extraordinarily low." *Transamerica Computer*, 481 F. Supp. at 987.

Further, a limit price is designed to deter entry into the market. To be limiting, therefore, the price must generally be below competitors' prices. Here, "IBM's prices did not undercut the PCM's prices, they did not even equal them, they merely closed the gap; the PCM's prices were still lower." *Id. at 1002*.

The evidence also suggests that IBM's prices did not have a limiting effect. A number of companies entered the peripherals market and took substantial business from IBM. *Id.* at 986. The early success of the PCMs suggests that no limit pricing occurred.

Finally, while *CalComp* held that "limit pricing by a monopolist might, on a record which presented the issue, be held an impermissible predatory practice," *613 F.2d at 743*, *CalComp* found that IBM's prices did not constitute limit pricing but rather were a lawful response to competition. *Id.* Transamerica's evidence is indistinguishable from *CalComp*'s. As in *CalComp*, we find that the evidence does not indicate that IBM engaged in limit pricing.

Thus, even assuming that IBM possessed monopoly power in the relevant market, its lease plan, design changes, and pricing policy did not constitute unreasonable restrictions on competition. On this record, IBM was entitled to judgment as a matter of law. Therefore, we need not consider whether the district court erred in finding that IBM did not possess monopoly power, *Transamerica Computer*, 481 F. Supp. at 974-87, or that Transamerica had failed to prove damages. *Id.* at 1010-21.

The judgment is AFFIRMED.

Concur by: LUCAS

Concur

LUCAS, District Judge, concurring:

I agree that the judgment of the district court in favor of defendant should be affirmed. I disagree, however, with the court's modification of the trial court's test for predatory pricing.

Professors Areeda and Turner, in their article, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975), proposed an exhaustive *per se* rule for determining whether pricing conduct should be deemed predatory: (1) prices above reasonably anticipated average variable cost should be conclusively presumed lawful; and (2) prices below reasonably anticipated average [**32] variable cost should be conclusively presumed unlawful.¹ In the nearly seven years since this article appeared many courts have considered this suggestion. See Spivak, *Monopolization Under Sherman Act*, *Section 2*, 50 *Antitrust Law* Journal 285, 313-14 n.132 (1982). Although it appears that no court has adopted this proposed rule without modification or qualification, many courts have agreed with Areeda and Turner that the relationship between prices and average variable cost is of significance in evaluating pricing behavior under the Sherman Act. *Id.* This court, in *William Inglis & Sons, Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014 (9th Cir. 1981), cert. denied, 459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61 (1982), made clear that the relationship was to be used to allocate the burden of proof on the issue of predation, rather than to resolve the issue conclusively. In thus modifying Areeda and Turner's suggested rule, the court explicitly declined to address their [*1390] more modest yet important suggestion that prices above average *total* cost should be conclusively presumed legal.² Judge Schnacke found this limited rule to be sound and used [**33] it in granting judgment in favor of defendant. In my opinion, the trial court was correct.

[**34] In rejecting the approach taken by Judge Schnacke, the court expresses four concerns. First the court points out that under certain circumstances price reductions might properly be labeled "predatory" even though prices never fall to average total cost or below. Two examples are given, both of which have often been discussed by the academic and by the courts: limit pricing and temporary price reductions in an industry with high entry barriers. See, e.g., Areeda & Turner, *supra*, at 705-09; *In re IBM Peripheral EDP Devices Antitrust Litigation*, *Transamerica Computer Co. Inc. v. IBM*, 481 F. Supp. 965 (N.D. Cal. 1979) [Transamerica Computer]; Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976). The second concern voiced by the court is that the district court erred in assuming that all "price reductions to average total cost result from

¹ Noting that "marginal cost data are typically unavailable," Professors Areeda and Turner use average variable cost as a surrogate for marginal cost. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 717 (1975).

² *Inglis, supra*, 668 F.2d 1014, 1035 n.30. Average total cost is, by definition, always higher than average variable cost. See Areeda & Turner, *supra*, note 1, at 700-01. A *per se* rule tied to average total cost creates, therefore, a smaller area in which pricing conduct will be presumed to be legal than a rule tied to average variable cost. (It is true that average variable cost is used as a surrogate for marginal cost and that marginal cost can, in some unusual cases, exceed average total cost. *Id.* Areeda and Turner modify their marginal cost rule in these cases, however, to provide that prices below marginal cost are legal if they exceed average total cost. *Id.* at 712-13.)

efficient production and harm only less efficient competitors." *Ante*, at 1387. This, however, merely restates the first concern noted by the court, for the only price reductions not attributable to efficient production which should be labeled "predatory" are those which harm equally or more [**35] efficient competitors. These fall into the two categories noted in the above examples. Indeed, the court's final argument, that "we should hesitate to create a 'free zone' in which monopolists can exploit their power without fear of scrutiny by the law," expresses the same fear voiced in the first two arguments.

The fear that some pricing conduct in the realm above average total cost might have socially undesirable effects in the long run does not, however, necessarily provide an adequate justification for adopting the rule approved by the court. One must also evaluate the practical utility of the rule, the consequences of adopting such a rule, and the advantages which a contrary rule, in this case a *per se* rule, might provide.

The court concedes that pricing conduct above average total cost will only "rarely" have socially undesirable effects and, thus, constitute predation. *Ante*, at 1388.³ Thus, even absent any practical problems of proof, the court's rule will seldom yield a result different from that which a *per se* rule would yield. The court also recognizes, however, that there will be problems of proof in this area. *Ante*, at 1387 n.14. It will be extremely [**36] difficult if not impossible to prove up facts sufficient to support a finding of predation where prices do not drop below average total cost. See *Transamerica Computer, supra, 481 F. Supp. at 991*. These practical difficulties, combined with the higher burden of proof imposed by the court today, raise a serious question as to whether liability will in fact be imposed in those rare cases in which it might be.

Yet, while the court's rule is likely to have little practical utility, it could well inhibit socially desirable conduct. As Judge Schnacke noted below:

It would be all but impossible to distinguish between above cost limit pricing conduct and a monopolist's [**37] procompetitive reaction to lower priced competitors. [*1391] One external characteristic is common to both cases, a lowered price. An attempt to attach liability to the one will surely inhibit the indistinguishable other.

Transamerica Computer, supra, at 991 (footnotes omitted). Furthermore, the rule approved by the court may well increase the number of meritless antitrust actions filed: without a reasonable "safe harbor" in which to seek shelter, every monopolist engaged in legal price competition above average total cost will be a potential target for attack by a competitor attempting to prove that its case is one of the rare instances of predatory pricing conduct.

In addition to these shortcomings, it cannot be doubted that the court's rule will increase the difficulty of trying complex antitrust cases. Cf. *Inglis, supra, at 1063-64* (Judge Wallace dissenting from denial to rehear *en banc* voiced similar concerns with the court's rejection of the marginal cost rule). A *per se* rule, by contrast, would provide a manageable way of significantly simplifying some aspects of many cases.

In addition to the court's fear of monopolist exploitation of the "free [**38] zone" above average total cost, the court gives an additional ground for rejecting a *per se* rule: the difficulty of calculating costs. Because such costs are difficult to calculate, the court finds it unwise to base conclusive presumptions on the price-cost relationship. Though difficult, the task of calculating costs is not impossible. As with other difficult factual issues, the finder of fact, aided by expert testimony, will, I believe, be able to determine average total cost with reasonable precision. Thus, I cannot agree that the difficulty of calculating costs warrants rejection of a useful and sound decisional tool such as the *per se* test tied to average total cost.

On balance, I find the limited *per se* rule adopted by Judge Schnacke to be preferable to the test approved by the court today. I would affirm the judgment without modifying the trial court's test for predatory pricing.

³ Even Spivak, who disagrees vigorously with the price tests put forward by Areeda and Turner, concedes that where prices are above average total cost, courts could "almost invariably" decide the predatory pricing issue on cost data alone. See Spivak, *Monopolization Under Sherman Act, Section 2*, 50 Antitrust L.J. 285, 315-16 (1982).

End of Document



Hallie v. Eau Claire

United States Court of Appeals for the Seventh Circuit

October 29, 1982, Argued ; February 17, 1983, Decided

No. 82-1715

Reporter

700 F.2d 376 *; 1983 U.S. App. LEXIS 30428 **; 1983-1 Trade Cas. (CCH) P65,227

TOWN OF HALLIE, Town of Seymour, Town of Union and Town of Washington, Wisconsin townships, Plaintiffs-Appellants, v. CITY OF EAU CLAIRE, a Wisconsin municipal corporation, Defendant-Appellee

Prior History: [**1] On Appeal from the United States District Court for the Western District of Wisconsin.

No. 80 C 527 -- John C. Shabaz, Judge.

Core Terms

municipal, state policy, sewage treatment, articulated, supervision, immunity, sewage, authorization, annexed, district court, antitrust, state action, Sherman Act, exempt, anticompetitive conduct, refuse to provide, anti trust law, anticompetitive, transportation, monopoly, collection, local government, compulsion, sovereign, Falls

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN1[] Exemptions & Immunities, Parker State Action Doctrine

Cities are not themselves sovereign; they do not receive all the federal deference of the states that create them. The limitation of the antitrust exemption to official action directed by a state, is consistent with the fact that the States' subdivisions generally have been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the nation's economic goals reflected in the antitrust laws, the courts are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Public Improvements > General Overview

Real Property Law > Subdivisions > State Regulations

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN2 [down] Exemptions & Immunities, Parker State Action Doctrine

The Parker doctrine exempts from antitrust laws, anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > General Overview

HN3 [down] Exemptions & Immunities, Parker State Action Doctrine

Municipal corporations are instrumentalities of the state for the convenient administration of government and a state may choose to effect its policies through the instrumentality of its cities and towns.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN4 [down] Exemptions & Immunities, Parker State Action Doctrine

If the state authorizes certain conduct, the court can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN5 [down] Exemptions & Immunities, Parker State Action Doctrine

The state need not compel a municipality to undertake an anticompetitive activity as a prerequisite for municipal immunity. The only immunity available to municipalities is that derived from the immunity granted to the states. The critical inquiry is to determine if the anticompetitive conduct undertaken by a municipality constitutes state action. Any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences an intent of the legislature to displace competition with regulation -- whether compelled, directed, authorized, or in the form of a prohibition -- is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN6 [down] Exemptions & Immunities, Parker State Action Doctrine

If the state compels or directs a municipality to undertake anticompetitive conduct, this compulsion or direction is strong evidence of a state policy to displace the antitrust laws.

Governments > Public Improvements > Sanitation & Water

HN7[] Public Improvements, Sanitation & Water

See Wis. Stat. § 66.069(2)(c).

Governments > Public Improvements > Sanitation & Water

HN8[] Public Improvements, Sanitation & Water

Wis. Stat. § 66.069(2)(c) applies to water utilities. Its provisions are incorporated into the statute governing municipal sewage systems by Wis. Stat. § 66.076(8).

Governments > Public Improvements > Sanitation & Water

HN9[] Public Improvements, Sanitation & Water

See Wis. Stat. § 144.07.

Governments > Local Governments > Boundaries

Governments > Public Improvements > Sanitation & Water

HN10[] Local Governments, Boundaries

Wis. Stat. § 144.07(lm) is constitutional. The statute balances and accommodates two matters of state concern: providing vital services to areas surrounding cities and the growth or expansion of cities or villages, with annexation as a means to bring all municipal services to areas annexed.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN11[] Exemptions & Immunities, Parker State Action Doctrine

State supervision is unnecessary to exempt municipal action from antitrust exemption because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity even though state supervision does not exist.

700 F.2d 376, *376L^A1983 U.S. App. LEXIS 30428, **1

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN12[] **Parker State Action Doctrine, Local Governments & Private Parties**

A state is not held to the high standard of active supervision of the conduct of a city performing a traditional municipal function for that city to receive antitrust immunity. The only requirement for receiving immunity when a traditional municipal function is involved is that the challenged restraint must be in furtherance or implementation of clearly articulated and affirmatively expressed state policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN13[] **Exemptions & Immunities, Parker State Action Doctrine**

Traditional municipal activity undertaken pursuant to clearly articulated and affirmatively expressed state policy and designed to promote public health and safety should be free from antitrust attack. When municipal activity strays from these functions, which includes the provision of basic services such as sewerage and sanitation, there is a more significant threat to free competition that may warrant active state supervision.

Counsel: Claude J. Covelli, Boardman, Suhr, Curry & Field, Madison, Wisconsin, for Plaintiff.

Frederick W. Fischer, Eau Claire, Wisconsin, for Defendant.

Judges: Eschbach, Circuit Judge, Coffey, Circuit Judge, and Wisdom, * Senior Circuit Judge.

Opinion by: WISDOM

Opinion

[*377] WISDOM, Senior Circuit Judge.

Four towns allege that a city is using a monopoly over sewage treatment services in [*378] the relevant geographic market to gain a monopoly in the markets for sewage collection and sewage transportation in violation of the Sherman Act, [15 U.S.C. § 1 et seq. \(1973\)](#), the Federal Water Pollution Control Act, [33 U.S.C. § 1251 et seq. \(1978\)](#), and a state common law duty of a utility to serve. On appeal, the towns contend that the district court erred in dismissing their claims under the Sherman Act on the ground that the conduct in question falls within the state action immunity doctrine of [Parker v. Brown, 1**21 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 \(1943\)](#). We conclude that the conduct in question is exempt from the antitrust laws under *Parker* and [Community Communications Company v. City of Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 \(1982\)](#), and we affirm the district court's decision.

I.

* Honorable John Minor Wisdom, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit sitting by designation.

The plaintiffs-appellants -- Town of Hallie, Town of Seymour, Town of Union, and Town of Washington ("Towns") -- are four Wisconsin townships that are adjacent to the City of Eau Claire ("City"). The City used federal funds to build a sewage treatment facility within the city limits, and this sewage treatment facility is the only such facility in the market available to the Towns. As a result, the City enjoys a monopoly in the market for sewage treatment services.¹

[**3] The City has refused to supply sewage treatment services to the Towns. The district court found that the City has provided sewage treatment services to individual landowners in the Towns only if they will agree to become annexed by the City and thereby obtain sewage collection and transportation services from the City. *Town of Hallie v. City of Eau Claire*, No. 80-C-527, slip op. at 1 (W.D. Wisc. April 5, 1982). By refusing to provide treatment services to the Towns, the City has prevented the Towns from competing in the markets for sewage collection and transportation. The Towns simply have no means of disposing of the sewage once they collect and transport it, so they do not collect it at all.

In their complaint seeking injunctive relief, the Towns alleged that the City's denial of sewage treatment services to them violated the Sherman Act, the Federal Water Pollution Control Act, and a common law duty of a utility to serve. The City moved to dismiss the complaint pursuant to Fed.R.Civ.Pro. 12(b), and the district court granted the motion. The district court dismissed the antitrust claims on the grounds that the City's conduct was exempt from the Sherman Act under *Parker* [**4] *v. Brown*.² The district court dismissed the Federal Water Pollution Control Act claim, holding that the Act does not provide a right to sue, that the Towns failed to pursue administrative remedies, and that the Act does not mandate the action that the Towns seek. After dismissing the federal claims, the district court dismissed the pendent state claim.

On appeal, the Towns contest only the denial of their antitrust claims. The Towns contend that the City's conduct is exempt from the Sherman Act only if it is in furtherance of clearly articulated [**5] and affirmatively expressed state policy and it is actively supervised by the State of Wisconsin. The Towns contend that state action immunity is unavailable to the City because it has met neither of these two requirements. The City contends that its denial of services to the Towns is authorized by clearly articulated state policy and that state action immunity protects its conduct.

[*379] II.

In *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), the Supreme Court addressed the issue whether the federal antitrust laws prohibited the State of California from adopting a program that prevented raisin producers from freely marketing their crop in interstate commerce. The Court held that the marketing program was exempt from the antitrust laws by virtue of limitations in the Sherman Act and concepts of federalism:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract [**6] 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.

317 U.S. at 350-51, 63 S. Ct. at 313, 87 L. Ed. at 326.

¹ The disposal of sewage is a three-step process. Sewage must be collected from the user, transported to the treatment facility, and treated and disposed of by the treatment facility. The City's monopoly in this case extends only to the third step.

² The Towns brought their antitrust claims under a number of theories. The first claim was that the City used its monopoly over sewage treatment to gain a monopoly over sewage collection and transportation. The second claim was that requiring the consumer to obtain sewage and collection services in order to gain sewage treatment services constituted an illegal tying arrangement. The third claim was that the City's conduct was an illegal refusal to deal with the Towns.

The Supreme Court later addressed the question whether the "state action" immunity exemption of *Parker v. Brown* was available to a state's municipalities.³ ^{**8]} In *City of Lafayette v. Louisiana Power & Light Co.*, [435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 \(1978\)](#),⁴ a private utility company brought suit under the Sherman Act against several Louisiana cities empowered to own and operate electric utility systems and alleged that they had committed various antitrust offenses in their operation of their utility systems. A majority of the Court rejected the contention that Congress did not intend the Sherman Act to apply to local governments, and a plurality of the Court stated:

HN1[] Cities are not themselves sovereign; they do not receive all the federal deference of the states that create them. *Parker*'s limitation of the exemption to "official action directed by a state," is consistent with the fact that the States' subdivisions generally have been treated ^{**7]} as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

[435 U.S. at 412-413, 98 S. Ct. at 1136, 55 L. Ed. 2d at 382-83](#). The Court recognized, however, that the state as sovereign might sanction anticompetitive activity by the municipalities and immunize this activity from antitrust liability.⁵ The Court concluded that **HN2[]** "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with [^{*380}] regulation or monopoly public service." *Id. at 413, 98 S. Ct. at 1137, 55 L. Ed. 2d at 383*.⁶

[9]** The Supreme Court returned to the issue of state action immunity for municipalities in *Community Communications Co. v. City of Boulder*, [455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 \(1982\)](#).⁷ The Court

³ During the period from 1943 to 1975, the Supreme Court did not address the state action immunity question. Since 1975, the Court has addressed the issue of immunity under *Parker* in seven cases. The Court responded to the concern that states and municipalities were sheltering too much conduct that contravened the antitrust laws, such as restrictive licensing practices, state action serving as a mask for private cartels, and instances of nominal state regulation in which the state took no active role. M. Handler, *Reforming the Antitrust Laws* 59 (1982). There was also the concern that regulated industries control their regulators and that private corporations use the political process to obtain monopoly profits. See R. Posner, *Economic Analysis of Law* 405-07 (2d ed. 1977).

⁴ For a discussion of the Court's decision in *City of Lafayette*, see Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435 (1981) [hereinafter "Antitrust Immunity"].

⁵ The Court recognized that **HN3[]** municipal corporations are instrumentalities of the state for the convenient administration of government and that a state may choose to effect its policies through the instrumentality of its cities and towns. *City of Lafayette*, [435 U.S. at 413, 98 S. Ct. at 1137, 55 L. Ed. 2d at 383](#). See *Community Communications Co. v. City of Boulder*, [455 U.S. 40, 51, 102 S. Ct. 835, 840, 70 L. Ed. 2d 810, 819 \(1982\)](#).

⁶ The Court in *City of Lafayette* reviewed a series of opinions dealing with the *Parker* exemption. The Court discussed *Bates v. State Bar of Arizona*, [433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 \(1977\)](#), which held that the antitrust laws did not apply to a ban on attorney advertising directly imposed by the Arizona Supreme Court. The Court emphasized that the state policy at issue in *Bates* was part of a comprehensive regulatory system, was clearly articulated and affirmatively expressed as state policy, and was actively supervised by the Arizona Supreme Court. *City of Lafayette*, [435 U.S. at 410, 98 S. Ct. at 1135, 55 L. Ed. 2d at 381](#). The Supreme Court in later cases has focused on the language requiring a "clearly articulated and affirmatively expressed state policy" and "active state supervision" in formulating the test to determine if conduct by governmental entities falls within the *Parker* exemption. See *Community Communications Co. v. City of Boulder*, [455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 \(1982\)](#); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, [445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 \(1980\)](#).

⁷ Between the decisions of *Lafayette* and *Boulder*, the Supreme Court addressed the issue of state action immunity in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, [445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 \(1980\)](#). The State of

addressed the question whether the *Parker* immunity extended to a "home rule" municipality that was granted extensive powers in local and municipal matters by the state constitution. The Court concluded that the restraint in question, a moratorium on the expansion of cable television enacted by the City Council of Boulder,⁸ could not be exempt from antitrust scrutiny unless it constituted the action of the State of Colorado itself in its sovereign capacity or municipal action in furtherance of clearly articulated and affirmatively expressed state policy. The Court held that the guarantee of local autonomy to municipalities through the Home Rule Amendment to the Colorado Constitution did not constitute the "clear articulation and affirmative expression" of state policy necessary for anticompetitive conduct to be protected under *Parker*. The Court found that the Home Rule Amendment was neutral with respect to the challenged activity and rejected the City's contention that **[**10]** the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances.

[11] III.**

The issue before the Court is to determine if the refusal of the City of Eau Claire to provide sewage treatment facilities to the Towns falls within the protection of *Parker v. Brown* as interpreted in *City of Lafayette* and *City of Boulder*. The holdings of these cases require that municipalities act pursuant to a clearly articulated and affirmatively expressed state policy. Before determining if such a state policy exists, we must resolve two preliminary issues.

First, the Towns contend that the conduct which must be pursuant to state policy is the City's use of monopoly power in sewage treatment services to monopolize sewage collection and transportation. The Towns argue that the district court erred in characterizing the anticompetitive conduct which must be pursuant to state policy as **[*381]** "the City's decision to provide sewage treatment services to the Towns if and only if they also permit the City to provide sewage collection and transportation services via annexation." According to the Towns, the City must point to a state policy authorizing the City's use of monopoly power over sewage treatment to gain monopolies in sewage collection and transportation.

[12]** We reject the Towns' argument that the authorization of the anticompetitive conduct complained of must be as specific as they request. In *City of Lafayette*, the Court rejected the position "that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust suit," and the Court went on to state that an adequate state mandate exists when it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of". [435 U.S. at 415, 98 S. Ct. at 1138, 55 L. Ed. 2d at 384](#). In this case, if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization.⁹ The district court properly focused on determining if authorization for the refusal to provide sewage treatment services exists rather than attempting to find a specific authorization for the monopolizing

California by statute required that wine suppliers set dealer resale prices and that dealers sell at those prices. The Court held that two standards must be met if this anticompetitive conduct were to receive antitrust immunity under *Parker v. Brown*. The challenged conduct must be one clearly articulated and affirmatively expressed as a state policy, and it must be actively supervised by the state. The Court struck down the statutory resale price maintenance scheme because there was no active state supervision over the private parties that were given the power to set prices under the statute. [Id. at 105-106, 100 S. Ct. at 943, 63 L. Ed. 2d at 243](#).

⁸ The City had enacted a moratorium on the expansion of cable television enterprises for a period of three months to give the City Council time to draft a model cable television ordinance and to invite new businesses to enter the market. The only existing cable television company in Boulder, Community Communications, sought injunctive relief to prevent the ordinance enacting the moratorium from taking effect.

⁹ See *Antitrust Immunity*, 95 Harv. L. Rev. at 445-46 (1981): "The Supreme Court has found it sufficient that 'the legislature contemplated the kind of action complained of.' A policy to displace antitrust laws will then be inferred if the challenged restraint of competition is a necessary or reasonable consequence of engaging in the authorized activity." *Id.* (quoting *City of Lafayette*, [435 U.S. at 415, 98 S. Ct. at 1138, 55 L. Ed. 2d at 384](#)).

effect that results from refusing to provide [**13] these services. [HN4](#)[[↑]] If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity.¹⁰

[**14] The second preliminary issue is the contention of the Towns that the City must point to a state policy *directing* or *compelling* the challenged conduct to gain *Parker* protection. There has been a great deal of confusion over whether the state must compel a municipality to undertake an anticompetitive activity in order to receive immunity under *Parker*. This confusion arose because of language in [Goldfarb v. Virginia State Bar, 421 U.S. 773, 791, 95 S. Ct. 2004, 2015, 44 L. Ed. 2d 572, 587 \(1975\)](#), and [Cantor v. Detroit Edison Co., 428 U.S. 579, 600, 96 S. Ct. 3110, 3122, 49 L. Ed. 2d 1141, 1155 \(1976\)](#), which appeared to require state compulsion as a prerequisite for municipal immunity. [HN5](#)[[↑]] We conclude that state compulsion is not required. It is clear in *City of Lafayette* and *City of Boulder* that the only immunity available to municipalities is that derived from the immunity granted to the states in *Parker*. The critical inquiry is to determine if the anticompetitive conduct undertaken by a municipality constitutes state action. We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences [**15] an intent of the legislature to displace competition with regulation -- whether compelled, directed, authorized, or in the form of a prohibition -- is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action.

Recent Supreme Court cases support our conclusion that compulsion is not required. The Court in *City of Boulder* and *City of Lafayette* explained that a state must only authorize the municipal activity for the *Parker* exemption to apply,¹¹ [**16] and many commentators have rejected the notion [*382] that compulsion is required.¹² Obviously, [HN6](#)[[↑]] if the state compels or directs a municipality to undertake anticompetitive conduct, this compulsion or direction is strong evidence of a state policy to displace the antitrust laws. We hold that the City must show only that clearly articulated and affirmatively expressed state policy authorizes the City's refusal to provide sewage treatment to the Towns to gain the state action immunity of *Parker*.

¹⁰ See P. Areeda, [*Antitrust Law*](#) § 212.3a, at 53-54 & n.8 (Supp. 1982) ("The courts have recognized that state statutes need not confer authorization expressly. It would be sufficient, the Supreme Court said, that 'the legislature contemplated the kind of action complained of.' A policy to displace the antitrust laws will then be found if the challenged restraint of competition is a necessary consequence of engaging in the authorized activity.").

¹¹ The court stated in *City of Boulder*:

Moreover, judicial enforcement of Congress' will regarding the state action exemption renders a state "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivision in exercising their delegated power must obey the antitrust laws."

[455 U.S. at 56-57, 102 S. Ct. at 843, 70 L. Ed. 2d at 822](#) (citations omitted) (emphasis supplied).

In *City of Lafayette*, the Court stated:

Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. *Parker* and its progeny make clear that a State properly may . . . direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws.

[435 U.S. at 416-17, 98 S. Ct. at 1138, 55 L. Ed. 2d at 385](#) (emphasis supplied), quoted in [City of Boulder, 455 U.S. at 57, 102 S. Ct. at 844, 70 L. Ed. 2d at 822](#).

¹² See P. Areeda, [*Antitrust Law*](#) § 212.5 (Supp. 1982); M. Handler, *Reforming the Antitrust Laws* 64-65 (1982); *Antitrust Immunity*, 95 Harv.L.Rev. at 445 ("Lafayette does not require that governmental acts be compelled or supervised by the state. Rather, it demands that the legislature have *authorized* the challenged activity with an intent to displace the antitrust laws.") (emphasis supplied); Page, *Antitrust Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L. Rev. 1099, 1122 n.141 (1981).

IV.

The Towns contend that the City's refusal to extend sewer services to them is not pursuant to clearly articulated and affirmatively expressed state policy. We disagree. Several statutes and court decisions interpreting those statutes give the City authority to decide where to extend sewer services and to insist on annexation as a condition to extending sewer services to the surrounding area.

Section 66.069(2) (c) of the Wisconsin Statutes provides that a city may fix the area in which to extend **[**17]** sewage services, and that a city has no obligation to serve beyond that area.¹³ **[**18]** This statute authorizes the City to fix the limits of its utility service and expressly provides that the City "shall have no obligation to serve beyond the area so delineated." In addition, section 144.07(lm) of the Wisconsin Statutes provides that the department of natural resources may order a city to extend its sewerage system to a town, but if that town then refused to become annexed to the city, the order becomes void and the city has no obligation to extend the sewerage system.¹⁴ This statute **[*383]** is evidence of a state policy to require annexation as a condition to receiving municipal services.

[19]** Our conclusion that state policy authorizes the City to refuse sewage treatment services unless the purchaser becomes annexed is strengthened by the holding of *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982). The Town of Hallie brought suit against Chippewa Falls under the state antitrust laws for the refusal of Chippewa Falls to provide sewage treatment facilities to the Town of Hallie unless the Town agreed to obtain other municipal services from Chippewa Falls. When the Town did not agree, the City annexed a portion of the Town. The court relied on the broad home rule provisions under Wisconsin law and §§ 66.069(2) (c) and 144.07(lm) to hold that state **antitrust law** did not apply to this conduct. The court stated:

Although the statutes do not specifically so provide, it seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer services to the area

While the facts of the present case are clearly not covered by this statute because no DNR order is involved, [sec. 144.07(lm)] is still helpful in indicating that the legislature **[**20]** seems to view annexation as an

¹³ **HN7**  Section 66.069(2) (c) provides:

Notwithstanding § 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

We note that **HN8**  § 66.069(2) (c) applies to water utilities. Its provisions, however, are incorporated into the statute governing municipal sewage systems by § 66.076(8).

¹⁴ **HN9**  Section 144.07 provides:

An order by the department for the connection of unincorporated territory to a city or village system or plant shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject to an order under this section may commence an annexation proceeding under § 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under § 66.024(4) is in favor of annexation, the territory shall be annexed to the city or village for all purposes, and sewerage service shall be extended to the territory subject to the order. If an application for an annexation referendum under § 66.024(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 90-day period, the order shall be effective.

HN10  The constitutionality of § 144.07(lm) was upheld in *City of Beloit v. Kallas*, 76 Wis.2d 61, 250 N.W.2d 342 (1977). The court held the statute balanced and accommodated two matters of state concern: providing vital services to areas surrounding cities and the growth or expansion of cities or villages, with annexation as a means to bring all municipal services to areas annexed.

appropriate prerequisite to the provision of sewage service outside the limits of a city. This seems reasonable because establishing and maintaining sewage treatment facilities can be a very substantial financial burden upon the city taxpayers and residents. If an area is to have the benefit of such services, it may be appropriate for it to be annexed in order to add to the city's tax base and help pay for the cost of providing such services.

314 N.W.2d at 325-26.

The *Town of Hallie* decision and the statutes that it interprets show that there is a clearly articulated and affirmatively expressed state policy not to burden municipalities with providing services unless they can annex the territory that they service. The City acted pursuant to and in a manner consistent with this policy by refusing to provide sewage treatment services to the Towns unless they agreed to become annexed and acquire the full range of sewage services. We hold that the conduct of the City in refusing to provide these services meets the standards of the *City of Boulder* requiring that the anticompetitive conduct was in furtherance of clearly articulated and affirmatively ^[**21] expressed state policy.

V.

The Towns contend that the State of Wisconsin must actively supervise the anticompetitive conduct for the City to gain the protection of *Parker v. Brown*. The "active state supervision" requirement arose in [California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 \(1980\)](#). *Midcal* involved a California statutory scheme allowing private wine suppliers to establish a program of resale price control to be enforced by the state. The State of California neither established nor reviewed the prices set by these private decision makers. The Supreme Court struck down the state law because it created a private price-setting mechanism that the state did not supervise. The Court concluded, "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." [Midcal, 445 U.S. at 106, 100 S. Ct. at 943, 63 L. Ed. 2d at 243.](#)

We do not conclude that *Midcal* requires active state supervision over the conduct ^[*384] in this case.¹⁵ ^[**23] The *Midcal* case involved private parties that were given ^[**22] power over price and that were free of state supervision. In this context, the requirement of active state supervision ensures that the private parties not abuse the anticompetitive power given to them and act pursuant to the state policy at stake. This case involves a local government performing a traditional municipal function. [HN1\[!\[\]\(d679a97fed7350b7cee161f1580a799f_img.jpg\)](#) Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity even though state supervision does not exist.¹⁶

¹⁵ In the *City of Boulder*, the Supreme Court left open the question whether a municipality must show active state supervision over its conduct in order to receive immunity under *Parker v. Brown*: "Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question whether that ordinance must or could satisfy the 'active state supervision' test focused upon in *Midcal*." [City of Boulder, 455 U.S. at 51 n.14, 102 S. Ct. at 841 n.14, 70 L. Ed. 2d at 819 n.14.](#)

In [Pueblo Aircraft Service v. City of Pueblo, 679 F.2d 805](#) (10 Cir. 1982), the Court did not require active state supervision for the City of Pueblo to receive *Parker v. Brown* immunity. The conduct in this case involved the City's operation of a municipal airport. The Court concluded that the key inquiry was whether the State of Colorado by affirmative legislative action granted the City an exemption from the operation of the antitrust laws by virtue of statutory language giving municipalities the authority to acquire and operate a municipal airport. Under this standard, the Court held the City's conduct to be exempt from the antitrust laws.

¹⁶ See P. Areeda, [Antitrust Law](#) § 212.2a, at 47 (Supp. 1982) ("Thus, requiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity."); *Antitrust Immunity*, 95 Harv. L. Rev. at 445 & n.49 ("Lafayette does not require that government acts . . . be supervised by the state.") ("a few courts erroneously appear to use the *Midcal* formula (clearly articulated state policy plus active public supervision of private parties) to require state supervision of governmental defendants"); Rogers,

[**24] We also conclude that requiring active state supervision over a traditional municipal function would be unwise. A requirement of active state supervision would erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of Wisconsin. States would be required to supervise all local actions if municipalities are to avoid antitrust exposure, and courts would have to make the difficult determination of what "active" supervision is in terms of frequency and effectiveness.¹⁷ We doubt that the Court in *Midcal* intended that the states spend their limited resources actively supervising the traditional governmental functions of their municipalities so that they can avoid antitrust liability.

[**25] We hold, therefore, that [HN12](#)[↑] a state is not held to the high standard of active supervision of the conduct of a city performing a traditional municipal function for that city to receive *Parker v. Brown* immunity.¹⁸ The only requirement for receiving immunity when a traditional municipal [*385] function is involved is that the challenged restraint must be in furtherance or implementation of clearly articulated and affirmatively expressed state policy. We do not question the holding of *Midcal*, but we conclude that the Court's concerns with the private price-fixing arrangement in that case are not present when local governments created by state law carry out governmental functions pursuant to clearly articulated and affirmatively expressed state policy.

[**26] VI.

Our examination of Wisconsin statutes and case law reveals that the challenged conduct is in furtherance of a clearly articulated and affirmatively expressed state policy. On the facts of this case, we conclude that the City must make no other showing to be entitled to immunity under *Parker v. Brown*. We hold that the district court properly dismissed the antitrust counts against the City, and we affirm the judgment of the district court.

End of Document

Municipal Antitrust Liability in a Federalist System, 1980 Ariz. St. L.J. 305, 340-342 ("It is questionable whether a showing of active state supervision is necessary for political subdivisions to gain *Parker* immunity, however, in spite of the seemingly unequivocal language of *California Retail Liquor*."). For an argument that the Supreme Court should abandon the active state supervision requirement completely, see Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L.Rev. 1099 (1981).

¹⁷ See [City of Boulder, 455 U.S. at 71 n.6, 102 S. Ct. at 851 n.6, 70 L. Ed. 2d at 831 n.6](#) (Rehnquist, J., dissenting) ("The Court understandably avoids determining whether local ordinances must satisfy the 'active state supervision' prong of the *Midcal* test. It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself.")

¹⁸ We reserve the question whether a municipality undertaking anticompetitive activity that falls outside the scope of a traditional governmental function must be actively supervised by the state to receive *Parker v. Brown* immunity. This reflects our belief that [HN13](#)[↑] traditional municipal activity undertaken pursuant to clearly articulated and affirmatively expressed state policy and designed to promote public health and safety should be free from antitrust attack. When municipal activity strays from these functions, which includes the provision of basic services such as sewerage and sanitation, there is a more significant threat to free competition that may warrant active state supervision. See *The Supreme Court, 1981 Term*, [96 Harv.L.Rev. 62, 171-273 \(1982\)](#).



Associated General Contractors v. Cal. State Council of Carpenters

Supreme Court of the United States

October 5, 1982, Argued ; February 22, 1983, Decided

No. 81-334

Reporter

459 U.S. 519 *; 103 S. Ct. 897 **; 74 L. Ed. 2d 723 ***; 1983 U.S. LEXIS 128 ****; 51 U.S.L.W. 4139; 96 Lab. Cas. (CCH) P14,028; 1983-1 Trade Cas. (CCH) P65,226; 112 L.R.R.M. 2753

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. v. CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL.

Prior History: [****1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: [648 F.2d 527](#), reversed.

Core Terms

damages, antitrust violation, anti trust law, firms, alleges, contractors, coercion, indirect, defendants', common-law, purchaser, nonunion, wages, restraint of trade, subcontractors, overcharges, injuries, cases, union dues, Clayton Act, Sherman Act, collective-bargaining, Appeals, parties, bargaining, conspiracy, antitrust, employees, violation of antitrust laws, amended complaint

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

HN1 Motions to Dismiss, Failure to State Claim

A court must assume that a party can prove the facts alleged in its amended complaint. It is not, however, proper to assume that a party can prove facts that it has not alleged.

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

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

HN2 Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

I I JÁNEJÁ FJÉÍ FJLÁCHÚÉODA JÍ ÉÍ JÍ LÁ I ÁSEÓaÉGÁÁ GHÁÉÍ GHÁJÍ HÁEÜÉSÓYÓÁFG ÓÉÉÉ

An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from a market. Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN3 Motions to Dismiss, Failure to State Claim

A district court retains the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

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

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

HN4 Private Actions, Standing

Even though coercion directed by a defendant at third parties in order to restrain trade may have been unlawful, it does not, of course, necessarily follow that still another party is a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

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

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

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

HN5 Standing, Clayton Act

The class of persons who may maintain a private damages action under the antitrust laws is broadly defined in § 4 of the Clayton Act, [15 U.S.C.S. § 15](#).

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

Antitrust & Trade Law > Clayton Act > General Overview

HN6 Private Actions, Standing

See [15 U.S.C.S. § 15](#).

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[Antitrust & Trade Law > Clayton Act > Scope](#)

[**HN7** \[down\] **Private Actions, Standing**](#)

The 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 Clayton Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

[Antitrust & Trade Law > Sherman Act > Remedies > Damages](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Antitrust & Trade Law > Sherman Act > Remedies > General Overview](#)

[**HN8** \[down\] **Remedies, Damages**](#)

Neither a creditor nor a stockholder of a corporation that is injured by a violation of the antitrust laws can recover treble damages under § 7 of the Sherman Act.

[Antitrust & Trade Law > Clayton Act > Claims](#)

[Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview](#)

[**HN9** \[down\] **Clayton Act, Claims**](#)

An antitrust violation may be expected to cause ripples of harm to flow through the nation's economy; but despite the broad wording of § 4 of the Clayton Act there is a point beyond which a wrongdoer should not be held liable. It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

[Antitrust & Trade Law > ... > Private Actions > Standing > Requirements](#)

[Civil Procedure > ... > Justiciability > Standing > Injury in Fact](#)

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Civil Procedure > Preliminary Considerations > Justiciability > General Overview](#)

[Civil Procedure > ... > Justiciability > Standing > General Overview](#)

[**HN10** \[down\] **Standing, Requirements**](#)

I Í JÁNEĀ FJĀĀ FJLĀ ĀHĀĀDĀ JĪ ĀĀ JÍ LĀ I ĀSEĀĀ ĀGĀĀ GĀĀĀ ĀHĀĀJÌ HĀĀĀSĀYĀĀGĀ ĀĀĀ

Harm to an antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but a court must make a further determination whether a plaintiff is a proper party to bring a private antitrust action.

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[**HN11**\[\] **Private Actions, Standing**](#)

What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations. What is meant by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.

[Antitrust & Trade Law > Clayton Act > Remedies > Damages](#)

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Antitrust & Trade Law > Clayton Act > Remedies > General Overview](#)

[**HN12**\[\] **Remedies, Damages**](#)

The availability of the § 4 of the Clayton Act remedy to some person who claims its benefit is not a question of the specific intent of the conspirators.

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions](#)

[**HN13**\[\] **Private Actions, Standing**](#)

A union, in its capacity as bargaining representative, will frequently not be part of a class the Sherman Act was designed to protect, especially in disputes with an employer with whom it bargains. In each case its alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall.

[Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview](#)

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

[Antitrust & Trade Law > Regulated Practices > Private Actions > Private Attorneys General](#)

[**HN14**\[\] **Private Actions, Remedies**](#)

The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to perform the office of a private attorney general.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN15 [] **Private Actions, Standing**

It is appropriate for purposes of § 4 of the Clayton Act to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

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

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

HN16 [] **Remedies, Damages**

The feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4 of the Clayton Act. Thus, the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system.

Lawyers' Edition Display

Decision

Union held not injured by violation of antitrust laws, within meaning of 4 of Clayton Act ([15 USCS 15](#)), by employer association's coercion of employers.

Summary

Two unions alleged that, in violation of the antitrust laws, a multiemployer association and its members coerced certain third parties, as well as some of the association's members, to enter into business relationships with nonunion firms. This coercion, according to the complaint, adversely affected the trade of certain unionized firms and thereby restrained the business activities of the unions. The unions sought treble damages under 4 of the Clayton Act ([15 USCS 15](#)), which authorizes the award of damages to those injured in their business or property by antitrust violations. The United States District Court for the Northern District of California dismissed the complaint ([404 F Supp 1067](#)). The United States Court of Appeals for the Ninth Circuit reversed the District Court's dismissal of the antitrust claim, holding that (1) a Sherman Act violation, a group boycott, had been alleged, (2) the defendants' conduct was not within the antitrust exemption for labor activities, and (3) the plaintiffs had standing to recover damages for the injury to their own business activities occasioned by the defendants' boycott ([648 F2d 527](#)).

I Í JÁNEÚÁ FJÉÍ FJLÁCHÁÉÓðÀ JÍ ÉÍ JÍ LÁ I ÁSEÓaÉGÁÁ GHÁÉÍ GHÁJÍ HÁEÚÉSÓYÓÁFG ÓÉÉÉ

On certiorari, the United States Supreme Court reversed. In an opinion by Stevens, J., joined by Burger, Ch. J., and Brennan, White, Blackmun, Powell, Rehnquist, and O'Connor, JJ., it was held that based on the allegations of the complaint, the unions were not persons injured by reason of a violation of the antitrust laws within the meaning of 4 of the Clayton Act.

Marshall, J., dissenting, expressed the view that the court's decision imposes an unwarranted judge-made limitation on the antitrust laws and that the unions fit comfortably within the language of 4.

Headnotes

PRACTICES §67 > who may recover -- union -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

A union is not a person injured by reason of a violation of the antitrust laws within the meaning of 4 of the Clayton Act ([15 USCS 15](#)), which authorizes the award of damages to those injured in their business or property by antitrust violations, based on the allegations of its complaint that a multiemployer association and its members coerced certain third parties, as well as some of the association's members, to enter into business relationships with nonunion firms, allegedly adversely affecting the trade of certain unionized firms and thereby restraining the business activities of the union. (Marshall, J., dissented from this holding.)

ERROR §1293 > complaint -- assumption that plaintiff can prove facts alleged -- > Headnote:

[LEdHN\[2\]](#) [2]

The reviewing court must assume that the plaintiff can prove the facts alleged in its amended complaint, on appeal considering the sufficiency of a complaint alleging violation of the antitrust laws; however, it is not proper to assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged in the complaint.

PRACTICES §46 > antitrust violations -- multiemployer association and its members -- > Headnote:

[LEdHN\[3\]](#) [3]

The allegations that a multiemployer association and its members have breached their collective bargaining agreements in various ways, and that they have manipulated their corporate names and corporate status in order to divert business to nonunion divisions or firms that they actually control, in the context of the bargaining relationship between them and a union, and the charge that the association and its members advocated, encouraged, induced, and aided nonmembers in refusing to enter into collective bargaining relationships with a union, do not describe antitrust violations.

PRACTICES §9 > coercive activity -- > Headnote:

[LEdHN\[4\]](#) [4]

I I JÁNEĀ FJÉÉ FJLÁCHÚÉDÉ JÍ ÉÉ JÍ LÁ I ÁSEÓaÉGÁÁ GHÁÉÉ GHÁJÍ HÁEÜÉSÓYÓÁFG ÓÉÉÉ

An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market; coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect.

PLEADING §130 > specificity -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

A Federal District Court retains the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed in a case of the magnitude of an antitrust suit filed by a union alleging that a multiemployer association and its members coerced certain third parties and some of the association's members to enter into business relationships with nonunion contractors and subcontractors, thereby adversely affecting the trade of certain unionized firms and restraining the union's business activities.

PRACTICES §67 > union -- injured party -- > Headnote:

[LEdHN\[6\]](#) [6]

Even though coercion directed by a multiemployer association and its members at third parties in order to restrain the trade of certain contractors and subcontractors may have been unlawful, it does not necessarily follow that still another party, a union, is a person injured by reason of a violation of the antitrust laws within the meaning of 4 of the Clayton Act ([15 USCS 15](#)), which authorizes the award of damages to those injured in their business or property by antitrust violations.

STATUTES §164 > construction -- language of statute -- > Headnote:

[LEdHN\[7\]](#) [7]

The starting point for interpreting a statute is the language of the statute itself.

PRACTICES §7 > Sherman Act -- common-law background -- > Headnote:

[LEdHN\[8\]](#) [8]

Congress intended the Sherman Act ([15 USCS 1 et seq.](#)) to be construed in the light of its common-law background.

PRACTICES §67 > who may recover -- union -- > Headnote:

[LEdHN\[9A\]](#) [9A] [LEdHN\[9B\]](#) [9B] [LEdHN\[9C\]](#) [9C]

The question of whether a union may recover for the injury allegedly suffered by reason of a multiemployer association and its members' coercion against certain third parties cannot be answered simply by reference to the

I I JÁNEĀ FJÉĀ FJLÁCHÁÉDÉ JÍ ÉĀ JÍ LÁ I ÁSEÓaÉGÁÄ GHÁÉÉ GHÁJÌ HÁEÜÉSÓYÓÄGÌ ÉÄFF

broad language of 4 of the Clayton Act ([15 USCS 15](#)) since, as was required in common-law damages litigation in 1890, the question requires an evaluation of the union's harm, the alleged wrongdoing by the defendants, and the relationship between them.

PRACTICES §67 > who may recover -- common-law limitations -- > Headnote:

[LEdHN\[10A\]](#) [] [10A] [LEdHN\[10B\]](#) [] [10B]

The limitations on damages recoveries found in common-law actions in 1890 are not intended to serve permanently as limits on recoveries under the Sherman Act ([15 USCS 1 et seq.](#)) since the common law is an evolving body of law.

PARTIES §3 > PRACTICES §67 > antitrust standing -- > Headnote:

[LEdHN\[11A\]](#) [] [11A] [LEdHN\[11B\]](#) [] [11B]

Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.

PRACTICES §67 > Clayton Act -- sufficiency of complaint -- > Headnote:

[LEdHN\[12A\]](#) [] [12A] [LEdHN\[12B\]](#) [] [12B]

The mere fact that a claim is literally encompassed by the Clayton Act does not end the inquiry; an allegation of improper motive, although it may support a plaintiff's damages claims under 4 of the Act ([15 USCS 15](#)), which authorizes the award of damages to those injured in their business or property by antitrust violations, is not a panacea that will enable any complaint to withstand a motion to dismiss; a defendant's specific intent may sometimes be relevant to the question of whether a violation of law has been alleged.

PRACTICES §67 > who may recover -- union -- > Headnote:

[LEdHN\[13A\]](#) [] [13A] [LEdHN\[13B\]](#) [] [13B]

A union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the union, are insufficient as a matter of law where other relevant factors--the nature of the union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy--weigh heavily against judicial enforcement of the union's antitrust claim.

Syllabus

I I JÁNEĀ FJÉÉ FJLÁCHÚÉDÉ JÍ ÉÉ JÍ LÁ I ÁSEÓaÉGáÄ GHÁÉÉ GHÁFJÍ HÁEÜÉSÓYÓÄFG ÓÉÉÉ

Petitioner multiemployer association and respondents (collectively the Union) are parties to collective-bargaining agreements governing the terms and conditions of employment in construction-related industries in California. The Union filed suit in Federal District Court, alleging that petitioner and its members, in violation of the antitrust laws, coerced certain third parties and some of petitioner's members to enter into business relationships with nonunion contractors and subcontractors, and thus adversely affected the trade of certain unionized firms, thereby restraining the Union's business activities. Treble damages were sought under § 4 of the Clayton Act, which authorizes recovery of such damages by "[any] person who shall be injured [****2] in his business or property by reason of anything forbidden in the antitrust laws." The District Court dismissed the complaint as insufficient to allege a cause of action for treble damages under § 4. The Court of Appeals reversed.

Held: Based on the allegations of the complaint, the Union was not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act. Pp. 526-546.

(a) Even though coercion allegedly directed by petitioner at third parties in order to restrain the trade of "certain" contractors and subcontractors may have been unlawful, it does not necessarily follow that the Union is a person injured by reason of a violation of the antitrust laws within the meaning of § 4. Pp. 526-529.

(b) The question whether the Union may recover for the alleged injury cannot be answered by literal reference to § 4's broad language. Instead, as was required in common-law damages litigation in 1890 when § 4's predecessor was enacted as § 7 of the Sherman Act, the question requires an evaluation of the Union's harm, the petitioner's alleged wrongdoing, and the relationship between them. Pp. 529-535.

(c) The Union's allegations [****3] of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors -- the nature of the alleged injury to the Union, which is neither a consumer nor a competitor in the market in which trade was allegedly restrained, the tenuous and speculative character of the causal relationship between the Union's alleged injury and the alleged restraint, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy -- weigh heavily against judicial enforcement of the Union's antitrust claim. Pp. 535-546.

Counsel: James P. Watson argued the cause for petitioner. With him on the briefs was George M. Cox.

Victor J. Van Bourg argued the cause and filed a brief for respondents. *

[****4]

Judges: STEVENS, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, post, p. 546.

Opinion by: STEVENS

Opinion

* Briefs of amici curiae urging reversal were filed by Solicitor General Lee, Assistant Attorney General Baxter, Deputy Solicitor General Wallace, Elinor Hadley Stillman, Robert B. Nicholson, and Robert J. Wiggers for the United States; by Peter G. Nash for the Associated General Contractors of America, Inc.; and by Edward B. Miller and Stephen A. Bokat for the Chamber of Commerce of the United States.

J. Albert Woll, Laurence Gold, and George Kaufmann filed briefs for the American Federation of Labor and Congress of Industrial Organization as amicus curiae urging affirmance.

Kenneth E. Ristau, Jr., and David A. Cathcart filed a brief for the Pacific Maritime Association as amicus curiae.

I I JÁNEĀ FJÉÉ FJLÁCHÚÉÓdÀ JÍ ÉÉÉ JÍ LÁ I ÁSEÓaÉGáÄ GHÁÉÉ GHÁFJÍ HÁWÉÉSÓYÓQÁFG ÓÉÉÉ

[*520] [***727] [**899] JUSTICE STEVENS delivered the opinion of the Court.

LEdHN/1A [1A] This case arises out of a dispute between parties to a multi-employer collective-bargaining agreement. The plaintiff unions allege that, in violation of the antitrust laws, the multi-employer association and its members coerced certain third parties, as well as some of the association's members, to enter into business relationships with nonunion firms. This coercion, according to the complaint, adversely affected the trade of certain unionized firms and thereby restrained the [*521] business activities of the unions. The question presented is whether the complaint sufficiently alleges that the unions have been "injured in [their] business or property by reason of anything forbidden in the antitrust laws" and may therefore recover treble damages under § 4 of the Clayton Act. [***5] 38 Stat. 731, 15 U. S. C. § 15. Unlike the majority of the Court of Appeals for the Ninth Circuit, we agree with the District Court's conclusion that the complaint is insufficient.

I

The two named plaintiffs (the Union) -- the California State Council of Carpenters and the Carpenters 46 Northern Counties [**900] Conference Board -- are affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. The Union represents more than 50,000 individuals employed by the defendants in the carpentry, drywall, piledriving, and related industries throughout the State of California. The Union's complaint is filed as a class action on behalf of numerous affiliated local unions and district councils. The defendants [***728] are Associated General Contractors of California, Inc. (Associated), a membership corporation composed of various building and construction contractors, approximately 250 members of Associated who are identified by name in an exhibit attached to the complaint, and 1,000 unidentified co-conspirators.

The Union and Associated, and their respective predecessors, have been parties to collective-bargaining agreements governing [***6] the terms and conditions of employment in construction-related industries in California for over 25 years. The wages and other benefits paid pursuant to these agreements amount to more than \$ 750 million per year. In addition, approximately 3,000 contractors who are not members of Associated have entered into separate "memorandum agreements" with the Union, which bind them to the terms of the master collective-bargaining agreements between the Union and Associated. The amended complaint does not [*522] state the number of nonsignatory employers or the number of nonunion employees who are active in the relevant market.

In paragraphs 23 and 24 of the amended complaint, the Union alleges the factual basis for five different damages claims.¹ [***8] Paragraph 23 alleges generally that the defendants conspired to abrogate and weaken the collective-bargaining relationship between the Union and the signatory employers. In seven subsections, paragraph 24 sets forth activities allegedly committed pursuant to the conspiracy. The most specific allegations relate to the labor relations between the parties.² The complaint's description of actions affecting nonparties is both brief and vague. [***7] It is alleged that defendants

"(3) Advocated, encouraged, induced, and aided non-members of defendant Associated General Contractors of California, Inc. to refuse to enter into collective bargaining relationships with plaintiffs and each of them;

¹ The facts set forth in paragraphs 23 and 24, initially alleged in support of the Union's federal antitrust claim, are realleged in each of the other claims for relief: breach of collective-bargaining agreements (PMPM 29-31); intentional interference with contractual relations (PMPM 32-35); intentional interference with business relationships (PMPM 36-39); and violation of the California antitrust statute (PMPM 40-43).

² For example, it is alleged that defendants breached their collective-bargaining agreements "by failing to pay agreed-upon wages, by failing to use the hiring hall, by failing to pay Trust Fund contributions, by failing to observe other terms and conditions of employment, and by generally weakening the good faith requirement of the collective bargaining agreements"; that defendants improperly changed their names and corporate status and made use of so-called "double breasted operations"; and that they encouraged nonmembers of Associated to refuse to enter into collective-bargaining agreements with the Union.

I I JÁNEĀ FJÉÉ GGÁÉHÁUÉÓDÀ JÍ ÉÉJÉELÁ I ÁSEÓAÉGÁÄ GHAÉÉ GÌ LAFJÌ HÁUÉÉSÓYÓQÁFG ÓÉÉÉ

"(4) Advocated, encouraged, induced, *coerced*, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them;

[*523] "(5) Advocated, induced, *coerced*, encouraged, and aided members of Associated General Contractors of California, Inc., non-members of Associated General Contractors of California, Inc., and 'memorandum contractors' to enter into subcontracting agreements with subcontractors who are not signatories to [***729] any collective bargaining agreements with plaintiffs and each of them"; App. E to Pet. for Cert. 17-19 (emphasis added).³

[***9] [**901] Paragraph 25 describes the alleged "purpose and effect" of these activities: first, "to weaken, destroy, and restrain the trade of certain contractors," who were either members of Associated or memorandum contractors who had signed agreements with the Union; and second, to restrain "the free exercise of the business activities of plaintiffs and each of them."⁴ [***10] Plaintiffs claim that these alleged antitrust violations [*524] caused them \$ 25 million in damages.⁵ The complaint does not identify any specific component of this damages claim.

After hearing "lengthy oral argument" and after receiving two sets of written briefs, one filed before and the second filed after this Court's decision in *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975), the District Court dismissed the complaint, including the federal antitrust claim. *404 F.Supp. 1067 (ND Cal. 1975)*.⁶ [***11] The court observed that the complaint alleged "a rather vague, general conspiracy," and that the allegations "appear typical of disputes a union might have with an employer," which in the normal course are resolved by grievance and arbitration or by the NLRB. *Id.*, at 1069.⁷ Without seeking to clarify or [***730] further amend the first amended complaint, the Union filed its notice of appeal on October 9, 1975.

³The word "coerced" did not appear in the complaint as originally filed. Even as amended after the filing of motions to dismiss, the complaint does not allege that the defendants used any coercion to persuade nonmembers of Associated to refuse to enter into collective-bargaining agreements with the Union (PM 24(3)). The complaint alleges neither the identity nor the number of landowners, general contractors, or others who were coerced into making contracts with nonunion firms.

⁴Paragraph 25, which describes the effect of the conspiracy, reads in full as follows:

"The purpose and effect of the above described activities, plan and conspiracy are oppressive, unreasonable, and illegal, and are in restraint of trade and an unlawful interference and restraint of the free exercise of the business activities of plaintiffs and each of them, all in violation of *15 U. S. C. Section 1*. The purpose and effect of the above described activities, plan and conspiracy, in addition, are to weaken, destroy, and restrain the trade of certain contractors, both members of the Associated General Contractors of California, Inc. and non-members, who are 'memorandum contractors,' who have faithfully performed the terms and conditions set out in the master collective bargaining agreements described above. The effect of this restraint on trade is to further weaken and destroy plaintiffs in this matter. These activities are in restraint of the free exercise of plaintiffs' trade and an interference therein, all in violation of *15 U. S. C. Section 1*." App. E to Pet. for Cert. 20-21.

⁵Plaintiffs do not seek injunctive relief under § 16 of the Clayton Act, *15 U. S. C. § 26*, and they do not ask us to consider whether they have standing to request such relief.

⁶An order dismissing the federal antitrust claim and the state-law claims was filed on August 4, 1975, and an amended order dismissing the entire complaint was entered on September 10, 1975. The District Court had initially stayed the breach-of-contract claim for 120 days pending grievance and arbitration procedures. On reconsideration it also dismissed the breach-of-contract claim, deciding that the suit had been prematurely filed.

⁷Addressing the federal antitrust claim, the District Court concluded:

"The essence of plaintiffs' claim seems to be that defendants violated the antitrust laws insofar as they declined to enter into agreements with plaintiffs to deal only with subcontractors which were signatories to contracts with plaintiffs, precisely the type of agreement which subjected the union in *Connell* to antitrust liability." *404 F.Supp., at 1070*.

The District Court reasoned that the employers' refusal to enter into such an agreement could not provide the basis for an antitrust claim.

I I JÁMEĀ FJĀĀ G LÉCHĀĀDÀ JÍ EEEFLÄ I ÅSEÅÄCA Ä GHÄTT HÉLÄJÌ HÄVÄÅSÖYÖÄG ÄTTFF

Over five years later, on November 20, 1980, the Court of Appeals reversed the District Court's dismissal of the Union's federal antitrust claim. [648 F.2d 527](#).⁸ The majority [*525] of the Court of Appeals disagreed with the District Court's characterization of the antitrust claim; it adopted a construction of the amended complaint which is somewhat broader than the allegations in the pleading itself.⁹ [****13] The Court of [**902] Appeals held (1) that a Sherman Act violation -- a group [****12] boycott -- had been alleged, [*id.* at 531-532](#); (2) that the defendants' conduct was not within the antitrust exemption for labor activities, [*id.* at 532-536](#); and (3) that the plaintiffs had standing to recover damages for the injury to their own business activities occasioned by the defendants' "industry-wide boycott against all subcontractors with whom the Unions had signed agreements . . ." [*Id.* at 537](#). In support of the Union's standing, the majority reasoned that the Union was within the area of the economy endangered by a breakdown of competitive conditions, not only because injury to the Union was a foreseeable consequence of the antitrust violation, but also because that injury was specifically intended by the defendants. The court noted that its conclusion was consistent with other cases holding that union organizational [*526] and representational activities constitute a form of business protected by the antitrust laws.¹⁰

[****14] II

[LEdHN\[2\]](#) [2]As the case comes to us, we [***731] [HN1](#) must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.¹¹

[LEdHN\[3\]](#) [3]We first note that the Union's most specific claims of injury involve matters that are not subject to review under the antitrust laws. The amended complaint alleges that the defendants have breached their collective-bargaining agreements [****15] in various ways, and that they have manipulated their corporate names and corporate status in order to divert business to nonunion divisions or firms that they actually control. Such deceptive diversion of business to the nonunion portion of a so-called "double-breasted" operation might constitute a breach

⁸ The Court of Appeals affirmed the dismissal of all other claims.

⁹ The Court of Appeals majority read subparagraph (4) of paragraph 24, quoted [supra, at 522](#), as though it alleged that the defendants had coerced landowners and other persons who let construction contracts "to hire *only* construction firms, primarily subcontractors, who had not signed with the Unions." [648 F.2d, at 532](#) (emphasis added); see also [id., at 544](#) (denying petition for rehearing). The word "only" does not appear in the amended complaint, and it implies that the defendants' activities gave rise to a broader restraint than was actually alleged.

The majority read subparagraph (5) of paragraph 24 to charge that defendants had "coerced and aided each other to subcontract *only* with subcontractors who had not signed with the Unions." [Id., at 531](#) (emphasis added). Again using the word "only," which does not appear in the complaint itself, the majority characterized the defendants' alleged activities as "very similar to a concerted refusal to deal, or a group boycott." *Ibid.* It concluded that the allegations "present virtually the obverse of the situation described in *Connell*": the conspiracy, if successful, "would effectively lock union-signatory subcontractors out of a portion of the market for carpentry work." [Id., at 532](#).

¹⁰ See *Tugboat, Inc. v. Mobile Towing Co.*, [534 F.2d 1172, 1176-1177 \(CA5 1976\)](#); *International Assn. of Heat & Frost Insulators v. United Contractors Assn.*, [483 F.2d 384, 397-398 \(CA3 1973\)](#).

Circuit Judge Sneed dissented. He first rejected the majority's characterization of the complaint, agreeing instead with the District Court. Second, assuming that the complaint alleged a boycott of certain employers, he concluded that neither the employees of a victim of the boycott nor their collective-bargaining representative had standing to assert the antitrust claim. Finally, he concluded that an injury that affected only the Union's organizational and representational activity was remediable under the labor laws rather than the antitrust laws.

The Court of Appeals denied the petition for rehearing and rehearing en banc on May 22, 1981. Accompanying the order was a statement by the majority rebutting the petitioners' assertion that the opinion rendered multiemployer bargaining units unlawful, and a dissent by Circuit Judge Sneed. [648 F.2d, at 543, 545](#).

¹¹ The Union had an adequate opportunity to amend its pleading to add factual allegations demonstrating that the District Court's decision to dismiss the complaint was based on a misunderstanding of its antitrust claim.

I I JÁMEĀ FJĀĀ G LÉCHUĀDÀ JÍ EEEGLÄ I ÅSEÅAÅA Å GHÄÅH HFLÅFJÌ HÅMÅÅSÖYÓÅG ÅÅÅÅFÍ

of contract, an unfair labor practice, or perhaps even a [*527] common-law fraud or deceit, but in the context of the bargaining relationship between the parties to this litigation, such activities are plainly not subject to review under the federal antitrust laws.¹² [****16] Similarly, the charge that the defendants "advocated, encouraged, induced, and aided nonmembers . . . to refuse [*903] to enter into collective bargaining relationships" with the Union (PM 24(3)) does not describe an antitrust violation.¹³

The Union's antitrust claims arise from alleged restraints caused by defendants in the market for construction contracting and subcontracting.¹⁴ The complaint alleges that defendants "coerced"¹⁵ [****18] two classes of persons: (1) landowners and [*528] others who let construction contracts, *i. e.*, the defendants' customers and potential customers; and (2) general contractors, *i. e.*, defendants' competitors and defendants themselves. Coercion against the members of both classes was designed to [****732] induce them to give some of their business -- but not necessarily all of it -- to nonunion firms.¹⁶ Although the pleading does not allege that the coercive conduct increased the aggregate share of nonunion firms in the market, it does allege that defendants' activities weakened and restrained the trade "of certain contractors." See n. 4, *supra*. Thus, particular victims of coercion may have diverted particular [****17] contracts to nonunion firms and thereby caused certain unionized subcontractors to lose some business.

LEdHN[4] [4] LEdHN[5A] [5A] We think the Court of Appeals properly assumed that such coercion might violate the antitrust laws.¹⁷ [****19] HN2 An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market. See *Associated Press v. United States*, 326 U.S. 1, 17 (1945). Coercive activity that prevents its victims from making free choices between market alternatives is inherently

¹² In analyzing the antitrust allegations in the amended complaint, we therefore construe the references to "contractors and subcontractors who are not signatories to collective bargaining agreements" as referring to completely independent nonunion firms rather than to operations covertly controlled by one or more defendants.

¹³ The Court of Appeals did not reverse the District Court's dismissal of the complaint with regard to these allegations. 648 F.2d, at 531-532, 537, 540.

¹⁴ See Brief for Respondents 37. There is no allegation of wrongful conduct directed at nonunion subcontracting firms. We therefore assume that, if any nonunion firms refused to bargain with the Union because of the conspiracy, they did so because they were rewarded with business they would not otherwise have obtained. Thus, nonunion firms could not be considered victims of the conspiracy; rather, they appear to have been its indirect beneficiaries. None are named either as defendants or as co-conspirators.

The amended complaint also does not allege any restraint on competition in the market for labor union services. Unlike the two cases involving union plaintiffs cited by the Court of Appeals, see n. 10, *supra*, in this case there is no claim that competition between rival unions has been injured or even that any rival unions exist.

¹⁵ The complaint does not specify the nature of the "coercion." It does not, for example, allege that the defendants refused to deal with all members of either of the two classes of persons against whom coercion was applied. Indeed, it is highly improbable that the defendants -- all of whom are signatories to union contracts -- would refuse to deal with all of their customers and potential customers in an attempt to divert all of their business to nonunion firms.

¹⁶ There is no allegation that any person subjected to coercion was required to deal exclusively with nonunion firms.

¹⁷ LEdHN[5B] [5B]

Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957), too far. Certainly in a case of this magnitude, HN3 a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

I I J Á N E Ú A F J Á N G L E H Á U Ó D Á J I É E J E H L Á I Á S E O Á E C Á Á G H Á T T Ó H G L Á F J Í H Á V E Ú E S Ó Y Ó Á F G Á T T E F J

destructive of competitive conditions and may be condemned even without proof of its actual market effect. Cf. *Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210-214 (1959)*.¹⁸

[*529] [LEdHN\[6\]](#) [6][HN4](#) Even though coercion directed by defendants at third parties in order to restrain the trade of "certain" contractors and subcontractors may have been unlawful, it does [*904] not, of course, necessarily follow that still another party -- the Union -- is a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act.

III

[LEdHN\[7\]](#) [7] [***20] We first consider the language in the controlling statute. See *Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)*. [HN5](#) The class of persons who may maintain a private damages action under the antitrust laws is broadly defined in § 4 of the Clayton Act. *15 U. S. C. § 15*. That section provides:

[HN6](#) "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, [***733] and the cost of suit, including a reasonable attorney's fee."

A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation. Some of our prior cases have paraphrased the [***21] statute in an equally expansive way.¹⁹ But before we hold that the statute is as broad as its [*530] words suggest, we must consider whether Congress intended such an open-ended meaning.

[***22] The critical statutory language was originally enacted in 1890 as § 7 of the Sherman Act. 26 Stat. 210. The legislative history of the section shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets.²⁰ That history supports a broad construction of this remedial provision. A proper interpretation of the section cannot, however, ignore the larger context in which the entire statute was debated.

¹⁸ Although we do not know what kind of coercion defendants allegedly employed, we assume for purposes of decision that it had a predatory "nature or character," *Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S., at 211*, and that it would "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951)*.

¹⁹ In *Mandeville Island Farms, Inc. v. Sugar Co., 334 U.S. 219 (1948)*, the Court held that growers of sugar beets could maintain a treble-damages action against refiners who had allegedly conspired to fix the price that they would pay for the beets. Although previous price-fixing cases had involved agreements among sellers to fix sales prices, the Court readily concluded that the Act applied equally to an agreement among competing buyers to fix purchase prices. The Court stated:

[HN7](#) "The 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. Cf. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150*; *American Tobacco Co. v. United States, 328 U.S. 781*. 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." *Id., at 236*.

Similarly broad language was used in later cases holding that actions could be maintained by consumers, *Reiter v. Sonotone Corp., 442 U.S. 330, 337-338 (1979)*, by a foreign government, *Pfizer Inc. v. India, 434 U.S. 308, 313-314 (1978)*, and by the direct victim of a boycott. *Blue Shield of Virginia v. McCready, 457 U.S. 465, 472-473 (1982)*. In each of those cases, however, the actual plaintiff was directly harmed by the defendants' unlawful conduct. The paraphrasing of the language of § 4 in those opinions added nothing to the even broader language that the statute itself contains.

²⁰ See 21 Cong. Rec. 1767-1768, 2455-2456, 2459, 2615, 3147-3148 (1890). The original proposal, which merely allowed recovery of the amount of actual enhancement in price, was successively amended to authorize double-damages and then treble-damages recoveries, in order to provide otherwise remediless small consumers with an adequate incentive to bring suit.

[****23] [*531] [LEdHN\[8\]](#) [8] [LEdHN\[9A\]](#) [9A] The repeated references to the common law in the debates that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be [**905] construed in the light of its common-law background.²¹ Senator Sherman stated that the bill "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal ***734 Government."²² Thus our comments on the need for judicial interpretation of § 1 are equally applicable to § 7:

"One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. . . .

"Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its [****24] application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." [National Society of J*5321 Professional Engineers v. United States, 435 U.S. 679, 687-688 \(1978\)](#) (footnotes omitted).

Just as the substantive content of the Sherman Act draws meaning from its common-law antecedents, so must we consider the contemporary legal context in which Congress acted when we try to ascertain the intended scope of the private remedy created by § 7.

[****25] [LEdHN\[10A\]](#) [10A] In 1890, notwithstanding general language in many state constitutions providing in substance that "every wrong shall have a remedy,"²³ [****26] a number of judge-made rules circumscribed the availability of damages recoveries in both tort and contract litigation -- doctrines such as foreseeability and proximate cause,²⁴ directness of injury,²⁵ [****27] certainty ***735 of damages, [*533]²⁶ and privity of

Id., at 1765, 2455, 3145. The same purpose was served by the special venue provisions, the provision for the recovery of attorney's fees, and the elimination of any requirement that the amount in controversy exceed the jurisdictional threshold applicable in other federal litigation. See, e. g., *id.*, at 2612, 3149. Moreover, changes in the description of the remedy extended the section's coverage beyond price fixing.

²¹ See, e. g., *id.*, at 2456, 2459, 3151-3152.

²² *Id.*, at 2456. Senator Sherman added: "The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests." *Ibid.*; see also *id.*, at 2459, 3149, 3151-3152. Although Members of Congress referred particularly to common-law definitions of "monopoly" and "restraint of trade," they appear to have been generally aware that the statute would be construed by common-law courts in accordance with traditional canons. For example, at the beginning of the debate on the Sherman Act, one Senator cautioned his colleagues:

"A careful analysis of the terms of the bill is essential. We must know what it means, what its legal effect is, if we give force to it as it is written. . . . We must adopt, therefore, the known methods of the courts in determining what the bill means." *Id.*, at 1765.

²³ For example, the State Constitution of Illinois, adopted in 1870, provided: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation. . . ." Art. II, § 19. Comparable provisions were found in the State Constitutions of Arkansas, Connecticut, Delaware, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, Ohio, and Vermont. See generally F. Hough, *American Constitutions* (1871).

²⁴ One treatise stated: "Natural, proximate, and legal results are all that damages can be recovered for, even under a statute entitling one 'to recover *any* damage.'" 3 J. Lawson, *Rights, Remedies, and Practice* 1740 (1890). Another leading treatise explained:

"The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety." T. Cooley, *Law of Torts* 73 (2d ed. 1888).

I I JÁMEĀ FJĀĀ HHLÉCHĀ JÓGĀ JÍ EEEJ É LÄ I ÅSEOÅGAÅ GHÉEÜ HÍ LAFJÍ HÁMEÅSÓYÓÅFG ÅEEEG

[**906] contract.²⁷ Although particular common-law limitations were not debated in Congress, the frequent references to common-law principles imply that Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation.²⁸

[****28] The federal judges who first confronted the task of giving meaning to § 7 so understood the congressional intent. Thus in 1910 the Court of Appeals for the Third Circuit held as a matter of law that [HN8↑](#) neither a creditor nor a stockholder of a corporation that was injured by a violation of the antitrust laws could recover treble damages under § 7. [*Loeb v. Eastman \[*534\] Kodak Co., 183 F. 704.*](#) The court explained that the plaintiff's injury as a stockholder was "indirect, remote, and consequential." [*Id., at 709.*](#)²⁹ This holding was consistent with Justice Holmes' explanation of a similar construction of the remedial provision of the Interstate Commerce Act a few years later: "The general tendency of the law, in regard to damages at least, is not to go beyond the first step." [*Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 \(1918\).*](#)³⁰ When [***736] Congress enacted § 4 of the Clayton Act in 1914, and when it reenacted that section in 1955, 69 Stat. 282, it adopted the language of § 7 and presumably [****29] also the judicial gloss that avoided a simple literal interpretation.

²⁵ In torts, a leading treatise on damages set forth the general principle that, "[where] the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is willful for that purpose." Thus, A, who had agreed with a town to support all the town paupers for a specific period, in return for a fixed sum, had no cause of action against S for assaulting and beating one of the paupers, thereby putting A to increased expense. Similarly, a purchaser under an output contract with a manufacturer had no right of recovery against a trespasser who stopped the company's machinery, and a creditor could not recover against a person who had forged a note, causing diminution in the dividends from an estate. 1 J. Sutherland, Law of Damages 55-56 (1882) (emphasis in original, footnote omitted).

Similarly, in contract, the common-law courts drew a distinction between direct and consequential damages; the latter had to be specifically included in the contract to be recoverable. See [*id., at 74-93;*](#) 1 T. Sedgwick, Measure of Damages 203-244 (8th ed. 1891) (discussing the rule of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854)).

²⁶ The common law required the plaintiff to prove, with certainty, both the existence of damages and the causal connection between the wrong and the injury. No damages could be recovered for uncertain, conjectural, or speculative losses. See generally cases cited in F. Bohlen, Cases on the Law of Torts 292-312 (2d ed. 1925) (cases alleging emotional harm to plaintiff). Even if the injury was easily provable, there would be no recovery if the plaintiff could not sufficiently establish the causal connection. See 1 Sutherland, *supra* n. 25, at 94-126; 1 Sedgwick, *supra* n. 25, at 245-294.

²⁷ See, e. g., *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

²⁸ [*LEdHN\[10B\]↑*](#) [10B]

See n. 22, *supra*. The common law, of course, is an evolving body of law. We do not mean to intimate that the limitations on damages recoveries found in common-law actions in 1890 were intended to serve permanently as limits on Sherman Act recoveries. But legislators familiar with these limits could hardly have intended the language of § 7 to be taken literally.

²⁹ See also [*Amex v. American Telephone & Telegraph Co., 166 F. 820 \(CC Mass. 1909\).*](#) Applying "ordinary principles of law" to the general language of the statute, the court held that a stockholder had no legally cognizable antitrust claim against defendants for illegally acquiring the corporation, thereby rendering plaintiff's stock worthless. Plaintiff's claim was not distinguishable from any injury sustained by the company itself. Therefore, the court stated, a contrary result would "subject the defendant not merely to treble damages, but to sextuple damages, for the same unlawful act." [*Id., at 823.*](#)

³⁰ The Court held in that case that the plaintiff shippers could recover damages from the defendant railroad for charging an excessive freight rate, even though they had been able to pass on the damage to their purchasers. Justice Holmes wrote that the law holds the defendant "liable if proximately the plaintiff has suffered a loss," but "does not attribute remote consequences to a defendant." [*245 U.S., at 533-534.*](#)

I I JÁMEĀ FJĀM HI LĀEHAUĀ JI EĒJ ē LĀ I ÅSEÅAÅ GHEĀH H I LÄFJÌ HÄWÆÅSÖYÓÅFG ÅÅEGJ

[****30] As this Court has observed, the lower federal courts have been "virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263, n. 14 (1972). Just last Term we stated:

HN9 [↑] " [**907] An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.' [*Illinois* [*535] *Brick Co. v. Illinois*, 431 U.S.], at 760 (BRENNAN, J., dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-477 (1982).

LEDHN[9B] [↑] [9B] **LEDHN[11A]** [↑] [11A] [****31] It is plain, therefore, that the question whether the Union may recover for the injury it allegedly suffered by reason of the defendants' coercion against certain third parties cannot be answered simply by reference to the broad language of § 4. Instead, as was required in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.³¹

[****32] IV

There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause,"³² [****33] and [***737] the struggle of federal judges to [*536] articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages.³³ [****34] It is common

³¹ **LEDHN[11B]** [↑] [11B]

The label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine.

HN10 [↑] Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. See Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L. J. 809, 813, n. 11 (1977); Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A. B. A. Antitrust L. J. 5, 6-7 (1966).

³² In his comment, *Mahoney v. Beatman*: A Study in Proximate Cause, 39 Yale L. J. 532, 533 (1930), Leon Green noted: "Legal theory is too rich in content not to afford alternative ways, and frequently several of them, for stating an acceptable judgment." Earlier, in his Rationale of Proximate Cause 135-136 (1927) (footnote omitted), Green had written:

"Cause,' although irreducible in its concept, could not escape the ruffles and decorations so generously bestowed: remote, proximate, direct, immediate, adequate, efficient, operative, inducing, moving, active, real, effective, decisive, supervening, primary, original, contributory, ultimate, concurrent, causa causans, legal, responsible, dominating, natural, probable, and others. The difficulty now is in getting any one to believe that so simple a creature could have been so extravagantly garbed."

³³ Some courts have focused on the directness of the injury, e. g., *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (CA3 1910); *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678, 679 (CA2 1955), cert. denied, 350 U.S. 936 (1956); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 394-395 (CA6 1962), cert. denied, 372 U.S. 907 (1963). Others have applied the requirement that the plaintiff must be in the "target area" of the antitrust conspiracy, that is, the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. E. g., *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546-547 (CA5 1980); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 17-18 (CA1 1979); *Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc.*, 454 F.2d 1292, 1292-1295 (CA2 1971). Another Court of Appeals has asked whether the injury is "arguably within the zone of interests protected by the antitrust laws." *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1151-1152 (CA6 1975). See generally Berger & Bernstein, *supra* n. 31.

I I JÁMEĀ FJÄÄ HÍ LÄCHÄUÖÄ JÍ ÈEJ ËI LÄ I ÄSEÖäÄÄ Ä GÄÄÄÄ HÍ LÄFJÌ HÄWÈÄSÖYÖÄFG ÄÄÄÄH

ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged [**908] wrongdoing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.³⁴ Instead, [*537] previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

[LEdHN\[9C\]](#) [↑] [9C] [LEdHN\[12A\]](#) [↑] [12A] The factors that favor judicial recognition of the Union's antitrust claim are easily stated. The complaint does allege a causal connection between an antitrust violation and harm to the Union and further [****35] alleges that the defendants intended to cause that harm. As we have indicated, however, the mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry. We are also satisfied that an allegation of improper motive, although it may support a plaintiff's damages claim under § 4, 35 [****36] is not a panacea that will [***738] enable any complaint to withstand a motion to dismiss.³⁶ Indeed, in *McCready*, we specifically held: "[HN12](#) [↑] The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators." [457 U.S., at 479.](#)³⁷

[*538] A number of other factors may be controlling. In this case it is appropriate to focus on the nature of the plaintiff's alleged injury. As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market.³⁸ [****38] Last Term in [Blue Shield of Virginia v. McCready, supra](#), we identified the relevance of this central policy to a determination of the plaintiff's right to maintain an action under § 4. McCready alleged that she was a consumer [****37] of psychotherapeutic services and that she had been

As a number of commentators have observed, these labels may lead to contradictory and inconsistent results. See Berger & Bernstein, *supra* n. 31, at 835, 843; Handler, The Shift From Substantive to Procedural Innovations in Antitrust Suits, 71 Colum. L. Rev. 1, 27-31 (1971); Sherman, Antitrust Standing: From *Loeb* to *Malamud*, 51 N. Y. U. L. Rev. 374, 407 (1976) ("it is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case"). In our view, courts should analyze each situation in light of the factors set forth in the text *infra*.

³⁴ Cf. [Blue Shield of Virginia v. McCready, 457 U.S., at 477-478, n. 13](#) (discussing elusiveness of test of proximate cause); [Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99 \(1928\)](#); *id. at 351-352, 162 N. E. at 103* (Andrews, J., dissenting) ("[HN11](#) [↑] What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point").

³⁵ [LEdHN\[12B\]](#) [↑] [12B]

It is well settled that a defendant's specific intent may sometimes be relevant to the question whether a violation of law has been alleged. See [United States v. Columbia Steel Co., 334 U.S. 495, 522 \(1948\)](#). Moreover, there no doubt are cases in which such an allegation would adequately support a plaintiff's claim under § 4. Cf. Handler, *supra* n. 33, at 30 (specific intent of defendant to cause injury to a particular class of persons should "ordinarily be dispositive" in creating standing to sue); Lytle & Purdue, Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation, 25 Am. U. L. Rev. 795, 814-816 (1976) (suggesting that standing in a group boycott situation should be based on the purpose of the boycott).

³⁶ See Sherman, *supra* n. 33, at 389-391, citing *Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 189 (CA2 1970)*, cert. denied, [401 U.S. 923 \(1971\)](#).

³⁷ In *McCready* we rejected the contention that, because there was no specific intent to harm the plaintiff, her injury was thereby rendered remote. This case presents a different question, but in neither case is the motive allegation of controlling importance.

³⁸ See [United States v. Topco Associates, Inc., 405 U.S. 596, 610 \(1972\)](#) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the [Bill of Rights](#) is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster").

I I JÁMEĀ FJĀM HÌ LÀEHAUĀGÀ JÌ ÈEJÈ LÀI ÅSEOÅGAÅ GHÄTT HÌ LÀFJÌ HÀWÈÅSÓYÓÅFG ÄÅTTÅH

injured by the defendants' conspiracy to restrain competition in the market for such services.³⁹ The Court stressed [**909] the fact that "McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." [457 U.S., at 483](#), citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, [429 U.S. 477, 487-489 \(1977\)](#). After noting that her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," [457 U.S., at 484](#), the Court concluded that such an injury "falls squarely within the area of congressional concern." *Ibid.*

[*539] [LEdHN\[13A\]](#) [↑] [13A] In this case, however, the Union was neither a consumer nor a competitor in the market in which trade was restrained.⁴⁰ [****40] It is not clear [***739] whether the Union's interests would be served or disserved by enhanced competition in the market. As a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals.⁴¹ At common law -- as well as in the early [***39] days of administration of the federal antitrust laws -- the collective activities of labor unions were regarded as a form of conspiracy in restraint of trade.⁴² [****41] Federal policy has since developed not only a broad labor exemption from the antitrust laws,⁴³ but also a separate body of [*540] labor law specifically designed to protect and encourage the organizational and representational activities of labor unions. Set against this background, [HN13](#) [↑] a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains. In each case its alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra, at 487-488*. In this case, particularly in light of the longstanding collective-bargaining relationship between the parties, the Union's labor-market interests seem to predominate, and the *Brunswick* test is not satisfied.

An additional factor is the directness or indirectness of the asserted injury. In this case, the chain of causation between the Union's injury and the alleged restraint in the market for construction subcontracts [**910] contains several somewhat vaguely defined links. According to the complaint, defendants applied coercion against certain landowners and other contracting parties in order to cause them to divert business from certain union contractors to nonunion contractors.⁴⁴ [****43] As a result, [*541] the [***740] Union's complaint alleges, the Union suffered

³⁹ McCready, a Blue Shield subscriber, alleged that Blue Shield and the Neuropsychiatric Society of Virginia, Inc., had unlawfully conspired to restrain competition in the market for psychotherapeutic services by providing insurance coverage only for consumers who patronized psychiatrists, not psychologists. McCready obtained services from a psychologist and was denied reimbursement.

⁴⁰ Moreover, it has not even alleged any marketwide restraint of trade. The allegedly unlawful conduct involves predatory behavior directed at "certain" parties, rather than a claim that output has been curtailed or prices enhanced throughout an entire competitive market.

⁴¹ In *Mine Workers v. Pennington*, [381 U.S. 657, 664 \(1965\)](#), the Court recognized that wages lie at the heart of the subjects of mandatory collective bargaining, and that "the elimination of competition based on wages among the employers in the bargaining unit," which directly benefits the union, also has an effect on competition in the product market. See generally Leslie, Principles of Labor Antitrust, 66 Va. L. Rev. 1183, 1185-1188 (1980); Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L. J. 14, 17-20, 28-30 (1963).

⁴² See, e. g., *Coronado Coal Co. v. Mine Workers*, [268 U.S. 295, 310 \(1925\)](#) (applying Sherman Act to alleged conspiracy by unions involved in labor dispute to restrain interstate trade in coal); *Loewe v. Lawlor*, [208 U.S. 274 \(1908\)](#) (applying Sherman Act to boycott by labor organization seeking to unionize plaintiff's hat factory); Cox, Labor and the Antitrust Laws -- A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 256-262 (1955); Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659, 661-666 (1965); Winter, *supra* n. 41, at 30-38.

⁴³ See [29 U. S. C. § 52](#) (statutory labor exemption); *Mine Workers v. Pennington, supra*; *Meat Cutters v. Jewel Tea Co.*, [381 U.S. 676 \(1965\)](#) (nonstatutory exemption). In this case we need not reach petitioner's contentions that the alleged activities are within the statutory and nonstatutory labor exemptions.

I Í JÁMEÐA FJÆÐI FLÁÐA ÆÐA JÍ ÆÐEJ FELÀ I ÆÐOÐA ÆÐA GHEÐI ÐI ÆÐFJÌ HÁÐEÐSÓYÓÐAG ÞÆÐH

unspecified injuries in its "business activities."⁴⁵ It is obvious that any such injuries were only an indirect result of whatever harm may have been suffered [****42] by "certain" construction contractors and subcontractors.⁴⁶

[****44] If either these firms, or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and, as we held in *McCready*, they would have a right to maintain their own treble-damages actions against the defendants. An action on their behalf would encounter none of the conceptual difficulties that [*542] encumber the Union's claim.⁴⁷ [****45] [HN14](#)[↑] The existence of an [***741] identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a [**911] more remote party such as the Union to perform the office of a private attorney general.⁴⁸ Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.⁴⁷

Partly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative. There is, for example, no allegation that

⁴⁴ There is a parallel between these allegations and the claim in *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975). The plaintiff in that case, a general building contractor, was coerced by the defendant union into signing an agreement not to deal with nonunion subcontractors. Similarly, in the *McCready* case, the plaintiff was the direct victim of unlawful coercion. As the Court noted, "McCready did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services." [457 U.S., at 483](#). Her status was thus comparable to that of a contracting or subcontracting firm that refused to yield to the defendants' coercive practices and therefore suffered whatever sanction that coercion imposed. Like *McCready*, and like *Connell Construction Co.*, such a firm could maintain an action against the defendants. In contrast, the Union is neither a participant in the market for construction contracts or subcontracts nor a direct victim of the defendants' coercive practices. We therefore need not decide whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market.

⁴⁵ Its brief merely echoes the Court of Appeals' description of its allegations: "the Unions have been injured in their business, i.e., organizing carpentry industry employees, negotiating and policing collective bargaining agreements, and securing jobs for their members." Brief for Respondents 25-26.

⁴⁶ Because of the absence of specific allegations, we can only speculate about the specific components of the Union's claim. If the Union asserts that its attempts to organize previously nonunion firms have been frustrated because nonunion firms wish to continue to obtain business from those subjected to coercion by the defendants, its harm stems most directly from the conduct of persons who are not victims of the conspiracy. See n. 14, *supra*. If the Union claims that dues payments were adversely affected because employees had less incentive to join the Union in light of expanding nonunion job opportunities, its damage is more remote than the harm allegedly suffered by unionized subcontractors. The same is true if the Union contends that revenues from dues payments declined because its members lost jobs or wages because their unionized employers lost business. That harm, moreover, is even more indirect than the already indirect injury to its members, yet a number of decisions have denied standing to employees with merely derivative injuries. See, e.g., *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 97 (CA3), cert. denied, 426 U.S. 935 (1976); *Contreras v. Grower Shipper Vegetable Assn.*, 484 F.2d 1346 (CA9 1973), cert. denied, 415 U.S. 932 (1974); *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (CA10), cert. denied, 411 U.S. 938 (1973). But see *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 334 (CA7 1967).

⁴⁷ Indeed, if there is substance to the Union's claim, it is difficult to understand why these direct victims of the conspiracy have not asserted any claim in their own right. The Union's suggested explanations of this fact tend to shed doubt on the proposition that these "victims" were actually harmed at all.

"Many unionized firms will respond to the alleged boycott . . . by setting up double-breasted operations or shifting more of their resources to the non-unionized part of their operations when double-breasted operations already exist. In this manner, unionized subcontractors can avoid losing any business and, as a result, these subcontractors will *not* possess the classic economic incentive to file suit." Alternatively, unionized subcontractors may simply not renew the collective bargaining agreement when it expires." Brief for Respondents 49 (citation omitted).

⁴⁸ Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-748 (1975) (purchaser-seller limitation on actions under § 10(b) of Securities Exchange Act of 1934).

I Í JÁMEÍA FJÆÍ I GLÆHÚDGA JÍ ÆFFLÀ I ÆSDAÉCA Á GHÆTÍ I FLAFJÍ HÁMEÍSÓYÓÁFG ÆTHÍ I

any collective-bargaining agreement was terminated as a result of the coercion, no allegation that the aggregate share of the contracting market controlled by union firms has diminished, no allegation that the number of employed union members has declined, and no allegation that the Union's revenues in the form of dues or initiation fees have decreased. Moreover, although coercion against certain firms is alleged, there is no assertion that any such firm was prevented from doing business with any union firms or that any firm or group of firms was subjected to a complete boycott. See nn. 9, 15, and 16, *supra*. [**543] Other than the alleged injuries flowing from breaches of [****46] the collective-bargaining agreements -- injuries that would be remediable under other laws -- nothing but speculation informs the Union's claim of injury by reason of the alleged unlawful coercion. Yet, as we have recently reiterated, [HN15](#)⁴⁹ it is appropriate for § 4 purposes "to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm." *Blue Shield of Virginia v. McCready*, 457 U.S., at 475, n. 11, citing *Hawaii v. Standard Oil Co.*, 405 U.S., at 262-263, n. 14.⁴⁹

[****47] The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits.⁵⁰ These cases have [***742] stressed the importance of avoiding [*544] either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. Thus, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), we refused to allow the defendants to discount the plaintiffs' damages claim to the extent that overcharges had been passed on to the plaintiffs' customers. We noted that any attempt to ascertain damages with such precision "would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.*, at 493. [**912] In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), we held that treble damages could not be recovered by indirect purchasers of concrete blocks who had paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy. We observed that potential plaintiffs [****48] at each level in the distribution chain would be in a position to assert conflicting claims to a common fund, the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund and prejudice to absent plaintiffs.

"Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge -- from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id.*, at 737-738.

⁴⁹ We expressly noted in *McCready*:

"[Our] cautious approach to speculative, abstract, or impractical damages theories has no application to McCready's suit. The nature of her injury is easily stated: As the result of an unlawful boycott, Blue Shield failed to pay the cost she incurred for the services of a psychologist. Her damages were fixed by the plan contract and, as the Court of Appeals observed, they could be 'ascertained to the penny.'" *457 U.S., at 475-476, n. 11*.

⁵⁰ This interest was also identified in the legislative debates preceding the enactment of the Sherman Act. Speaking in opposition to a proposed amendment that might have complicated the procedures in private actions, Senator Edmunds said:

"Therefore I say as to the suggested amendment of my friend from Mississippi -- and I repeat it in all earnestness -- that if I were a lobbyist and wanted to entangle this business, I should provide that everybody might sue everybody else in one common suit and have a regular *pot-pourri* of the affair, as his amendment proposes, and leave it to the lawyers of the trust to have an interminable litigation in respect of the proper parties, whether their interests were common or diverse or how they were affected, and take twenty years in order to get a result as to a single one of them. The Judiciary Committee did not think it wise to do that sort of thing, because we were in earnest about the business, as I know my friend is." 21 Cong. Rec. 3148 (1890).

See also *id.*, at 3149 (remarks of Senator Morgan opposing same amendment: "There is as much harm in trying to do too much as there is in not trying to do anything, and I think we have stopped at about the proper line in this bill, and I shall support it just as it is").

I I JÁMEĀ FJĀM I I LÉCHAUĀGĀ JI EĒJFGĀ I ÅSEÅAÅCÅÅ GÅÅTÅI I GLÅJÌ HÅÅEÅSØYØÅFG ÅÅTÅI

[****49] The same concerns should guide us in determining whether the Union is a proper plaintiff under § 4 of the Clayton Act.⁵¹ [****50] [*545] As the Court wrote in *Illinois Brick*, massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits. *Id.* at 745. In this case, if the Union's complaint asserts a claim for damages under § 4, the District Court would face problems of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities. It would be necessary to determine to what extent the coerced firms diverted business away from union subcontractors, and then to what extent those subcontractors [***743] absorbed the damage to their businesses or passed it on to employees by reducing the work force or cutting hours or wages. In turn it would be necessary to ascertain the extent to which the affected employees absorbed their losses and continued to pay union dues.⁵²

LEdHN[1B] [↑] [1B] LEdHN[13B] [↑] [13B] We conclude, therefore, that the Union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors -- the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy -- weigh heavily against [***51] judicial enforcement of the Union's antitrust claim. Accordingly, we hold that, based on the allegations of this complaint, the District [*546] Court was correct in concluding that the Union is not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act. The judgment of the Court of Appeals is reversed.

It is so ordered.

Dissent by: MARSHALL

Dissent

JUSTICE MARSHALL, dissenting.

Section 4 of the Clayton Act provides that a damages action may be brought under the antitrust laws by "[any] person who [has been] injured in his business or [**913] property by reason of anything forbidden in the antitrust laws." 15 U. S. C. § 15 (emphasis added). Despite the absence of an "articulable consideration of statutory policy" supporting the denial of standing, *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 (1982), the Court today holds that the intended victim of a restraint of trade does not constitute a "person who [has been] injured in his business or property by reason of anything forbidden in the antitrust laws." Because I believe that this decision imposes an [***52] unwarranted judge-made limitation on the antitrust laws, I respectfully dissent.

Congress' adoption of the broad language of § 4 was not accidental. As this Court observed in *Pfizer Inc. v. India*, 434 U.S. 308, 312 (1978): "Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition." Only last Term we emphasized that the all-encompassing language of § 4 "reflects Congress' 'expansive remedial purpose' in enacting

⁵¹ We pointed out in *McCready*, 457 U.S., at 475, n. 11:

"If there is a subordinate theme to our opinions in *Hawaii* and *Illinois Brick*, it is that HN16 [↑] the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4. . . . Thus we recognized that the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system."

⁵² Although the policy against duplicative recoveries may not apply to the other type of harm asserted in the Union's brief -- reduction in its ability to persuade nonunion contractors to enter into union agreements -- the remote and obviously speculative character of that harm is plainly sufficient to place it beyond the reach of § 4. See n. 46, *supra*.

I Í JÁMEÍA FJÆÍ I Í LÆCHAUÐA JÍ ÆEJFHÄ I ÅSEÐA ÆCA Á GHÆTI Í HLÆFJÍ HÁMEÍSÓYÓÁFG ÆTEG

§ 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." [Blue Shield of Virginia v. McCready, supra, \[***744\] at 472](#), quoting [Pfizer Inc. v. India, supra, at 313-314](#).

In keeping with the inclusive language and remedial purposes of § 4, this Court has "refused to engraft artificial limitations [⁵⁴⁷] on the § 4 remedy." [Blue Shield of Virginia v. McCready, supra, at 472](#) (footnote omitted). [⁵³] ¹ Thus, for example, in [Pfizer Inc. v. India](#), the Court held that the statutory phrase "any person" is broad enough to encompass a foreign sovereign. In [Reiter v. Sonotone Corp., 442 U.S. 330 \(1979\)](#), the Court likewise adopted an expansive reading of the statutory term "property," ruling that a consumer who pays a higher price as a result of a price-fixing conspiracy has sustained an injury to his "property" and therefore has standing to sue under § 4.

The plaintiff unions fit comfortably within the language of § 4. The complaint [⁵⁴] alleges that plaintiffs suffered injury as a result of a restraint of trade that was "designed to weaken and destroy plaintiffs and each of them." Complaint para. 26. The Court does not suggest that a union is not a "person" within the meaning of § 4, or that plaintiffs cannot prove injury to their "business or property." Moreover, it would require a strained reading of § 4 to conclude that a party that an antitrust violation was aimed at cannot prove that it suffered injury "by reason of" an antitrust violation.

Far from supporting the Court's conclusion, *ante*, at 531-533, the common-law background of the antitrust laws highlights the anomaly of denying a remedy to the intended victim of unlawful conduct. Since antitrust violations are essentially "tortious acts," [Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 \(1946\)](#),² the most apt analogy is to the common law of torts. Although many legal battles have been fought over the extent of tort liability for remote consequences [⁵⁴⁸] of *negligent* conduct, it has always been assumed that the victim of an *intentional* tort can recover from the tortfeasor if he proves that the tortious [⁵⁵] conduct was a cause-in-fact of his injuries. An [⁹¹⁴] inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors.³ [⁵⁶] For [⁷⁴⁵] example, if one party makes false representations to another, intending them to be communicated to a third party and acted upon to his detriment, the third party can bring an action for misrepresentation against the originator of the false information if he suffers injury as a result.⁴ Indeed, in many

¹ Cf. [Radovich v. National Football League, 352 U.S. 445, 453-454 \(1957\)](#) (given Congress' determination that the activities prohibited by the antitrust laws are "injurious to the public" and its creation of "sanctions allowing private enforcement of the antitrust laws by an aggrieved party," "this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws").

² See [Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 \(CA9 1955\)](#) (antitrust action is basically a suit to recover "for a tort").

³ See **Restatement of Torts § 279** (1934) ("If the actor's conduct is intended by him to bring about bodily harm to another which the actor is not privileged to inflict, it is the legal cause of any bodily harm of the type intended by him which it is a substantial factor in bringing about"); *id.*, Comment c ("There are no rules which relieve the actor from liability because of the manner in which his conduct has resulted in the injury such as there are where the liability of a negligent actor is in question. Therefore, the fact that the actor's conduct becomes effective in harm only through the intervention of new and independent forces for which the actor is not responsible is of no importance") (citations omitted); *id.*, § 280 (same rule applies to conduct intended to cause harm other than bodily harm); [Seidel v. Greenberg, 108 N. J. Super. 248, 261-269, 260 A. 2d 863, 871-876 \(1969\)](#); [Derosier v. New England Tel. & Tel. Co., 81 N. H. 451, 464, 130 A. 145, 152 \(1925\)](#) ("For an intended injury the law is astute to discover even very remote causation").

The Court's reliance on Sutherland's treatise on damages is misplaced. *Ante*, at 532-533, n. 25. Although Sutherland stated as a general proposition that a defendant is not liable to a plaintiff for injuries suffered as a result of the defendant's conduct with respect to a third party, he distinguished cases in which "the wrongful act is willful for that purpose," by which he presumably meant cases in which the defendant intended to injure the plaintiff. 1 J. Sutherland, *Law of Damages* 55 (1882) (footnote omitted). In the examples given by Sutherland and cited by the Court, there is no suggestion that the defendants intended to inflict injury upon the plaintiffs.

I Í JÁMEĀ FJĀĀ I Í LÄCHÄĀDÄ JÍ ÄEJFI LÄI ÄSEOÄÄÄÄ GÄÄÄÄ I Í LÄFJÌ HÄWÄÄSÖYÖÄFG ÄÄÄÄ I

situations the common law holds [*549] an intentional tortfeasor liable even for the unforeseeable consequences of his conduct.⁵ I am not aware of any cases exonerating an intentional tortfeasor from responsibility for the intended consequences of his actions merely because he inflicted harm upon his victim indirectly rather than directly.

This case does not implicate the sort of "articulable consideration of statutory policy" which we have deemed necessary to deny standing to a party encompassed by the language of § 4. *Blue Shield of Virginia v. McCready*, 457 U.S., at 473. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), we denied standing to parties that suffered injury because an illegal acquisition prevented them from reaping profits that they would have reaped had the acquired firms been permitted to fail. We reasoned that permitting recovery for "the profits [plaintiffs] [****57] would have realized had competition been reduced" would be "inimical" to the purposes of the antitrust laws, *id.*, at 488, since plaintiffs' injuries did not "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation," *id.*, at 489. This consideration of statutory policy is not applicable here, for plaintiffs allege that they suffered injury as a result of the defendants' efforts to coerce and induce letters of construction contracts and others to deal with nonunion carpentry firms solely because of their nonunion status. If plaintiffs prove their allegations, they will prove that they suffered harm attributable to the anticompetitive consequences of the defendants' restraint of trade.

Nor does the present case implicate the consideration of statutory policy underlying this Court's decisions in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). Critical to the denial of [**915] standing in those cases was [***746] the risk of duplicative recovery that would have been created by affording [****58] the plaintiffs [*550] standing.⁶ In *Illinois Brick* the Court held that an indirect purchaser has no standing to sue a seller on the theory that overcharges paid to the seller by a direct purchaser were passed on to the indirect purchaser. 431 U.S., at 730-731. If the Court had held in *Illinois Brick* that the indirect purchaser has standing, sellers would have faced the prospect of two treble-damages actions based on the same overcharges. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), had established that a direct purchaser can sue a seller for the entire amount of the seller's overcharges, and that the seller cannot assert as a defense that the direct purchaser passed the overcharges through to its customers (the indirect purchasers). Similarly, in *Hawaii v. Standard Oil Co.*, where the State of Hawaii sought to recover for financial harm allegedly suffered by the general economy of the State, the Court denied standing because "[a] large and ultimately indeterminable part of the injury to the 'general economy,' as it is measured by economists, is no more than a reflection of injuries to the 'business' [***59] or property' of consumers, for which they may recover themselves under § 4." 405 U.S., at 264.⁷

[***60] There is no risk of double recovery here. The plaintiff unions seek recovery for injuries distinct from those that other parties may have suffered. One such distinct injury [*551] plaintiffs may have suffered is a decrease in union dues resulting from a reduction in work available to union members. In addition to regular dues, it is not uncommon for employees to pay periodic dues representing a percentage of their wages. See R. Gorman, Basic

⁴ See, e. g., *Watson v. Crandall*, 7 Mo. App. 233 (1879), aff'd, 78 Mo. 583 (1883); *Campbell v. Gooch*, 131 Kan. 456, 292 P. 752 (1930). See generally Prosser, Misrepresentation and Third Persons, 19 Vand. L. Rev. 231, 240-242 (1966).

⁵ See, e. g., W. Prosser, Law of Torts 32-33 (4th ed. 1971) (doctrine of transferred intent); *id.*, at 67-68 (trespasser is responsible for unforeseeable consequences of his trespass).

⁶ See *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 474-475 (1982) (noting that *Illinois Brick* and *Hawaii v. Standard Oil Co.* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws").

⁷ Significantly, the risk of duplicative recovery that the Court relied on in both *Illinois Brick* and *Hawaii v. Standard Oil Co.* is not simply a judicially invented reason for restricting the broad scope of § 4. Permitting two recoveries based on the very same injuries would be contrary to the basic statutory scheme governing damages actions, for the result would be to subject antitrust defendants to sextuple-damages awards rather than the treble-damages awards that Congress contemplated. See 2 P. Areeda & D. Turner, *Antitrust Law* § 337d (1978).

Text on Labor Law 650 (1976).⁸ If union members lost work as a result of the alleged restraint of trade, their wages and thus the dues collected by the plaintiff unions may have been reduced.

Any recovery of lost dues by the plaintiff unions would not duplicate [***61] recoveries that might be obtained by either unionized carpentry firms or employees of those firms. A recovery of lost dues by a union would not duplicate a recovery for lost profits that might be obtained by a firm for which union members worked, for union dues are not an element of a [***747] firm's profits. Nor would a recovery of lost dues by a union duplicate recoveries of lost wages that employees might obtain. Although periodic union dues are based on a percentage of wages, there would be no double recovery because union dues would be subtracted from lost wages in calculating the employees' damages. The *Hanover Shoe* rule barring the assertion of a "pass-through" defense would not prevent subtraction of union dues from wages in determining the employees' damages. The *Hanover Shoe* rule was designed to avoid the "additional long and complicated proceedings involving massive evidence and complicated theories" that would be required to determine the extent to which price overcharges were passed through to an indirect purchaser. [392 U.S., at 493](#). [**916] In sharp contrast, where union dues are a percentage of wages, there is no difficulty in determining [***62] the amount of dues that a union lost as a result of a reduction in the wages earned by union members.

[*552] I recognize that it may not be easy to ascertain to what extent any reduction in union dues was attributable to the defendants' conduct. But our cases make it clear that "[if] there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury." [Perkins v. Standard Oil Co., 395 U.S. 642, 648 \(1969\)](#) (reinstating jury verdict based on injury indirectly caused by price discrimination in violation of the Robinson-Patman Act). Insofar as the amount of damages is concerned, an antitrust plaintiff need only provide a reasonable estimate of the damages stemming from an antitrust violation. See [Bigelow v. RKO Radio Pictures, Inc., 327 U.S., at 266](#). "Difficulty of ascertainment is no longer confused with right of recovery," *id.*, [at 265](#), quoting *Story Parchment Co. v. Paterson Co., 282 U.S. 555, 566 (1931), and "[the] most elementary conceptions of justice and public policy require that the wrongdoer shall [***63] bear the risk of the uncertainty which his own wrong has created," [327 U.S., at 265](#).*

Any concern the Court may have that the plaintiffs cannot prove their case does not justify throwing them out of court solely on the basis of the pleadings. If, during discovery, it becomes apparent that plaintiffs cannot establish a reasonable inference of causation or cannot provide evidence supporting a rational estimate of damages, they will be vulnerable to a motion for summary judgment. Dismissal for failure to state a claim is too crude a procedural device to be used to vindicate the "interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *Ante*, at 543.

References

[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 289](#)

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:61 et seq.

[15 USCS 15](#)

FRES, Labor Disputes 72:53, 72:54

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 67

L Ed Index to Annos, Restraints of Trade and Monopolies

⁸ Since we have only the pleadings before us, we do not know how the plaintiff unions collect their dues. However, plaintiffs are entitled to survive a motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) if there is any set of facts that, if proved at trial, would entitle them to recover.

I I JÁMEĀ FJĀM I GŁEHAJÓDÀ JI ÈEJFÌ LÀ I ÅSEØAÅCAÅ GHÅTTI I I LAFJÌ HÅMEÅSØYØÅFG ÅTTÅH

ALR Quick Index, Restraints of Trade [*****64**] and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Supreme Court's views as to meaning of term "person," as used in statutory or constitutional provision. [56 L Ed 2d 895.](#)

Validity, under the federal antitrust laws ([15 USCS 1 et seq.](#)), of agreements between employers or employer associations imposing restrictions on employment. 2 ALR Fed 839.

End of Document



Foremost Pro Color, Inc. v. Eastman Kodak Co.

United States Court of Appeals for the Ninth Circuit

June 8, 1982, Argued and Submitted ; February 23, 1983, Decided

No. 80-5629

Reporter

703 F.2d 534 *; 1983 U.S. App. LEXIS 30247 **; 1983-1 Trade Cas. (CCH) P65,239; 35 U.C.C. Rep. Serv. (Callaghan) 1087

FOREMOST PRO COLOR, INC., a California corporation, individually and on behalf of all other similarly situated, Plaintiff-Appellant, v. EASTMAN KODAK COMPANY, a New Jersey corporation, Defendant-Appellee

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Central District of California. Francis C. Whelan, District Judge, Presiding.

Disposition: Affirmed

Core Terms

photofinishing, photographic, products, film, monopolization, technological, chemicals, competitors, tying arrangement, amateur, district court, commodities, new product, Sherman Act, delivery, cameras, tied product, anticompetitive, allegations, contracts, processed, monopoly power, incompatible, markets, argues, resale, anti trust law, manufacturers, customers, photographic paper

LexisNexis® Headnotes

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

[**HN1**](#) **Standards of Review, Clearly Erroneous Review**

The court gives substantial deference to the construction of state law by a district judge sitting in that state and will reverse only if the district judge's interpretation of state law is clearly wrong.

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

[**HN2**](#) **Defenses, Demurrsers & Objections, Affirmative Defenses**

703 F.2d 534, *534L 1983 U.S. App. LEXIS 30247, **1

California has a two-year statute of limitations for breach of contract claims not founded upon an instrument in writing. [Cal. Civ. Proc. Code § 339.](#)

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Commercial Law (UCC) > Sales (Article 2) > Subject Matter > General Overview

[HN3](#) [Contracts, Sales of Goods

[Cal. Com. Code § 2725](#) applies only to contracts for the sale of goods.

Commercial Law (UCC) > ... > Contract Provisions > Contract Terms > General Overview

[HN4](#) [Contract Provisions, Contract Terms

[Cal. Com. Code § 2204\(1\)](#) permits a court to find an enforceable contract in the absence of a written agreement.

Contracts Law > Contract Formation > Offers > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > General Overview

[HN5](#) [Contract Formation, Offers

Trade circulars, catalogs and advertisements are uniformly regarded as mere preliminary invitations which create no power of acceptance in the recipient.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review > General Overview

[HN6](#) [Motions to Dismiss, Failure to State Claim

In reviewing a dismissal for failure to state a claim upon which relief can be granted under [Fed. R. Civ. P. 12\(b\)\(6\)](#), the court must accept as true all the well-pleaded allegations of the complaint and can affirm only if it appears with certainty that plaintiff would not be entitled to relief under any set of facts which might be proved in support of its claims.

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

703 F.2d 534, *534L 1983 U.S. App. LEXIS 30247, **1

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN7 **Tying Arrangements, Clayton Act**

Tying arrangements have long been considered per se unlawful under the Sherman Act, [15 U.S.C.S. § 1](#).

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

HN8 **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is an agreement by a party to sell one product only on the condition that the buyer also purchases a different or tied product.

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

Evidence > Burdens of Proof > General Overview

HN9 **Price Fixing & Restraints of Trade, Tying Arrangements**

In order to establish an unlawful tying arrangement, a plaintiff must demonstrate the existence of two distinct products or services, that the sale of the tying product or service is conditioned on the purchase of the tied product or service, that the defendant has sufficient economic power in the market for the tying product to appreciably restrain competition in the market for the tied product, and that the amount of commerce involved in the market for the tied product is not insubstantial.

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

HN10 **Price Fixing & Restraints of Trade, Tying Arrangements**

A significant element of an illegal tying arrangement is coercion by the seller. The seller must condition the sale of the tying product on the buyer's purchase of the tied product. If the buyer is free to take either product by itself, there is no tying problem.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

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

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

[**HN11**](#) [blue document icon] Consumer Protection, Deceptive & Unfair Trade Practices

Some modicum of involuntariness or coercion is essential to the existence of a per se illegal tie-in.

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

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

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

[**HN12**](#) [blue document icon] Tying Arrangements, Defenses

When the prerequisites are met, tying arrangements are illegal in and of themselves, without any requirement that the plaintiff make a showing of unreasonable competitive effect.

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

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

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN13**](#) [blue document icon] Tying Arrangements, Clayton Act

Conduct which does not meet the requirements of the per se prohibition against tying arrangements may still constitute a violation of [15 U.S.C.S. § 1](#), of the Sherman Act under the "rule of reason" test.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

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

[**HN14**](#) [blue document icon] Consumer Protection, Deceptive & Unfair Trade Practices

Coercion for purposes of the per se rule means a product sold on the condition that the buyer also purchase a different or tied product or at least that the buyer agrees not to purchase the product from any other supplier.

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

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

703 F.2d 534, *534L 1983 U.S. App. LEXIS 30247, **1

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN15 [blue icon] **Monopolies & Monopolization, Actual Monopolization**

To state a claim for relief for monopolization, the plaintiff must allege: (1) the possession of monopoly power in the relevant market; (2) the willful acquisition or maintenance of that power; and (3) causal antitrust injury. It is the second element, the conduct element, which distinguishes lawful possession of monopoly power from unlawful possession of monopoly power.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN16 [blue icon] **Monopolies & Monopolization, Actual Monopolization**

15 U.S.C.S. § 2 of the Sherman Act proscribes monopolization; it does not render unlawful all monopolies.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN17 [blue icon] **Monopolies & Monopolization, Attempts to Monopolize**

To state a claim for attempted monopolization under 15 U.S.C.S. § 2, a plaintiff must allege: (1) specific intent to control prices or destroy competition in the relevant market; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. In the Ninth Circuit, both the requisite specific intent and dangerous probability of success may, in appropriate cases, be inferred from the existence of predatory or anticompetitive conduct. However, specific intent to monopolize, and hence an inference of dangerous probability of success, cannot be inferred from conduct alone unless that conduct is predatory or anticompetitive and forms the basis for a substantial claim of restraint of trade.

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

HN18 [blue icon] **Monopolies & Monopolization, Conspiracy to Monopolize**

As a general rule, any firm, even a monopolist, may bring its products to market whenever and however it chooses.

703 F.2d 534, *534L 1983 U.S. App. LEXIS 30247, **1

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN19 [] **Robinson-Patman Act, Claims**

Section 2(e) of the Robinson-Patman Act, 15 U.S.C.S. § 13(e), prohibits discrimination against purchasers of a commodity bought for resale by offering or furnishing services or facilities that are not accorded to all purchasers on proportionately equal terms.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

HN20 [] **Antitrust & Trade Law, Robinson-Patman Act**

As a general rule, practices related to the resale of commodities are cognizable under 15 U.S.C.S. § 13(e), while practices related to the original sale of commodities are cognizable under 15 U.S.C.S. § 13(a). Thus, 15 U.S.C.S. § 13(e), applies only to services or facilities connected with the resale of the product by the purchaser.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN21 [] **Antitrust & Trade Law, Robinson-Patman Act**

15 U.S.C.S. § 13(e) covers commodities bought for resale with or without processing.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

HN22 [] **Antitrust & Trade Law, Robinson-Patman Act**

Commodities may undergo physical alterations during processing and yet still be purchased for resale within the meaning of 15 U.S.C.S. § 13(e).

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN23 [] **Price Discrimination, Competitive Injuries**

703 F.2d 534, *534L 1983 U.S. App. LEXIS 30247, **1

[15 U.S.C.S. § 13\(a\)](#) expressly provides that price discriminations are unlawful only 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.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[HN24](#) [] **Robinson-Patman Act, Claims**

[Section 2\(a\)](#) of the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#), does not make price discriminations per se unlawful.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[HN25](#) [] **Price Discrimination, Competitive Injuries**

Although [15 U.S.C.S. § 13\(e\)](#), does not require that the discriminations must in fact have harmed competition, it is clear that there can be no violation of [15 U.S.C.S. § 13\(a\)](#), if the alleged price differential has no potential for adversely affecting competition.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[HN26](#) [] **Price Discrimination, Competitive Injuries**

The naked demonstration of injury to a specific competitor without more is not sufficient to show that a price discrimination may substantially lessen competition. The test must always focus on injury to competition.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

[HN27](#) [] **Robinson-Patman Act, Claims**

The language of [15 U.S.C.S. § 13\(a\)](#) compels the conclusion that a prima facie claim for unlawful price discrimination cannot be stated absent an allegation that the discrimination in price may produce injury to competition.

Counsel: Robert C. Fortune, Attorney at Law, Downey, California, for Plaintiff-Appellant; Robert C. Fortune, Esq., Thomas McCoy, O'Melveny & Meyers, Los Angeles, California, for Defendant-Appellee.

Judges: Goodwin, Wallace, and Pregerson, Circuit Judges.

Opinion by: WALLACE

Opinion

[*537] WALLACE, Circuit Judge:

Foremost Pro Color, Inc. (Foremost) appeals from the district court's judgment for Eastman Kodak Co. (Kodak). The district court dismissed Foremost's antitrust claims for failure to state a claim upon which relief could be granted. The court then granted Kodak's motion for summary judgment on four of Foremost's five breach of contract claims. After Foremost voluntarily dismissed the remaining contract claim, the district court entered final judgment for Kodak. We affirm.

I

Kodak is the preeminent firm in the amateur photographic industry in this country, enjoying a dominant position in the markets for photographic film and conventional amateur still cameras. For example, over eighty percent of all photofinishing -- the development [**2] of negatives and the printing of photographs -- is conducted with Kodak-manufactured photofinishing equipment, photographic paper and chemicals.

Foremost is an authorized Kodak dealer and an independent photofinisher. As a dealer, Foremost has purchased photographic film, paper and chemicals from Kodak for resale to consumers. As a photofinisher, Foremost has purchased photographic equipment, paper and chemicals from Kodak and used them in the photofinishing process on orders placed by its consumer customers. Because Kodak is also a photofinisher, although at a significantly smaller level than in the past as a result of a 1954 consent decree negotiated with the United States Department of Justice, Foremost is both a photofinisher customer and competitor of Kodak.

Kodak's dominance of the photographic film and amateur still camera markets "is no doubt due to the firm's history of innovation." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 269 (2d Cir. 1979), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980) (*Berkey*). It is one of those innovations which ignited the present controversy. Similar to *Berkey*, this case arises out of Kodak's [**3] undisclosed development and 1972 introduction of its then-newest line of cameras, the 110 "pocket instamatic," and its supporting photographic system. That system included a new generation of film (Kodacolor II), photographic paper, and photographic film processing and printing chemicals. The relevant history of the development and introduction of this system is well-outlined in *Berkey*. *Id. at 276-78*.

Foremost argues that this introduction of a new, integrated photographic system violated several provisions of the antitrust laws. First, it contends that the introduction constituted monopolization and attempted monopolization of the "amateur photographic market" in the United States in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. Second, Foremost claims that because the 110 cameras could only use new Kodacolor II film and because this film could only be processed with the new papers and chemicals, Kodak implicitly and unlawfully tied the sale of cameras to film, film to chemicals, and chemicals to paper and film in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and section 3 of the Clayton Act, 15 U.S.C. § 14. Finally, Foremost maintains that Kodak [**4] discriminated against it in the supplying of technical photographic assistance and in the timeliness of deliveries, in violation of section 2(e) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(e), and discriminated against it in prices and credit terms in violation of section 2(a) of the same statute, 15 U.S.C. § 13(a).

Although the facts of Foremost's contract claims are more complex, the legal issues they raise are easily analyzed. The jurisdiction of the district court over these state law claims rested upon diversity of citizenship. [HN1](#)[↑] We give substantial deference to the construction of state law by a district judge sitting in that state and will reverse only if the district judge's interpretation of state law is clearly wrong. See, e.g., [Begay v. Kerr-McGee Corp.](#), [682 F.2d 1311 \(9th Cir. 1982\)](#). We turn first to the entry of summary judgment on the breach of contract claims.

II

Foremost's first contract claim was voluntarily dismissed and is not before us. Its second contract claim alleged that in August 1972, more than three years prior to the commencement of this action, Kodak breached a contract to "assist and supervise" Foremost's [\[*5\]](#) efforts to convert its photofinishing operations to utilize the new Kodak chemicals and paper required to develop film from the 110 instamatic camera. The district court granted summary judgment for Kodak on this claim, concluding that (1) the undisputed facts demonstrated that Kodak had not breached the alleged contract, and (2) in the absence of a written agreement, Foremost's claim was barred by California's two-year statute of limitations for actions based on non-sales, oral contracts. [Cal. Civ. Proc. Code § 339](#) (West 1982).

We need not decide whether the district court ruled correctly on the issue of breach because we affirm on the alternative statute of limitations ground. Foremost argued to the district court, and on appeal, that the alleged contract underlying this claim was an August 1, 1972 letter from Kodak. Actually it was a newsletter from Kauffman, Kodak's Manager for Professional and Finishing Markets, announcing the development of the new chemicals and papers to the photofinishing trade. However, Fortune, the president of Foremost, testified that this letter was not the written contract pleaded in Foremost's complaint and that a similar document, the author of [\[*6\]](#) which he could not recall, was the contract pleaded. Foremost never produced this alleged written contract. Thus, the district court was not clearly wrong in granting summary judgment for Kodak on this claim pursuant to [HN2](#)[↑] California's two-year statute of limitations for breach of contract claims "not founded upon an instrument in writing." [Cal. Civ. Proc. Code § 339](#).

Foremost argues that it had a "unilateral" or "implied" contract with Kodak for technical assistance, based upon Kodak's consistent offers of technical assistance to it and other photofinishers, to which the four-year limitations period of [Cal. Com. Code § 2725](#) (West Supp. 1982) applies. Even assuming that Kodak's conduct was sufficient to support such an implied contract, however, there remained no material question of fact. [Section 2725 HN3](#)[↑] applies only to contracts for the sale of goods. See *id.* [§ 2725\(1\)](#) (four-year limit for "any contract for sale"); *id.* § 2106(1) (defining "contract for sale"). The contract alleged and testified to by Foremost was a contract to provide "assistance and supervision" for Foremost's conversion of older equipment purchased from another manufacturer. Therefore, the alleged [\[*7\]](#) contract in no way involved the sale of goods by Kodak.

Foremost's third and fourth contract claims alleged that Kodak's untimely delivery of certain photofinishing equipment ordered by Foremost breached two written contracts. The undisputed facts show that the alleged contracts upon which Foremost relies in both instances are purchase order forms submitted by Foremost to Kodak through the latter's sales representatives, that only one could be located by the parties and it specified no delivery date, and that such order forms specifically state that all orders are "subject to acceptance" by Kodak. The district court concluded that there was no contract underlying either claim because the purchase orders were merely offers to buy, inviting Kodak's acceptance either by a prompt promise to ship or by prompt or current shipment under [Cal. Com. Code § 2206\(1\)\(b\)](#) (West 1964).

The district court was not clearly wrong in this application of [section 2206\(1\)\(b\)](#). The weight of authority is that purchase orders such as those at issue here are not enforceable contracts until they are accepted by the seller. See *Restatement (Second) of Contracts* § 26 comment d (1981); 1 [Corbin on Contracts](#) § 24, at 73-74 (1963); [Zinni v. Royal Lincoln-Mercury, Inc.](#), [84 Ill. App. 3d 1093, 406 N.E.2d 212, 40 Ill. Dec. 511 \(1980\)](#). Foremost has cited no California cases to the contrary. Since there was no promise to ship by Kodak, no contracts were formed until Kodak shipped the merchandise ordered, [Cal. Com. Code § 2206\(1\)\(b\)](#), and, therefore, there could be no late delivery. Foremost's argument that Kodak somehow promised to ship the merchandise by logging the

purchase orders as "received" is without merit; this alone did not manifest Kodak's acceptance of Foremost's offer of purchase. See *Restatement (Second) of Contracts* § 19(2) (1981).

Foremost also argues that [Cal. Com. Code § 2204\(1\)](#) (West 1964) applies to these claims, as there was "conduct by both parties which recognizes the existence of such a contract." While it is true that [section 2204\(1\) HN4](#) [↑] permits a court to find an enforceable contract in the absence of a written agreement, the agreement-making conduct identified by Foremost is that "the equipment was actually shipped and sold by Kodak." If this statute applied, there could be no contracts formed until Kodak shipped the merchandise. Obviously, [**9] Foremost could have no claim for late delivery based upon a failure to deliver the goods before the contracts were formed.

Foremost's fifth and last contract claim alleged that Kodak breached a May 1, 1973 written agreement in which it promised to advise and assist Foremost in converting its photofinishing facilities to permit it to process the new 110 Kodacolor II film. The contract Foremost produced was an "information circular" distributed by Kauffman to the photofinishing trade. The district court granted summary judgment for Kodak on the ground, among others, that this claim was barred by California's two-year statute of limitations for actions based on non-sales, oral contracts. [Cal. Civ. Proc. Code § 339](#) (West 1982). We agree. [HN5](#) [↑] Trade circulars, catalogs and advertisements are uniformly regarded as mere preliminary invitations which create no power of acceptance in the recipient. See, e.g., 1 Corbin on Contracts, *supra*, § 28; [Lonergan v. Scolnick](#), 129 Cal. App. 2d 179, 182, 276 P.2d 8 (1944). Based upon this settled law, the district court correctly concluded that there remained no material question of fact as to whether the alleged agreement had been embodied [**10] in a written contract. As there was no written contract in this claim, it is barred by the two-year statute of limitations for oral contracts.

III

The district court dismissed Foremost's antitrust claims for failure to state a claim upon which relief can be granted. [Fed. R. Civ. P. 12\(b\)\(6\)](#). [HN6](#) [↑] In reviewing this dismissal, we must accept as true all the well-pleaded allegations of the complaint and can affirm only if it appears with certainty that Foremost would not be entitled to relief under any set of facts which might be proved in support of its claims. [Conley v. Gibson](#), 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); [Jablon v. Dean Witter & Co.](#), 614 F.2d 677, 682 (9th Cir. 1980). The dismissal is a ruling on a question of law and is therefore freely reviewable on appeal. [Halet v. Wend Investment Co.](#), 672 F.2d 1305, 1309 (9th Cir. 1982).

Foremost's seventh claim alleged that Kodak unlawfully tied the sale of the several distinct components of the 110 system in violation of [section 1](#) of the Sherman Act and [section 3](#) of the Clayton Act, and its eighth claim alleged monopolization and attempted monopolization in violation of [section 2](#) of the Sherman Act. [**11] We turn first to the charges of tying.

A.

Foremost's third amended complaint¹ alleged that because "the new Kodacolor II [*540] film . . . was not compatible with any of the then existing film processing procedures or chemical solutions," and because the new "chemistry was not compatible with the then existing . . . paper, [Foremost] was required to discard its complete inventory of the old paper and chemistry and purchase the new . . . papers and . . . chemistry." Foremost alleged

¹ The original complaint alleged five contract and three antitrust claims. One antitrust claim was dismissed voluntarily, and the remaining two were dismissed for failure to state claims for relief. The first amended complaint realleged the two antitrust claims previously dismissed, added three new ones, and realleged all five contract claims. Pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#), the district court dismissed all the antitrust claims, with leave to amend, and thus did not rule on Kodak's alternative motion for summary judgment on the antitrust claims. The same process was repeated in the second and third amended complaints, although the third amended complaint contained only four antitrust claims and the contract claims. After the district court dismissed the antitrust claims, Foremost attempted to appeal the order of dismissal without complying with the requirements of [Fed. R. Civ. P. 54\(b\)](#). We dismissed that appeal for lack of jurisdiction. The jurisdictional defect was cured when, after summary judgment on the contract claims, Foremost dismissed its last remaining contract claim, the district court entered judgment for Kodak, and Foremost filed a timely notice of appeal.

that this amounted to the sale of commodities "on an implied contract, condition, agreement or understanding that [Foremost] would purchase other photographic commodities manufactured and sold by [Kodak]." As Foremost has phrased it on appeal, this implied condition, agreement or understanding arose because "whenever Foremost purchased one Kodak product, it *necessarily had to purchase additional Kodak commodities*" (emphasis in original).

[**12] [HN7](#) Tying arrangements have long been considered *per se* unlawful under [section 1](#) of the Sherman Act. [Northern Pacific Railway Co. v. United States](#), 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). [HN8](#) A tying arrangement is an agreement by a party to sell one product only on the condition that the buyer also purchase a different or "tied" product. *Id.*; [Yentsch v. Texaco, Inc.](#), 630 F.2d 46, 56 (2d Cir. 1980). [HN9](#) In order to establish an unlawful tying arrangement,² a plaintiff must demonstrate the existence of two distinct products or services, that the sale of the "tying" product or service is conditioned on the purchase of the "tied" product or service, that the defendant has "sufficient economic power" in the market for the tying product to appreciably restrain competition in the market for the tied product, and that the amount of commerce involved in the market for the tied product is "not insubstantial." [Portland Retail Druggists Association v. Kaiser Foundation Health Plan](#), 662 F.2d 641, 648 (9th Cir. 1981); [Community Builders, Inc. v. City of Phoenix](#), 652 F.2d 823, 830 (9th Cir. 1981); [Moore v. Jas. H. Matthews & Co.](#), 550 F.2d 1207, 1212 (9th Cir. 1977). [**13] [HN10](#) A significant element of an illegal tying arrangement is coercion by the seller, i.e., the seller must condition the sale of the tying product on the buyer's purchase of the tied product. See [Northern Pacific Railway Co. v. United States](#), *supra*, 356 U.S. at 5-6, 10; [Times-Picayune Publishing Co. v. United States](#), 345 U.S. 594, 605, 97 L. Ed. 1277, 73 S. Ct. 872 (1953); L. Sullivan, *Handbook of the Law of Antitrust* 431 (1977). If the buyer is free to take either product by itself, "there is no tying problem." [Northern Pacific Railway Co. v. United States](#), *supra*, 356 U.S. at 6 n.4. [HN11](#) "Some modicum" of involuntariness or coercion is thus essential to the existence of a *per se* illegal tie-in. See, e.g., [Betaseed, Inc. v. U and I Inc.](#), 681 F.2d 1203, 1215 (9th Cir. 1982); [Hirsh v. Martindale-Hubbell, Inc.](#), 674 F.2d 1343, 1347 (9th Cir. 1982); [Sobrato v. Prudential Insurance Co. of America](#), 632 F.2d 786, 787 (9th Cir. 1980).

[**14] When these prerequisites are met, tying arrangements are illegal in and of themselves, without any requirement that the plaintiff make a showing of unreasonable competitive effect. [Fortner Enterprises, Inc. v. United States Steel Corp.](#), 394 U.S. 495, 498, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969). The principal evil of the tying arrangement, that which has traditionally justified its inclusion in the *per se* category, is that it denies competitors access to the market for the tied product not because the party imposing the arrangement necessarily has a superior product in that market, but rather because of the leverage exerted as a result of its economic power in the market for the tying product and the demand for the tying product.³ See [Kentucky Fried Chicken Corp. v.](#)

²The slight differences between the elements of a tying violation under [section 1](#) of the Sherman Act and [section 3](#) of the Clayton Act, see [Moore v. Jas. H. Matthews & Co.](#), 550 F.2d 1207, 1214 (9th Cir. 1977), are not relevant to this case. The rule stated in the text, however, applies to [section 3](#) only if both the tying and tied items are "commodities." [15 U.S.C. § 14](#). They are in this case.

[HN12](#) -

³Other justifications of the *per se* prohibition have been suggested. See [Hirsh v. Martindale-Hubbell, Inc.](#), 674 F.2d 1343, 1348-49 (9th Cir. 1982); [Moore v. Jas H. Matthews & Co.](#), *supra*, 550 F.2d at 1212-13. However, despite the fact that some commentators and economists have criticized the leverage justification mentioned in the text, see R. Bork, *The Antitrust Paradox* 373 (1978), it is that theory on which the Supreme Court has consistently justified the *per se* tying rule from *Northern Pacific* to *Fortner*. While commentators may certainly assist courts in developing legal standards to implement the antitrust laws, see [William Inglis & Sons Baking Co. v. ITT Continental Baking Co.](#), 668 F.2d 1014, 1061-63 (9th Cir. 1981) (Wallace, J., dissenting from denial of rehearing en banc), as of now the Supreme Court has foreclosed our developing new theories by teaching that "there is general agreement . . . that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product." [Fortner Enterprises, Inc. v. United States Steel Corp.](#), 394 U.S. 495, 512, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969) (White, J., dissenting); see *id.* at 498-99 (majority opinion), quoting [Northern Pacific Railway Co. v. United States](#), 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958); see also [United States Steel Corp. v. Fortner Enterprises, Inc.](#), 429 U.S. 610, 617-18 & n.8, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977).

Diversified Packaging Corp., 549 F.2d 368, 375 (5th Cir. 1977); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47, 14 A.L.R. Fed. 458 (9th Cir. 1971), cert. denied, 405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972). Thus, competition in the market for the tied product is severely restrained because competitors "cannot offer their products on an equal basis" with the party imposing [**15] the tying arrangement. Moore v. Jas. H. Matthews & Co., supra, 550 F.2d at 1212.

[**16] Of course, HN13[¹⁴] conduct which does not meet the requirements of the *per se* prohibition against tying arrangements may still constitute a violation of section 1 of the Sherman Act under the "rule of reason" test. Fortner Enterprises, Inc. v. United States Steel Corp., supra, 394 U.S. at 499-500; Phonetele, Inc. v. American Telephone & Telegraph Co., 664 F.2d 716, 738 (9th Cir. 1981). But Foremost has not challenged the alleged tying arrangement under the rule of reason. Thus, the dispositive question before us is whether, under the *per se* rule, Foremost adequately pleaded the requisite coercion in its complaint.

Although the complaint boldly asserts that the purchase of the tied products was "required," that single word is insufficient to support even an inference of the necessary coercion. See Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 708-09 (7th Cir. 1977), cert. denied, 439 U.S. 822, 58 L. Ed. 2d 113, 99 S. Ct. 87 (1978). Foremost did not allege that there existed an express requirement to purchase the 110 components as a package, that Kodak threatened to terminate film sales if Foremost did not also purchase paper and chemicals, or that [**17] a condition of being an authorized dealer of 110 cameras was the purchase of 110 film, paper and chemicals. Rather, as the complaint itself explains, the reason Foremost insists that it was required to purchase new film, chemicals and paper was that the newly introduced 110 film could not be processed with the then existing technology and these new products were necessary to satisfy consumer demand for 110 products and to process 110 photofinishing orders placed by its customers. Thus, Foremost's complaint pointedly refrains from alleging that Kodak itself required the purchase of film as a *condition* of the sale of cameras, or required the purchase of chemicals and paper as a *condition* of the sale of film. HN14[¹⁵] Coercion for purposes of the *per se* rule means "a product sold on [*542] the condition that the buyer also purchase a different or tied product or at least that the buyer agrees not to purchase the product from any other supplier." Betaseed, Inc. v. U and I Inc., supra, 681 F.2d at 1222 n.35. In the absence of an allegation that the purchase of the alleged tied products was required as a condition of sale of the alleged tying products, rather than as a prerequisite [**18] to practical and effective use of the tying products, Foremost's complaint failed to plead the coercion essential to a *per se* unlawful tying arrangement.⁴

Although liberally sprinkled with the word "required," Foremost's tying allegation basically involves the so-called technological tie. In other words, because the new film could not be processed with the old chemicals, and because the needed new photographic paper similarly could not be processed [**19] with the old chemicals, it was necessary to purchase an entire package of film, chemicals and paper. We do not believe that, standing alone, such technological interrelationship among complementary products is sufficient to establish the coercion essential to a *per se* unlawful tying arrangement. Indeed, such a rule could become a roadblock to the competition vital for an ever expanding and improving economy. Product innovation, particularly in such technologically advancing industries as the photographic industry, is in many cases the essence of competitive conduct. Therefore, we decline to place such technological ties in the category of economic restrictions deemed *per se* unlawful by *Northern Pacific* and its progeny. See Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-51 & 50 n.16, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977); Betaseed, Inc. v. U and I Inc., supra, 681 F.2d at 1215.

Nor are the allegations that the new 110 film, chemicals and paper were incompatible with the products offered by Kodak's competitors sufficient to support a *per se* unlawful tie-in. Quite obviously, a firm that pioneers new technology will often introduce the first [**20] of a new product type along with related, ancillary products that can

⁴ Under the facts alleged in the complaint, there could not as a matter of law be the sort of implicit coercion discussed in Moore v. Jas. H. Matthews & Co., supra, 550 F.2d at 1217, because Foremost was not forced to "accept the tied item and forego possibly desirable substitutes." Since the complaint alleges that, when the 110 system was introduced, no competing manufacturers produced chemicals and papers compatible with Kodacolor II film, there could have been no substitutes that Foremost or other photofinishing customers were foreclosed from purchasing.

only be utilized effectively with the newly developed technology. Until other, less technologically advanced competitors procure licenses or otherwise develop ancillary products that are compatible with the new product, the technological leader will be faced with no present competition in the newly developed product market. The essence of a *per se* unlawful tying arrangement, however, is that it *forecloses* competition in the market for the tied product or products. The creation of technological incompatibilities, without more, does not foreclose competition; rather, it increases competition by providing consumers with a choice among differing technologies, advanced and standard, and by providing competing manufacturers the incentive to enter the new product market by developing similar products of advanced technology. Any short-run absence of competition in the market for the technologically tied product could just as likely be due to the unwillingness or inability of competitors to devote sufficient economic resources to match the pace of technological development set by the industry's leader, as to the [**21] abuse of market power by that dominant firm. Thus, the *per se* rule does not logically fit and should not be applied. It is clear that a mere technological tie does not present the competitive evils which the *per se* prohibition of tying arrangements is designed to prevent. See [*Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., supra, 549 F.2d at 378-79.*](#)

As a general rule, therefore, we hold that the development and introduction [*543] of a system of technologically interrelated products is not sufficient alone to establish a *per se* unlawful tying arrangement even if the new products are incompatible with the products then offered by the competition and effective use of any one of the new products necessitates purchase of some or all of the others. Any other conclusion would unjustifiably deter the development and introduction of those new technologies so essential to the continued progress of our economy.

Foremost's tying claim alleged only the introduction of technologically related components incompatible with existing products offered by the competition. It did not allege that the dominant purpose motivating Kodak's design and introduction [**22] of the 110 system was to compel purchase of the entire system as a package, rather than to achieve the legitimate goal of marketing new, technologically superior products designed to satisfy consumer demand for smaller, pocket-sized cameras. Therefore, the complaint failed to state a claim for relief predicated on unlawful tying.

B.

Foremost incorporated its tying allegations into its eighth claim, which charges monopolization and attempted monopolization in violation of [section 2](#) of the Sherman Act. In this claim, Foremost's complaint alleged that Kodak's dominance of the "amateur photographic market" was the result of its "continually researching and developing new photographic products," that by introducing new products Kodak would "render[] obsolete existing competitive products, and . . . regain[] . . . the dominant share of the amateur photographic market," and that Kodak "perpetrated certain acts" in the course of its monopolization and attempt to monopolize, including developing new products "that are incompatible with then existing photographic products and photofinishing equipment[,] . . . withholding . . . new . . . products . . . from the amateur photographic [**23] market until competition . . . force[d] the introduction of these products[,] . . . [and] developing and marketing its 110 [system] in such a manner that [Foremost] was required to purchase new paper, chemistry and photofinishing equipment to enable it to photofinish 110 size film and Kodacolor II film." Foremost also alleged that, as an "effect" of the violations asserted, Kodak "has obtained the dominant share of the amateur photographic market . . . [and] has secured the power to control prices and to exclude . . . actual and potential competition" in that market. We discuss first the tying allegations.

Because the conduct Foremost alleged in support of its [section 1](#) tying claim is not anticompetitive, it is of no assistance to Foremost's efforts to state a claim for relief for monopolization or attempted monopolization, both of which require at least some allegation of anticompetitive conduct. For example, [HN15](#) to state a claim for relief for monopolization, the plaintiff must allege (1) the possession of monopoly power in the relevant market, (2) the "willful acquisition or maintenance" of that power, and (3) causal antitrust injury. E.g., [*Forro Precision, Inc. v. IBM Corp., 673 F.2d 1045, 1058 \(9th Cir. 1982\)*](#). It is the second element, the conduct element, which distinguishes lawful possession of monopoly power from unlawful possession of monopoly power. [Section 2](#) of the Sherman Act [HN16](#) proscribes "monopolization"; it does not render unlawful all monopolies. Therefore, we have recently reemphasized that for purposes of a monopolization claim, "willful acquisition or maintenance [of monopoly power] means that the monopolist must have 'engaged in "willful" acts directed at establishing or

retaining its monopoly, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." " [Phonetel, Inc. v. American Telephone & Telegraph Co., supra, 664 F.2d at 739-40.](#)

Similarly, [HN17](#) in order to state a claim for attempted monopolization under [section 2](#), a plaintiff must allege (1) specific intent [^{*}544] to control prices or destroy competition in the relevant market, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success. [Janich Brothers, Inc. v. American Distilling Co., 570 F.2d 848, 853 \(9th Cir. 1977\),](#) [**25] cert. denied, 439 U.S. 829, 58 L. Ed. 2d 122, 99 S. Ct. 103 (1978); [Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 845 \(9th Cir. 1980\)](#); [California Computer Products, Inc. v. IBM Corp., 613 F.2d 727, 736 \(9th Cir. 1979\)](#). In this circuit, both the requisite specific intent and dangerous probability of success may, in appropriate cases, be inferred from the existence of predatory or anticompetitive conduct. [Janich Brothers, Inc. v. American Distilling Co., supra, 570 F.2d at 853-54.](#) However, specific intent to monopolize, and hence an inference of dangerous probability of success, cannot be inferred from conduct alone unless that conduct is predatory or anticompetitive and forms the basis for a substantial claim of restraint of trade. See [Janich Brothers, Inc. v. American Distilling Co., supra, 570 F.2d at 857;](#) [Greyhound Computer Corp. v. IBM Corp., 559 F.2d 488, 505 \(9th Cir. 1977\),](#) cert. denied, 434 U.S. 1040, 54 L. Ed. 2d 790, 98 S. Ct. 782 (1978).

As we indicated earlier, the introduction of technologically related products, even if incompatible with the products offered by competitors, is alone neither a predatory nor anticompetitive act. Foremost's [^{*}26] tying allegations, therefore, are insufficient to aver the requisite willful acquisition or maintenance element of a monopolization claim or the anticompetitive or predatory conduct element of an attempted monopolization claim. Four of the six acts that Foremost alleged Kodak perpetrated in attempting to monopolize and monopolizing the "amateur photographic market" related to these tying allegations. We are left, therefore, with only the two remaining anticompetitive acts pleaded: first, that the 110 system was incompatible with then existing photographic products and photofinishing equipment, and second, that Kodak withheld the 110 system from the amateur photographic market "until competition from other manufacturers force[d] the introduction" of the system.

It is useful to point out that Foremost's complaint did not attempt to state a claim for relief for monopolization or attempted monopolization on the ground that Kodak's failure to "predisclose" its 110 format to the competition constituted willful maintenance of its monopoly power or predatory or anticompetitive conduct in an attempt to monopolize the market. See [Berkey, supra, 603 F.2d at 279-85.](#) Nor did Foremost's [^{*}27] complaint distinguish among the various product markets which comprise the "amateur photographic market." Therefore, there is no occasion to address whether Foremost's complaint stated a valid claim for relief on the ground that Kodak abused its monopoly power in the film market or used that power as a lever to create, or attempt to create, a monopoly in the markets for amateur still cameras or photographic chemicals or paper. See [id. at 275-76, 284, 292;](#) see also [Phonetel, Inc. v. American Telephone & Telegraph Co., supra, 664 F.2d at 739;](#) [Sargent Welch Scientific Co. v. Ventron Corp., supra, 567 F.2d at 711-12.](#) In the absence of either of these allegations, we hold that Foremost's complaint failed to state a claim upon which relief can be granted for monopolization or attempted monopolization under [section 2](#) of the Sherman Act.

For us to hold that Foremost's allegations were sufficient as a matter of law to satisfy the conduct element of [section 2](#) would be contrary to the very purpose of the antitrust laws, which is, after all, to foster and ensure competition on the merits. "It is the possibility of success in the marketplace, attributable to superior performance, [^{*}28] that provides the incentives on which the proper functioning of our competitive economy rests." [Berkey, supra, 603 F.2d at 281.](#) A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits, and any success it may achieve solely [^{*}545] through "the process of invention and innovation" is necessarily tolerated by the antitrust laws. *Id.*, quoting [United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 344 \(D. Mass. 1953\), aff'd, 347 U.S. 521, 98 L. Ed. 910, 74 S. Ct. 699 \(1954\)](#) (per curiam); see 3 P. Areeda & D. Turner, [Antitrust Law](#) para. 626b (1978). Foremost's complaint alleged nothing more than conduct of this sort, conduct which is lawful whether or not the defendant enjoys monopoly power in the relevant market. See [Sargent-Welch Scientific Co. v. Ventron Corp., supra, 567 F.2d at 712](#) (a monopolist "is not forbidden from improving his efficiency in manufacturing or marketing, even though the effect of doing so will be to

maintain or improve his sales"). Indeed, the complaint expressly alleged that Kodak "has dominated the amateur photographic market by continually researching and [**29] developing new photographic products."

It is of no legal import that Foremost chooses to characterize the technological incompatibilities of the 110 system with the products offered by Kodak's competitors in 1972, and Kodak's alleged delay in introducing the 110 system, as a form of technological predation. Even assuming that Kodak enjoyed monopoly power in the amateur photographic market, as Foremost alleged in its complaint, Kodak "had the right to redesign its products to make them more attractive to buyers -- whether by reason of lower manufacturing cost and price or improved performance." [California Computer Products v. IBM Corp., supra, 613 F.2d at 744](#). The antitrust laws did not impose a duty on Kodak to assist Foremost, other photofinishers, or manufacturers of competing cameras, film, paper or chemicals to "survive or expand." *Id.* See [ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 439 \(N.D. Cal. 1978\)](#) (discussing technological innovations by alleged monopolist), aff'd sub nom., [Memorex Corp. v. IBM Corp., 636 F.2d 1188 \(9th Cir. 1980\)](#) (per curiam), cert. denied, 452 U.S. 972, 69 L. Ed. 2d 983, 101 S. Ct. 3126 (1981). Kodak need not have "constricted [**30] its product development so as to facilitate sales of rival products." [California Computer Products v. IBM Corp., supra, 613 F.2d at 744](#).

We do not, of course, hold that product innovation is immune from antitrust scrutiny and may never provide the requisite conduct element in support of a claim for monopolization or attempted monopolization under [section 2](#) of the Sherman Act. In all cases, however, "it is not the product introduction itself, but some associated conduct, that supplies the violation." [Berkey, supra, 603 F.2d at 286 n.30](#). Here, the only "associated conduct" pleaded by Foremost in support of its [section 2](#) claim is the creation of technological incompatibilities and Kodak's alleged delay in bringing the 110 system to the market. We have discussed the first in sufficient detail already. As to the second, it seems clear that even a monopolist cannot *exclude* or *restrain* competition in its own market or related markets by delaying the introduction of new, technologically advanced products. In this case, for example, any delay by Kodak in introducing the 110 system could have worked only to the advantage of photofinishers and competing manufacturers. Prior [**31] to the introduction of the 110 system, it is obvious that Foremost, along with all other photofinishers, was able to choose among several technologically compatible products offered by Kodak and many of its smaller competitors.

It is appropriate to emphasize that [HN18\[\]](#) as a general rule, "any firm, even a monopolist, may . . . bring its products to market whenever and however it chooses." [Berkey, supra, 603 F.2d at 286](#) (footnote omitted). Without more, it is not unlawful for any competitor in any market to delay the introduction of a new product or an entire line of new products until, as Foremost alleged in this case, the competition forces such introduction. In order to state a claim for relief under [section 2](#), product introduction must be alleged to involve some associated conduct which constitutes an anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of attempting to monopolize the [*546] relevant market, rather than aggressive competition on the merits. That the dominant firm in any market may through technological innovation expand its market share, increase consumer brand identification, or create demand for new products is perfectly [**32] consistent with the competitive forces that the Sherman Act was intended to foster. The antitrust laws were not intended to invalidate all competitive practices tending to improve a firm's market position. [Hirsh v. Martindale-Hubbell, Inc., supra, 674 F.2d at 1348](#).

IV

We now discuss the Robinson-Patman issues. In its sixth claim, Foremost alleged that Kodak violated [section 2\(e\)](#) of the Robinson-Patman Act, [15 U.S.C. § 13\(e\)](#), by "failing to deliver . . . photofinishing equipment orders within the same sixty-day . . . schedule that [was] given to [Foremost's] competitors" and by "providing technical assistance and services [for the] conversion of . . . photofinishing equipment" only to Foremost's competitors. Foremost alleged in its ninth claim that Kodak violated [section 2\(a\)](#) of the Robinson-Patman Act, [15 U.S.C. § 13\(a\)](#), by "offering price reductions to its other customers in competition with [Foremost], while refusing to offer the same price reductions to [Foremost] on a proportionately equal basis." Specifically, Foremost alleged that Kodak allowed its other customers to order a six-month supply of photographic paper and pay for the order in six monthly installments [*33] but did not offer the same terms to Foremost. The district court dismissed these claims for failure to state a claim for relief.

A.

Section 2(e) of the Robinson-Patman Act [HN19](#) prohibits discrimination against "purchasers of a commodity bought for resale" by offering or furnishing "services or facilities" that are not "accorded to all purchasers on proportionately equal terms." [15 U.S.C. § 13\(e\)](#). Kodak argues that the "services or facilities" to which section 2(e) applies are only advertising and promotional services, and thus that neither deliveries of nor technical assistance with respect to photofinishing equipment are covered by the statute. There is a split among the circuits concerning whether the timeliness of delivery services is a form of discrimination cognizable under section 2(e). Compare, e.g., [L & L Oil Co. v. Murphy Oil Corp.](#), 674 F.2d 1113, 1119 (5th Cir. 1982) (section 2(e) does not cover discrimination in deliveries), with [Centex-Winston Corp. v. Edward Hines Lumber Co.](#), 447 F.2d 585 (7th Cir. 1971) (section 2(e) covers discrimination in deliveries), cert. denied, 405 U.S. 921, 30 L. Ed. 2d 791, 92 S. Ct. 956 (1972). We have criticized the [Centex-Winston](#) position, but have not yet decided whether discrimination in "services or facilities" under section 2(e). See [Purdy Mobile Homes, Inc. v. Champion Home Builders Co.](#), 594 F.2d 1313, 1318 (9th Cir. 1979) (Purdy). We need not do so here.

[HN20](#) As a general rule, practices related to the resale of commodities are cognizable under section 2(e), while practices related to the original sale of commodities are cognizable under section 2(a). Thus, section 2(e) "appl[ies] only to services or facilities connected with the *resale* of the product by the purchaser." [Purdy, supra, 594 F.2d at 1317](#) (emphasis added). See also [Corn Products Refining Co. v. FTC](#), 324 U.S. 726, 744, 89 L. Ed. 1320, 65 S. Ct. 961 (1945). Foremost's complaint does not allege that Foremost resold the photofinishing equipment whose delivery was supposedly delayed, nor does it allege that it resold the photofinishing equipment for which Kodak allegedly provided technical assistance only to its other customers, competitors of Foremost. Foremost's failure to allege resale of the photofinishing equipment, the commodities with respect to which the alleged discrimination in deliveries and technical services [**35](#) occurred, is a failure as a matter of law to allege a crucial element of a section 2(e) violation. [Purdy, supra, 594 F.2d at 1317](#).

[\[*547\]](#) Foremost never comes to grips with this fatal flaw. Instead, Foremost argues that its complaint states a section 2(e) claim because it resells *other* commodities purchased from Kodak -- photographic paper, film and chemicals -- in its capacity as an authorized dealer. It is true, as Foremost argues, that section 2(e) [HN21](#) covers commodities bought for resale "with or without processing." [15 U.S.C. § 2\(e\)](#). In addition, the Supreme Court has recognized that [HN22](#) commodities may undergo physical alterations during processing and yet still be purchased for resale within the meaning of section 2(e). See [Corn Products Refining Co. v. FTC, supra, 324 U.S. at 744](#) (section 2(e) covers discrimination in services and facilities "in all cases where the commodity is to be resold, whether in its original form or in a processed product"). However, that Foremost alleged that it resold photographic chemicals and paper to its customers in connection with the sale of processed photographs is not sufficient. Even if these specific commodities were purchased [**36](#) for resale within the meaning of *Purdy*, Foremost did not contend that it resells the photofinishing equipment involved in the alleged discrimination. Thus, it has failed to state a claim for relief under section 2(e).

B.

Foremost contends that its section 2(a) allegations demonstrate that Kodak violated this portion of the Robinson-Patman Act by (1) offering a twelve percent price reduction to competitors of Foremost purchasing a six-month supply of photographic paper, and (2) permitting competitors of Foremost to defer payment on a six-month bulk purchase of paper but not offering the same terms to Foremost. Kodak argues that these allegations plead only credit discrimination, which, it contends, is not a form of indirect price discrimination cognizable under section 2(a). See [Craig v. Sun Oil Co.](#), 515 F.2d 221, 224 (10th Cir. 1975), cert. denied, 429 U.S. 829, 50 L. Ed. 2d 92, 97 S. Ct. 88 (1976). However, Foremost has conceded in its reply brief that it "does not allege that Kodak's discrimination toward it as to [the deferred payment credit plan] violates Section 2(a)." We need not decide, therefore, whether to adopt *Craig*.

Foremost argues that its [\[*37\]](#) first allegation concerning a twelve percent price reduction is sufficient to state a *prima facie* claim for relief under section 2(a). Kodak, on the other hand, argues that Foremost has failed to allege at least two completed, contemporaneous sales by the same seller. See, e.g., [Bruce's Juices, Inc. v. American Can Co.](#), 330 U.S. 743, 755, 91 L. Ed. 1219, 67 S. Ct. 1015 (1947); [Rutledge v. Electric Hose & Rubber Co.](#), 511 F.2d

[668, 677 \(9th Cir. 1975\)](#). This element of a prima facie [section 2\(a\)](#) violation stems directly from the language of the statute referring to discriminations "in price between different *purchasers*." [15 U.S.C. § 13\(a\)](#) (emphasis added). Clearly, a mere "offer" to sell to competing customers at different prices does not satisfy this requirement of two actual, contemporaneous sales. See [Shaw's Inc. v. Wilson-Jones Co., 105 F.2d 331, 333 \(3d Cir. 1939\)](#).

We need not decide whether Foremost's complaint alleges the requisite two contemporaneous sales to competing purchasers at different prices because it suffers from another flaw fatal to its [section 2\(a\)](#) claim. [Section 2\(a\) HN23](#)[¹⁵] expressly provides that such price discriminations are unlawful only "where [**38] 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 . . ." [15 U.S.C. § 13\(a\)](#). In this case, therefore, it was incumbent upon Foremost to allege that the price discrimination "may . . . substantially . . . lessen competition" in the photofinishing market. *Id.*

It is undisputed that [section 2\(a\)](#) of the Robinson-Patman Act [HN24](#)[¹⁶] does not make price discriminations *per se* unlawful. See [Foremost \[*548\] Dairies, Inc. v. FTC, 348 F.2d 674, 680](#) (5th Cir.), cert. denied, 382 U.S. 959, 15 L. Ed. 2d 362, 86 S. Ct. 435 (1965). [HN25](#)[¹⁷] And although the statute does not "require that the discriminations must in fact have harmed competition," [Corn Products Refining Co. v. FTC, supra, 324 U.S. at 742](#), it is clear that there can be no violation of [section 2\(a\)](#) if the alleged price differential has no potential for adversely affecting competition. See [Janich Brothers, Inc. v. American Distilling Co., supra, 570 F.2d at 862](#). [HN26](#)[¹⁸] The naked demonstration of injury to a specific [**39] competitor without more is not sufficient to show that a price discrimination "may" substantially lessen competition; the test must always focus on injury to *competition*. See [M.C. Manufacturing Co. v. Texas Foundries, Inc., 517 F.2d 1059, 1067-68 \(5th Cir. 1975\)](#), cert. denied, 424 U.S. 968, 47 L. Ed. 2d 736, 96 S. Ct. 1466 (1976). See also [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#).

Without addressing the dispute about whether [section 2\(a\)](#) requires a mere "possibility" or a more substantial "probability" of injury to competition, see [William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1042 & n.50 \(9th Cir. 1981\)](#), we take note of [HN27](#)[¹⁹] the language of [section 2\(a\)](#) itself, which compels the conclusion that a prima facie claim for unlawful price discrimination cannot be stated absent an allegation that the discrimination in price may produce injury to competition. Although the Robinson-Patman Act is a prophylactic statute which should be construed broadly, consistent with the policies of the antitrust laws, [Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 80 n.13, 59 L. Ed. 2d \[*40\] 153, 99 S. Ct. 925 \(1979\)](#), neither [section 2\(a\)](#) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition. See [Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 627 \(9th Cir. 1977\)](#). Nothing in Foremost's [section 2\(a\)](#) count provides such an allegation or inference of injury to competition. Foremost alleged only that *it* "has sustained increased cost[s] of doing business" and that "competition by *plaintiff* in the photofinishing trade has been lessened, restrained and eliminated" (emphasis added).

Injury to a specific competitor is not enough from which a court may infer that an alleged price discrimination may "substantially" injure competition. If Foremost had alleged that it occupied a substantial share of the photofinishing market, nationally or in any relevant geographic sub-market, or that the alleged discrimination was "sufficient in amount to influence . . . resale prices" of photographic paper, see [FTC v. Morton Salt Co., 334 U.S. 37, 47, 92 L. Ed. 1196, 68 S. Ct. 822 \(1948\)](#), or that the photofinishing industry operates on relatively low profit margins, see [Foremost Dairies, Inc. v. FTC, \[*411\] supra, 348 F.2d at 680](#), such that the alleged discrimination provided Foremost's competitors with a significant competitive advantage even if it did not directly affect retail prices, the issue would be closer. But Foremost did not. Accordingly, Foremost's [section 2\(a\)](#) claim failed to state a claim for relief.

AFFIRMED.

Danou v. Kroger Co.

United States District Court for the Eastern District of Michigan, Southern Division

February 28, 1983

Civil Action No. 80-72481

Reporter

557 F. Supp. 1266 *; 1983 U.S. Dist. LEXIS 18946 **; 1983-1 Trade Cas. (CCH) P65,394

SAMIR A. DANOU, Plaintiff, v. KROGER COMPANY, an Ohio corporation, qualified to do business in Michigan, Defendant

Core Terms

retailers, wholesalers, fixtures, prices, products, selling, summary judgment, resale price, concerted activity, restraint of trade, adhere, lenses, Sherman Act, merchandise, sales, unilaterally, benefitted, discount, customers, newspaper, cases, clean, renew a motion, grocery store, retail price, non-discounting, combined, licensed, alleges, catalog

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] Antitrust & Trade Law, Sherman Act

The Michigan antitrust statute is patterned after the Sherman Act. [15 U.S.C.S. § 1 et seq.](#) Accordingly, the federal courts' interpretations of the Sherman Act are persuasive authority as to the meaning of the Michigan Act. Nevertheless, where a violation of state law is alleged, the decisions of the Michigan courts are the controlling authority in seeking to interpret the Michigan statute. Therefore, a Court must look first to the Michigan cases to determine what degree of concerted activity is required under the Michigan statute.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] Public Enforcement, State Civil Actions

[Mich. Comp. Laws Ann. §§ 445.701](#) and [445.731](#) sections prohibit only concerted action in restraint of trade; they do not prohibit unilateral action.

557 F. Supp. 1266, *1266L^A 1983 U.S. Dist. LEXIS 18946, **18946

Antitrust & Trade Law > Sherman Act > General Overview

[**HN3**](#) [PDF] Antitrust & Trade Law, Sherman Act

A manufacturer may unilaterally enforce a price maintenance policy by announcing such a policy and refusing to deal with customers who do not observe it. So long as the manufacturer acts alone, this does not constitute concerted activity and therefore does not violate [§ 1](#) of the Sherman Act.

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

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

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

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

[**HN4**](#) [PDF] Summary Judgment, Supporting Materials

When a motion for summary judgment is supported by affidavits or depositions, an adverse party may not rely upon mere allegations. The adverse party must set forth facts to demonstrate that there is a genuine factual dispute. [Fed. R. Civ. P. 56\(e\)](#).

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

Civil Procedure > ... > Grounds for Relief from Final Judgment, Order or Proceeding > Excusable Mistakes & Neglect > General Overview

[**HN5**](#) [PDF] Appellate Review, Appealability

[Fed. R. Civ. P. 60\(b\)](#) applies only to a final judgment, order, or proceeding. The denial of a summary judgment motion is an interlocutory order, and a Court can modify or rescind such an order at any time prior to the entry of a final judgment.

Counsel: [\[**1\]](#) Peter P. Sudnick, Esq., Southfield, Michigan, for Plaintiff.

Timothy D. Wittlinger, Esq., Detroit, Michigan, for Defendant.

Judges: Pratt

Opinion by: PRATT

Opinion

[\[*1267\]](#) MEMORANDUM OPINION AND ORDER

This action involves defendant's alleged refusal to sell plaintiff the store fixtures located in a grocery store which defendant had leased from plaintiff. Plaintiff has filed a three-count complaint in connection with this alleged

refusal.¹ Count I alleges that this refusal was a breach of contract. Count II alleges that defendant tortiously interfered with plaintiff's business relationships. Count III alleges that defendant and American Store Fixtures ("American") conspired to restrain trade, in violation of the Michigan antitrust statute. [Mich.Comp.Laws Ann. §§ 445.701, 445.731.](#)

Defendant subsequently moved **[**2]** for summary judgment. In a Memorandum Opinion and Order issued March 20, 1982, this Court granted summary judgment in favor of defendant as to Count II, but denied summary judgment as to Counts I and III. Defendant has now filed a renewed motion for summary judgment as to Count III. The parties have briefed the issues and have waived oral argument. For the following reasons, defendant's renewed motion is hereby granted.

In Count III, plaintiff alleges that defendant and American conspired to restrain trade, by refusing to sell plaintiff certain store fixtures without first removing them from the store. Prior to March 31, 1980, defendant leased a building in Detroit, Michigan from plaintiff and operated a grocery store in it. After receiving notice from defendant of its decision to terminate its occupancy, plaintiff sent defendant notice that the lease would be cancelled as of March 31, 1980. Plaintiff wished to operate a grocery store at this location once defendant had vacated the premises, and he sought to buy the store fixtures from defendant while they were still installed in the store. Indeed, plaintiff claims that a lease modification executed in 1974 required defendant **[**3]** to give plaintiff the first right to purchase these fixtures when the lease was cancelled.

The parties were unable to reach an agreement for the sale of these fixtures, however. Defendant then contracted with American to remove all of the fixtures and clean the store. Under this agreement, American was to leave the store in "broom clean" condition; in addition, American was to receive title to all of the fixtures once they were removed from the building.

During the time that American's employees were removing the fixtures and cleaning the store, plaintiff offered to purchase the fixtures in place from American. American maintained, however, that its contract with defendant required that the fixtures be removed from the store. In fact, American's vice-president, David Glass, called one of defendant's employees, Donald Plummer, to inform him that plaintiff wished to purchase the fixtures in place. Plummer told Glass that the fixtures could not be sold to plaintiff unless they were removed from the building. Although plaintiff did purchase some of the smaller fixtures from American, he was unable to purchase many of the larger fixtures which he wished to obtain. American removed **[**4]** all of these larger fixtures from the store; plaintiff eventually purchased fixtures elsewhere and opened a grocery store at this location.²

[*1268] Plaintiff claims that the agreement between defendant and American restrained trade in the sale of store fixtures, because it prevented him from purchasing the fixtures while they were still in place. He further claims that this agreement restrained trade in the retail grocery business, because the alleged refusal to sell these fixtures in place caused a three-month delay in his plans to open a grocery store at this location.

In its Memorandum Opinion and Order of March 20, 1982, this Court found that the agreement between defendant and American could be characterized as a restraint **[**5]** of trade if it stifled competition. The Court noted, however, that only unreasonable restraints of trade are actionable under the Michigan statute. The Court concluded that there was a factual question as to whether this agreement was unreasonable, and that summary judgment was therefore inappropriate.

In its renewed motion for summary judgment as to Count III, defendant argues that there was no concerted action in this case, and that it therefore did not violate the Michigan statute. As authority for this position, defendant has

¹This complaint was originally filed in the Wayne County Circuit Court. Defendant removed the action to this Court, on the grounds that the parties are of diverse citizenship. [28 U.S.C. §§ 1332, 1441.](#)

²The facts as stated here are largely undisputed by the parties. They are also based in part on the deposition testimony submitted to the Court in this matter. See Deposition of Samir A. Danou at 67; Deposition of David Glass at 15; Deposition of Donald Plummer at 12.

cited *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068 (3rd Cir. 1978). Although decided long before defendant's earlier motion, *Friedman* was not cited by defendant in that motion. Defendant now argues that under the authority of *Friedman*, it is entitled to summary judgment as to Count III.

In response, plaintiff argues that the existence of concerted action in the case at bar is a question of Michigan law, and that *Friedman* is therefore inapplicable. Plaintiff further argues that defendant's failure to cite *Friedman* in its earlier motion was caused by its own inexcusable neglect, and that this renewed motion should be denied for [**6] that reason. *Fed.R.Civ.P. 60(b)*.

HN1[] The Michigan antitrust statute is patterned after the Sherman Act. [15 U.S.C. § 1 et seq.](#) Accordingly, the federal courts' interpretations of the Sherman Act are persuasive authority as to the meaning of the Michigan Act. *Goldman v. Loubella Extendables*, 91 Mich. App. 212, 283 N.W.2d 695 (1979). Nevertheless, Count III does allege a violation of state law, and the decisions of the Michigan courts are the controlling authority in seeking to interpret the Michigan statute. Therefore, the Court must look first to the Michigan cases to determine what degree of concerted activity is required under the Michigan statute.

As mentioned above, Count III alleges that defendant violated **HN2**[] [Mich.Comp.Laws Ann. §§ 445.701](#) and [445.731](#). These sections prohibit only concerted action in restraint of trade; they do not prohibit unilateral action. This concerted action requirement was explained in *Goldman v. Loubella Extendables*, *supra*. Plaintiff has excerpted a quotation from that case, and relies on it to argue that there is a material factual issue which precludes granting summary judgment in favor of defendant.³ In order to apply *Goldman* correctly [**7] to the case at bar, however, the Court must examine the circumstances of that case. It is also necessary to examine the cases cited by the Michigan court in *Goldman*, so that the Court's observations may be placed in an appropriate context.

In *Goldman*, plaintiff operated a retail clothing store, and defendant was a clothing manufacturer. Plaintiff alleged that defendant and plaintiff's competitors had conspired to stop defendant's sales to plaintiff, because plaintiff was selling defendant's merchandise at a discount. The trial court granted summary judgment in favor of defendant, finding that plaintiff had presented no [**8] evidence of a conspiracy.

On appeal, the sole issue was whether defendant had conspired or combined with plaintiff's competitors, as required to establish liability under [Mich.Comp.Laws Ann. I-12691 § 445.701](#). The Michigan Court of Appeals reversed the trial court and remanded the case for trial. The court noted that defendant had indeed stopped selling its merchandise to plaintiff, without offering any explanation for its actions. There was also evidence that defendant had informed other retailers that it would not allow them to sell its merchandise at discounted prices, and that it had stopped selling its merchandise to any retailers that did not heed this warning. When defendant learned that other retailers were continuing to supply its merchandise to plaintiff, it had stopped selling to these other retailers as well. Finally, there was evidence that the retailers that were selling defendant's merchandise at full price had contacted defendant to complain about the retailers that were selling at a discount.

In light of these findings, the court concluded that there was some indication that defendant had combined with the non-discounting retailers, and that the complaints [**9] from these retailers had led defendant to stop selling to plaintiff and others. The court held that this presented a factual question which could not be resolved on a motion for summary judgment.

The Michigan court relied on four decisions of the United States Supreme Court which have explained the concerted activity requirement in [§ 1](#) of the Sherman Act. The leading case in this regard is *Albrecht v. Herald Co.*, 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968). *Albrecht* involved a newspaper publisher's attempt to force distributors to adhere to a retail price set by the publisher. Plaintiff Albrecht distributed defendant's newspaper in a

³ Quoting from *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960), the Michigan court stated: "When a manufacturer goes 'beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices', he has put together a combination." [91 Mich. App. at 221, 283 N.W.2d at 699](#).

particular area of metropolitan St. Louis. When he raised his price above defendant's suggested resale price, defendant informed him that unless he lowered his price, defendant would take over his delivery route. Defendant hired Milne Circulation Sales, Inc. to solicit subscriptions from Albrecht's customers at defendant's lower price. Defendant then hired George Kroner to deliver newspapers to the customers solicited by Milne. Kroner was required to comply with defendant's suggested resale price, and he knew that defendant would [**10] likely return his customers to Albrecht if Albrecht agreed to comply with this price as well.

The Court found that the agreement among defendant, Milne, and Kroner constituted concerted activity and that it violated § 1 of the Sherman Act. The Court noted that both Milne and Kroner knew that defendant's purpose in entering this agreement was to fix the retail price of its newspapers.

The Michigan court also cited [United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 \(1960\)](#). In that case, it was alleged that defendant had combined with retail and wholesale druggists to maintain the price of its pharmaceutical products. Defendant had announced a resale price maintenance policy in its wholesale and retail catalogs. Each of these catalogs contained a schedule of minimum prices to be charged. Nevertheless, certain retailers began to sell defendant's products at prices well below those listed in defendant's catalog. Defendant then informed its wholesalers that it would no longer sell its products to wholesalers who did not adhere to the catalog prices, nor to wholesalers who distributed these products to retailers who did not adhere to the catalog prices. [**11] Defendant also contacted its retailers directly, and informed them that neither defendant nor its wholesalers would sell to them if they did not observe the minimum prices.

Despite these warnings, several retailers continued to sell defendant's products at prices below the minimum prices. Defendant informed its wholesalers of this, and sales to these retailers were terminated.

The District Court found that defendant had not violated the Sherman Act, because it had acted unilaterally.⁴ The Supreme [*1270] Court reversed. It found that defendant had "(employed) other means which (effected) adherence to his resale prices", and had therefore not acted unilaterally. [362 U.S. at 44](#). The Court found that there was a combination among defendant, its wholesalers, and its retailers to maintain the retail prices of defendant's products.

[**12] The third case cited by the Michigan court was [United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 88 L. Ed. 1024, 64 S. Ct. 805 \(1944\)](#). This case involved a business relationship between Bausch & Lomb and Soft-Lite Lens Co., Inc. Bausch & Lomb manufactured tinted optical lenses which it sold to Soft-Lite. Bausch & Lomb agreed to sell these lenses only to Soft-Lite; Soft-Lite agreed to buy them only from Bausch & Lomb. In addition, Bausch & Lomb was the majority shareholder in most of the wholesale companies through which Soft-Lite distributed these lenses to retail opticians.

Bausch & Lomb and the other wholesalers were allowed to sell the lenses only to retailers which had been licensed by Soft-Lite. Moreover, each pair of lenses was numbered so that Soft-Lite could determine which wholesalers had sold them to unlicensed retailers. Soft-Lite stated the price at which its wholesalers were to sell the lenses to retailers. Soft-Lite also forbade its retailers to sell the lenses for less than locally prevailing prices. Soft-Lite's salesmen and wholesalers policed the conduct of the licensed retailers. If retailers sold the lenses for less than Soft-Lite's stipulated [**13] price or otherwise violated the license granted by Soft-Lite, this was reported to Soft-Lite. Sales to these "undesirable" retailers were then terminated.

When charged with violating § 1 of the Sherman Act, Soft-Lite claimed that it had unilaterally refused to sell its lenses to retailers who failed to meet the terms of their licenses. The Court found that Soft-Lite had combined with Bausch & Lomb and its other wholesalers to fix resale prices and prevent sales to unlicensed retailers.

⁴Under [United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#), [HN3](#) a manufacturer may unilaterally enforce a price maintenance policy by announcing such a policy and refusing to deal with customers who do not observe it. So long as the manufacturer acts alone, this does not constitute concerted activity and therefore does not violate § 1 of the Sherman Act.

Finally, the Michigan court cited [*F.T.C. v. Beech-Nut Packing Co., 257 U.S. 441, 66 L. Ed. 307, 42 S. Ct. 150 \(1922\)*](#). In that case, Beech-Nut circulated a list of uniform resale prices to its wholesalers and retailers. Beech-Nut informed its wholesalers and retailers that it would discontinue selling its products to anyone who failed to adhere to these prices. It also informed its wholesalers that it would discontinue its sales to any wholesaler which distributed its products to a retailer failing to adhere to the uniform prices. In addition, Beech-Nut placed code numbers on its products and instituted a reporting system to detect violations of its pricing policy.

The Court found that Beech-Nut, [\[**14\]](#) its wholesalers, and its retailers had combined to suppress price competition. The Court noted that Beech-Nut could have unilaterally refused to sell its products without violating the Sherman Act. The Court found, however, that by enlisting the cooperation of its wholesalers and retailers Beech-Nut had "(gone) beyond the exercise of this right." [*257 U.S. at 453*](#).

The Court must now examine the alleged combination between defendant and American in the case at bar, and compare it to the concerted activity found to exist in [*Goldman, supra*](#), and the cases cited therein.⁵ [\[*1271\]](#) For three reasons, the Court finds that the relationship between defendant and American was clearly different from the conduct which was found to constitute concerted activity in these other cases.

[\[**15\]](#) First, American derived no benefit from its role in this alleged combination. It would have been much more profitable for American to sell the fixtures in place, as requested by plaintiff. American could have resold the fixtures for a higher price if it had not first removed them. In addition, American could have saved itself the cost of removing the fixtures. Plaintiff has not even alleged that American would have benefitted from a restraint of trade in the retail grocery market; American has no interest in this market. If there was in fact a restraint of trade in the case at bar, it is clear that only defendant benefitted from it.

This is in marked contrast to the alleged circumstances in *Goldman* and the cases cited therein. In *Goldman*, defendant and the non-discounting retailers all benefitted from the restraint. Their actions suppressed price competition in the sale of defendant's products, which permitted all of them to sell these goods at a higher price. In *Albrecht*, Kroner clearly benefitted from defendant's restraint; he received newspaper customers as a direct result of this restraint. Milne also benefitted, by receiving its fee from defendant.

In [\[**16\]](#) *Parke, Davis and Beech-Nut*, the wholesalers and retailers involved benefitted from the price maintenance programs. Because they agreed to adhere to defendants' prices, they were assured of a continuing supply of defendants' products. In addition, they were able to sell these products at higher prices because of the price maintenance programs. The wholesalers in *Bausch & Lomb* similarly benefitted from their combination with Soft-Lite, because it allowed them to sell at higher prices.

Second, defendant's contract with American was clearly collateral to its alleged restraint of trade. American played no part in the alleged decision not to sell plaintiff the fixtures in place; it merely performed its contract with

⁵ Defendant has cited [*Harold Friedman, Inc. v. Kroger Co., supra*](#), a case in which the Third Circuit applied [*Albrecht, supra*](#), under circumstances very similar to those in the case at bar. The Court in *Friedman* formulated a four-part test to determine whether concerted activity existed:

- (1) all members of the combination knew of the defendant's purpose to restrain trade;
- (2) at least two members of the combination benefited by the restraint of trade and, in that sense, shared a common purpose in restraining trade;
- (3) the agreement by two members of the combination actually restrained trade, as opposed to merely facilitating the restraint; and
- (4) at least two members of the combination intended to restrain trade.

[*581 F.2d at 1073*](#). The Court's opinion is a perceptive analysis of *Albrecht*'s concerted activity requirement; as will be discussed *infra*, the relationship between defendant and American clearly did not meet this four-part test. *Friedman* cannot be considered an important authority in the case at bar, however. Its four-part test has never been adopted by the Supreme Court, nor by many other federal courts. While *Friedman* has been frequently cited by the federal courts within the Third Circuit, it has rarely been cited by any others. It therefore cannot be regarded as the "leading authority in the country" which defendant claims it to be. Defendant's Brief at 3.

557 F. Supp. 1266, *1271 (1983 U.S. Dist. LEXIS 18946, **16

defendant. American made no direct contribution to defendant's alleged restraint. At most, American merely facilitated defendant's unilateral restraint by performing its contract and removing the fixtures from the building.

In contrast, the actions of the other retailers in *Goldman* were crucial for the success of defendant's refusal to deal with plaintiff. First, the non-discounting retailers also ceased selling goods to plaintiff when defendant informed [**17] them that plaintiff was selling these goods at discounted prices. Second, the non-discounting retailers complained to defendant that plaintiff was selling at a discount, and this led defendant to stop dealing with plaintiff.

Similarly, defendant's agreement with Kroner in *Albrecht* was an essential element in defendant's enforcement of its retail prices. Defendant would not have solicited Albrecht's customers unless it had made alternate plans for the delivery of its newspapers to these customers. Defendant's agreement with Milne may have been merely collateral and therefore insufficient, standing alone, to support a finding of combination. The Court in *Albrecht* did not indicate whether an agreement between defendant and Milne alone would have constituted concerted activity. It has been persuasively suggested that it would not have.⁶

[**18] [*1272] In *Parke, Davis and Beech-Nut*, the assistance of the wholesalers and retailers was essential to the success of defendants' price maintenance programs. These wholesalers and retailers adhered to the resale prices set by defendants; in addition, they discontinued sales to other persons who did not adhere to these prices. The wholesalers in *Bausch & Lomb* also provided necessary assistance in implementing defendant's restraints. In addition to adhering to defendant's resale prices, they also policed the conduct of defendant's retailers and reported any violations of the retail licensing agreements.

Finally, American had no knowledge of defendant's alleged anticompetitive intent when it agreed to clean the store and remove the fixtures. Nothing in the deposition testimony submitted by the parties indicates that when American agreed to clean the store, it knew that defendant wanted to avoid selling the fixtures in place to plaintiff.⁷ [**19] At

⁶ See [Friedman, supra, 581 F.2d at 1073-1074](#):

It is not clear from the *Albrecht* opinion whether the Supreme Court would have found concerted activity under [§ 1](#) based on the agreement between the Herald and Milne alone if the Herald had delivered the newspapers itself and not hired Kroner. It would have been reasonable for the Court to have found that the Herald acted unilaterally in such a case, for in this hypothetical case only the Herald intended to restrain trade, only the Herald restrained trade, only the Herald stood to benefit from restraining trade, and no one shared with the Herald a common purpose of restraining trade. Professor Areeda also finds this position reasonable and suggests that a purely collateral agreement, such as that between Milne and the Herald, is insufficient to constitute concerted activity It seems to us, therefore, that Kroner's role in the combination was crucial to the outcome of the case.

Other commentators have also criticized the Court's conclusion in *Albrecht* that there was a combination among the Herald, Milne, and Kroner. See *The Supreme Court, 1967 Term*, 82 Harv.L.Rev. 63, 257-258 (1968):

Both Kroner and Milne were agents hired by the corporate defendant to perform specific tasks, in which they had no independent interests beyond the fee they were paid. It is difficult to find in this agency the "contract, combination in the form of trust or otherwise, or conspiracy" that is required to violate [section 1](#) of the Sherman Act Nor does there appear to be any economically significant difference between the defendant's hiring Milne to solicit the customers and its doing the job alone.

See also Handler, *Reforming the Antitrust Laws*, [82 Colum.L.Rev. 1287, 1299-1302 \(1982\)](#):

In *Albrecht* . . . the Court . . . extended [section 1](#) to unilateral conduct by stretching the concept of concerted action well beyond the breaking point The courts of appeals have begun to interpret *Albrecht* properly to apply to cases involving concerted action, and not to those involving the mere "aiding and abetting" of a supplier's unilateral refusal to deal It is time for the Supreme Court to clarify *Albrecht* and explain that merely aiding and abetting a unilateral refusal to deal does not convert that unilateral conduct into a contract, combination, or conspiracy.

557 F. Supp. 1266, *1272L^{1983 U.S. Dist. LEXIS 18946, **19}

most, plaintiff may be able to establish that American learned while it was cleaning the store that defendant would not allow plaintiff to purchase the fixtures in place.⁸

In *Goldman*, on the other hand, there was no question but that the non-discounting retailers knew of defendant's intent to maintain its resale prices. Defendant expressly told its retailers that it would not allow them to sell its merchandise at discounted prices. In addition, it stopped selling its merchandise to any retailer who did sell at a discount.

In *Albrecht*, the Court emphasized that both Milne and Kroner knew of defendant's intent to enforce compliance with its suggested retail prices.⁹ In *Parke, Davis and Beech-Nut*, the wholesalers and retailers clearly knew of defendants' intent to maintain their resale prices; these defendants circulated uniform price lists to their wholesalers and retailers. In *Bausch & Lomb*, [*1273] the wholesalers similarly knew that defendant sought to maintain its resale prices and prevent sales to unlicensed retailers.

[**20] In sum, the alleged conduct of defendant and American in the case at bar falls far short of the conduct found to constitute concerted activity in *Goldman*, *Albrecht*, *Parke, Davis*, *Bausch & Lomb*, and *Beech-Nut*. Measured against the conduct present in *Albrecht*, *Parke, Davis*, *Bausch & Lomb*, and *Beech-Nut*, the conduct of defendant and American was not concerted activity as that term has been defined under the Sherman Act. Moreover, the Michigan court expressly relied on those cases to formulate its definition of concerted activity in *Goldman*. Applying the *Goldman* test to the case at bar, therefore, the Court finds as a matter of law that there was no concerted activity under the Michigan antitrust statute. If there was any restraint of trade in the case at bar, it was caused by defendant's unilateral acts. Accordingly, defendant's renewed Motion for Summary Judgment as to Count III is hereby GRANTED.¹⁰

[**21] IT IS SO ORDERED.

End of Document

⁷ [HN4](#) When a motion for summary judgment is supported by affidavits or depositions, an adverse party may not rely upon mere allegations. The adverse party must set forth facts to demonstrate that there is a genuine factual dispute. [Fed.R.Civ.P. 56\(e\)](#).

⁸ See Deposition of Donald Plummer at 12.

⁹ See [390 U.S. at 150](#):

Milne's purpose was undoubtedly to earn its fee, but it was aware that the aim of the solicitation campaign was to force petitioner to lower his price. Kroner knew that respondent was giving him the customer list as part of a program to get petitioner to conform to the advertised price, and he knew that he might have to return the customers if petitioner ultimately complied with respondent's demands.

¹⁰ Plaintiff has argued that defendant inexcusably neglected to raise the issue of concerted activity in its earlier motion for summary judgment, and that [Fed.R.Civ.P. 60\(b\)](#) mandates that this renewed motion be denied. [HN5](#) Rule 60(b), however, applies only to a "final judgment, order, or proceeding." The denial of a summary judgment motion is an interlocutory order, and the Court can modify or rescind such an order at any time prior to the entry of a final judgment. [Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 \(5th Cir. 1970\)](#).



Konik v. Champlain Valley Physicians Hosp. Medical Ctr.

United States District Court for the Northern District of New York

February 28, 1983

No. 79-CV-217

Reporter

561 F. Supp. 700 *; 1983 U.S. Dist. LEXIS 18953 **; 1983-1 Trade Cas. (CCH) P65,363

Louise Konik, M.D., Plaintiff v. Champlain Valley Physicians Hospital Medical Center, Anesthesia Associates of Plattsburgh, P.C., David T. Hannan, as President of Champlain Valley Physicians Hospital, and Michael J. Moynihan, M.D., as Chief of Staff of Champlain Valley Physicians Hospital Medical Center, Salem Bayoumy, M.D., as Chief of the Department of Anesthesiology, Champlain Valley Physicians Hospital Medical Center, and John Menustik, M.D., as President, Anesthesia Associates of Plattsburgh, P.C., Defendants

Core Terms

interstate commerce, Sherman Act, cases, anesthesia, tying arrangement, summary judgment, out of state, anesthesiology, antitrust, price fixing, defendants', anesthesiologists, group boycott, facilities, exclusive contract, allegations, commerce, patients, staff, per se rule, professional corporation, challenged activity, restraint of trade, rule of reason, horizontal, delivery, per se violation, anti trust law, fee schedule, constitutes

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Jurisdiction

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

HN1 [] Sherman Act, Jurisdiction

The jurisdictional requirement under the Sherman Act, [15 U.S.C.S. § 1, et seq.](#), may be satisfied by showing that the challenged activity either occurred in interstate commerce, or, though wholly local in nature, has an effect on interstate commerce. It is also well established that the jurisdictional issue in antitrust cases involving the denial of hospital staff privileges or access to hospital facilities may be determined under the "effect on commerce" test. To establish jurisdiction under the "effect on commerce" test plaintiff need not show that the defendants' challenged conduct itself had a substantial effect on interstate commerce. The plaintiff, then, must establish that there exists a sufficient nexus between the challenged activity and interstate commerce so that it can be said as a matter of practical economics there is a not insubstantial effect on the interstate commerce involved. In determining jurisdiction, there is no talismanic test. Rather, jurisdiction must be determined using a case-by-case analysis of the relevant economic facts. Moreover, the impact defendant's professional activities may have upon interstate commerce is a question of fact.

561 F. Supp. 700, *700L^A1983 U.S. Dist. LEXIS 18953, **18953

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > General Overview

Business & Corporate Compliance > ... > Insurance Company Operations > Conducting Business > Foreign Insurers

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > Restrictions

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

Denial of hospital privileges affects interstate commerce because it retards competition. This retardation affects interstate commerce in the following ways: first, by denying to physicians the opportunity to compete, prices will invariably stabilize at some fixed rate and this will affect the amount of payments made by out of state, third-party insurers. Allowing these plaintiff-physicians privileges and access will provide patients and third-party insurers the benefits of free and open competition. This in turn will affect the amount of payments made by out of state, third-party insurers. Second, the competition that will be generated by permitting physicians staff privileges and access will affect the volume of out of state patients treated and the volume of the out of state purchases of supplies.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Business & Corporate Compliance > ... > Insurance Company Operations > Conducting Business > Foreign Insurers

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

The underpinning of the denial of privileges and access cases is the fact that the defendants' challenged activities have the effect of eliminating competition which in turn affects instate commerce activities of treating patients who travel in interstate commerce, purchases of out of state supplies, and receipt of revenue from out of state third-party insurers.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Insurance Company Operations > Conducting Business > Foreign Insurers

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

HN4 [down] **Antitrust & Trade Law, Sherman Act**

The "substantial effect" test may be satisfied upon any showing that there existed an unreasonable burden on the free and uninterrupted flow of interstate commerce.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Healthcare Law > Healthcare Litigation > Antitrust Actions

Antitrust & Trade Law > Sherman Act > General Overview

HN5 Sherman Act, Jurisdiction

Interstate commerce allegations of treating patients from out of state sources, of the trafficking in out of state goods, and of the receipt of revenues from out of state sources are sufficient to establish jurisdiction under the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

HN6 Antitrust & Trade Law, Sherman Act

See [15 U.S.C.S. § 1](#).

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

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7 Regulated Practices, Price Fixing & Restraints of Trade

Under the "rule of reason," only unreasonable restraints of trade are forbidden. A restraint of trade is deemed unreasonable where the anti-competitive effects outweigh the pro-competitive effects of the challenged activity. Certain business combinations, however, 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. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts and tying arrangements.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Industries > General Overview

HN8 Antitrust & Trade Law, Sherman Act

The Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations](#)

[HN9](#)[] **Monopolies & Monopolization, Attempts to Monopolize**

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 Supreme Court has recognized that the vice of tying arrangements lies in the use of economic power in one market to restrict the competition on the merits in another regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not. However, not all tying arrangements are proscribed by the Sherman Act. A tying arrangement is a per se violation of the Act when it exhibits the following four characteristics: 1. two separate products, the tying product and the tied product; 2. sufficient market power in the tying market to coerce purchase of the tied product; 3. involvement of a not insubstantial amount of interstate commerce in the tied market; and 4. anticompetitive effects in the tied market.

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview](#)

[Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements](#)

[Healthcare Law > Healthcare Litigation > Antitrust Actions](#)

[HN10](#)[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A plaintiff does not have to prove that a hospital totally dominated the market. All that plaintiff must show is that the hospital possessed sufficient economic power to impose an appreciable restraint on free competition in the tied product. As a first step, in demonstrating "sufficient market power," plaintiff must demonstrate the relevant geographic market for the hospital's services. Then it must be shown that, within that geographic market, the seller has the power to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product. There exist many problems and pitfalls in establishing the above two factors. There is a serious question whether the relevant market area can be sliced so small as to embrace a single hospital.

[Healthcare Law > Healthcare Litigation > Antitrust Actions](#)

[Healthcare Law > ... > Health Insurance > Reimbursement > General Overview](#)

[HN11](#)[] **Healthcare Litigation, Antitrust Actions**

Because the prevalence of third party payment of bills eliminates a patient's incentive to compare the relative cost effectiveness of competing hospitals and there exists a lack of complete information regarding the quality of medical care offered, patients tend to choose hospitals by location rather than price or quality, which means that the geographic market area apparently may subsume only an individual hospital.

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN12 [] **Price Fixing & Restraints of Trade, Tying Arrangements**

In demonstrating "sufficient market power," that is, that within the relevant market area it must be shown that the hospital is able to coerce its purchasers of services into accepting burdensome terms that could not be exacted in a completely competitive market, a plaintiff must show that patients are compelled to purchase the hospital's chosen service in return for the use of the hospital's operating room and analogous services. There must have existed, then, competition insofar as patients are concerned. If this cannot be shown, the factor of impermissible coercion is missing from the tying arrangement equation and, consequently, a plaintiff cannot prevail on this theory. A demonstrated exclusive contract would then be lawful.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN13 [] **Price Fixing & Restraints of Trade, Tying Arrangements**

If a defendant hospital affords proof of a legitimate articulated medical reason for the existence of a tying arrangement, and further demonstrates that there does not exist a less restrictive way to accomplish the end which justifies that medical reason, defendant hospital will be insulated from liability.

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

HN14 [] **Regulated Practices, Price Fixing & Restraints of Trade**

Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

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

HN15 [] **Price Fixing & Restraints of Trade, Vertical Restraints**

A vertical combination should be analyzed under the rule of reason. As the name suggests, the rule of reason requires the trier of fact to decide whether under all of the circumstances of the case, the restrictive practice imposes an unreasonable restraint on competition. 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.

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

International Trade Law > General Overview

HN16 [] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A plaintiff may prevail on a per se price fixing theory if it can be shown that the agreement or combination was 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.

Antitrust & Trade Law > Sherman Act > Claims

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

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

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN17 [] Sherman Act, Claims

A horizontal arrangement between physicians to establish the maximum fees they could claim in full payment for health services provided to policy holders of specified plans can be a per se violation of the Sherman Act.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN18 [] Regulated Practices, Price Fixing & Restraints of Trade

A price restraint tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

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

HN19 [blue document icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Where exclusionary or coercive conduct has been present, the arrangements have been viewed as naked restraints of trade, and have fallen victim to the per se rule. On the other hand, where these elements have been missing, the per se rule has not been applied to collective refusals to deal. Therefore, the resort to the per se rule is justified only when there exists the presence of exclusionary or coercive conduct which, when present, warrants the view that the arrangement is a "naked restraint of trade." Absent these factors, the rule of reason must be followed in determining the legality of the agreement.

[Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade](#)

[Contracts Law > Types of Contracts > Lease Agreements > General Overview](#)

[Real Property Law > Encumbrances > Restrictive Covenants > General Overview](#)

[Antitrust & Trade Law > Regulated Industries > Sports > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview](#)

HN20 [blue document icon] Causes of Action, Restraints of Trade

Where facilities cannot be practically duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility. To be "essential," a facility need not be indispensable; it is sufficient if duplication of the facility would be economically unfeasible and if denial of its use inflicts a severe handicap on potential market entrants. However, this principle must be carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately.

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview](#)

[Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities](#)

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview](#)

HN21 [blue document icon] Price Fixing & Restraints of Trade, Vertical Restraints

Unilateral policy decisions, motivated by "market strategy" or "business necessity," which impose a reasonable vertical restraint, cannot give rise to antitrust liability.

Counsel: [*1] For plaintiff: Tobin & Dempf, Albany, New York, (Michael Costello, of counsel).

For defendants: Fitzpatrick, Bennett, Trombley & Lennon, Plattsburgh, New York, (Eric W. Springer, of Hortsy, Springer & Mattern, Pittsburgh, Pennsylvania, of counsel), for Champlain Valley Physicians Hospital Medical Center, Hannan, Moynihan, and Bayoumy;.

Carter, Conboy, Bardwell, Case & Blackmore, Albany, New York, (James S. Carter, of counsel), for Anesthesia Associates of Plattsburgh, P.C., and Menustik.

Judges: Miner, D.J.

Opinion by: MINER

Opinion

[*706] Memorandum-Decision and Order

MINER, D.J.

I

Plaintiff, an anesthesiologist, has commenced this action for declaratory, injunctive and monetary relief against the following defendants: Champlain Valley Physicians Hospital Medical Center (hereinafter the "hospital"), its President, David T. Hannan, its Chief of Staff, Michael J. Moynihan, Anesthesia Associates of Plattsburgh, P. C. (hereinafter "AAP"), its President, John Menustik and the hospital's Chief of Anesthesiology, Salem Bayoumy. Plaintiff's complaint contained claims for relief under the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§ 1 et seq., the Civil Rights Act of 1871, 42 U.S.C. § 1983 and the Medicare Act, 42 U.S.C. §§ 1395 et seq. Subject matter jurisdiction for the various federal claims was predicated upon 28 U.S.C. §§ 1331(a), 1343(3) and 1337. Additionally, the complaint set forth four claims for relief invoking this Court's pendent jurisdiction, and, finally, treble damages, compensatory damages and punitive damages were sought.

On July 19, 1979, the Honorable James T. Foley, U.S.D.J., granted defendants' motion to dismiss as to the civil rights, medicare and state pendent claims and denied defendants' motion to dismiss as to the antitrust claims. Plaintiff's cross-motion for preliminary injunctive relief was denied and dismissed. See *Konik v. Champlain Valley Physicians Hospital Medical Center*, 79-CV-217 (N.D.N.Y. July 19, 1979). The only claims remaining, then, are plaintiff's antitrust claims.¹

[**3] Before this Court is defendants' motion to dismiss the antitrust claims for lack of subject matter jurisdiction and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56(b). Also before this Court is plaintiff's cross-motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(a).

II

Plaintiff is a physician duly licensed to practice medicine in the State of New York. She has held her license since 1958 and her specialty is anesthesiology. On January 1, 1961, Dr. Konik was appointed to the staff of the predecessor of the defendant, Champlain Valley Physicians Hospital Medical Center, and has remained on the general medical staff of the defendant hospital over the last twenty-two years. (Affidavit of Louise Konik, M.D., sworn to October 27, 1982, para. 8; hereinafter "Konik Affidavit").² Indeed, Dr. Konik has served as Chief of the Anesthesiology Department at the hospital.

[**4] In June, 1969, the anesthesiologists serving the defendant hospital subscribed to a document that stated their intent to form a professional group for the practice of anesthesiology in Plattsburgh. Plaintiff herself signed this document. (Affidavit of David T. Hannan, sworn to April 9, 1979, Ex. A; hereinafter "Hanna Affidavit"). Moreover, due to the expansion of the hospital and the increase in the need for their professional services, the hospital encouraged the five staff anesthesiologists to "enter a group practice arrangement." (Hannan Affidavit, Ex. C). A formal partnership agreement, reciting the wishes of the hospital, was executed by the anesthesiologists on January 1, 1971. (Hannan Affidavit, Ex. B). During this early existence of the anesthesiology group, however, the hospital did not believe that a formal contract between itself and the group was required since the scheduling of services through the [*707] group "would preempt the available caseload." (Hannan Affidavit, Ex. D).

¹ The Court refused to grant defendants' motion as to the plaintiff's first "cause of action," the antitrust claims, in part because there was an insufficiency of discovery to form a basis for summary judgment on the contested jurisdictional issue.

² Dr. Konik's latest appointment occurred on January 18, 1982, when the hospital's board of directors approved her appointment to the "Attending Medical Staff" and granted her "Senior Privileges in Anesthesiology." (Konik Affidavit, para. 9, Ex. 3).

There is no mention of fee arrangements in the anesthesiologists' partnership agreement. However, there is some evidence that a billing fee of \$35.00 was collected by the hospital for [**5] anesthesia services during obstetrical vaginal delivery, that quarterly transfers of the accumulated fees were made to the group, and that such an arrangement was the product of an agreement between the hospital and the anesthesiologists as a group. (Hannan Affidavit, Ex. F).

During the year 1973, the anesthesiology group established a professional corporation, allegedly for administrative and professional reasons. This is the professional corporation which in this action constitutes the defendant AAP (Konik Affidavit, para. 25). Dr. Konik continued to be affiliated with AAP until August, 1978. (*Id.*, P 27).

It is not entirely clear from the record whether plaintiff chose to withdraw from the AAP as a consequence of the hospital's decision to require a formal contractual undertaking between itself and the anesthesiologists as a condition to the delivery of those services, or, whether plaintiff withdrew from the group for internal and personal reasons other than the contractual clauses plaintiff now finds to be objectionable.³ In any event, the hospital's stated reason for the contractual arrangement was to "provide community anesthesiology services sufficient in quantity [**6] and quality to meet the ongoing surgical and obstetrical demands of its patients." (Hannan Affidavit).

Plaintiff alleges that at this time she was advised that she would not be permitted any access to the surgical suites at the hospital unless she agreed "to abide by and become a signatory to the contemplated exclusive contract between the hospital [**7] and defendant, AAP." (Konik Affidavit, para. 30). However, on August 1, 1978, an offer was made to Dr. Konik on behalf of the hospital and its administration, to allow her to practice at the hospital and deliver anesthesia services for a period of time up to September 1, 1978, as an independent physician on the staff practicing as "a solo physician." (Konik Affidavit, para. 31, Exs. 5, 6).

During this period of time, plaintiff maintains, there was no disruption in anesthesia coverage at the hospital, the assignment of anesthesia services was effectively handled by the Department of Anesthesiology, she effectively competed with AAP in delivering anesthesia services to the hospital, and that this arrangement "proceeded smoothly . . . with no problems whatsoever," in part because she was obligated to abide by the bylaws of the General Medical staff of the hospital as well as all of the rules, regulations and bylaws of the Department of Anesthesiology, all of which allegedly provide that physicians must furnish necessary services when required.⁴ (*Id.*, P 33). Plaintiff further maintains that on September 1, 1978 defendant President Hannan ordered defendant Bayoumy, then Chief of [**8] Anesthesiology, to remove Dr. Konik from the anesthesia rotation schedule. As a consequence, plaintiff has not engaged in the active practice of her profession at the defendant hospital since September, 1978.

Between September and November, 1978, the hospital and plaintiff attempted to [*708] reach an accommodation regarding the content of the agreements which the hospital allegedly required as a condition of the delivery of anesthesiology services to its patients. One of the proposed agreements is alleged to have provided for a uniform posted fee schedule to which the plaintiff objected. Dr. Konik signed and submitted a counter proposal, dated September 29, 1978, with a provision, originally contained in the earlier August 31, 1978 tripartite agreement subscribed [**9] to by the hospital and AAP but unsigned by plaintiff, that provided that the fees charged will be no greater than those charged by other anesthesiologists for similar work situations in upstate New York. (Hannan

³Dr. Konik seems to maintain that she discontinued her "affiliation with the defendant, AAP, in order to practice as an independent physician with Senior Privileges in Anesthesiology at defendant, [hospital]." (Konik Affidavit, para. 28). Dr. Konik, however, also hints that she resigned from AAP since "discussions and negotiations had been undertaken [at the time of her departure] between the defendant, [hospital], and defendant, AAP, for purposes of entering into an exclusive contract [between the hospital and AAP] . . . whereby [AAP] would have the exclusive franchise for providing anesthesia services at the [hospital]." (Konik Affidavit, para. 29).

⁴ Plaintiff also contends that no proceedings in accordance with the hospital bylaws have ever been instituted regarding her conduct, either professionally, or, as a consequence of her withdrawal from AAP. This contention is uncontested.

Affidavit, Ex. G). This counter proposal also sought to reserve to the plaintiff all legal rights against the defendants. The defendant hospital and the defendant AAP did not sign this proposal.⁵

Plaintiff states that she was "forced" to sign and submit this counter proposal "to restore my access to the surgical suites of the defendant [**10] hospital in order that I could continue delivering anesthesia services," lest professional inactivity result in a deterioration of her skills. (Konik Affidavit, para. 35). Dr. Konik further states that she will not be coerced into entering into any contract, similar to the August 31, 1978 agreement, regulating her fee schedule and that, as a competent practitioner of 18 years, she will not have her status reviewed every six months as provided for in the contract. She asserts that the matter of a due process violation (denial of the use of hospital facilities for delivery of anesthesiological services), in addition to the contractual impasse, was brought to the attention of the State and County Medical Societies at a November 13, 1978 meeting between the principals and representatives of those societies. (Konik Reply Affidavit).

A new proposal was submitted by defendants, attempting to incorporate the clauses desired by plaintiff and reach an accommodation as to the disputed reservation of legal rights. (Hannan Affidavit, Ex. I). Plaintiff apparently refused to sign this compromise agreement. Therefore, plaintiff claims, the original tripartite agreement (hospital-AAP-plaintiff) [**11] of August 31, 1978, signed only by the defendants hospital and AAP, is presently in effect.⁶

III

Plaintiff's remaining claim, entitled "First Cause of Action," purports to set forth claims under [15 U.S.C. §§ 1, 2, 14](#), [15](#) and [26](#). Under the heading of "First Cause of Action," two individual "counts" are pleaded, alleging violations of [15 U.S.C. §§ 1](#) and [2](#). A liberal reading of plaintiff's antitrust averments reveals that the gravamen of her [§ 1](#) claims are premised upon the *per se* violations of price-fixing, [United States v. Trenton Potteries Co., 273 U.S. 392, 398, 71 L. Ed. 700, 47 S. Ct. 377 \(1927\)](#), and group boycotts or concerted refusals to deal, [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 \[**12\] U.S. 207, 212, 3 L. Ed. 2d 741, 79 S. Ct. 705 and n. 5 \(1959\)](#) (Complaint, para. 40, 41). Plaintiff's partial summary judgment motion is specifically predicated upon a showing of an illegal tying arrangement (exclusive contract), horizontal price fixing, vertical price fixing, illegal group boycott, and a violation of the essential facilities doctrine. (Notice of Motion by Plaintiff for Partial Summary Judgment, dated October 27, 1982).

[*709] Defendants have asserted in their summary judgment motion⁷ an array of defenses against plaintiff's antitrust claims, including: (1) the lack of a showing of the existence of an exclusive contract, [Capili v. Shott, 620 F.2d 438 \(4th Cir. 1980\)](#); (2) the failure to demonstrate a conspiracy or a combination in restraint of trade or commerce among the states; and (3) the lack of subject matter jurisdiction under the Sherman Act, [Yellow Cab Co. of Nevada v. Cab Emp. Automotive, 457 F.2d 1032 \(9th Cir. 1972\)](#); [Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center, 536 F. Supp. 1065 \(E.D. Pa. 1982\)](#). As a threshold matter, this Court shall consider the jurisdictional question.

[**13] Jurisdictional Prerequisites Under the Sherman Act

HN1 [↑] The jurisdictional requirement under the Sherman Act may be satisfied by showing that the challenged activity either occurred in interstate commerce, or, though wholly local in nature, has an effect on interstate

⁵ Paragraph 6 of the September 29th agreement provides, "the execution of this Memorandum of Understanding shall not be deemed a waiver of any cause of action of the party of the third-part [Dr. Konik] heretofore existing against any other party to this agreement." Plaintiff contends that the reason AAP and the hospital refused to sign this agreement was that she intended to challenge the legality of this and prior "exclusive" agreements. (Konik Affidavit, para. 36).

⁶ It is not disputed that the August 31st agreement is still in effect, at least between defendants hospital and AAP. However, it is the effect and scope of the contract that is at the very heart of the dispute at bar. The agreement is provided in Appendix A, *infra*, for the reader's convenience.

⁷ Since the Court is considering material outside the pleadings, defendants' motion shall be treated solely as one for summary judgment.

commerce. *McLain v. Real Estate Board, Inc.*, 444 U.S. 232, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980). "It can no longer be doubted . . . that the jurisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or the 'effect on commerce' theory." *Id. at 242*. It is also well established that the jurisdictional issue in antitrust cases involving the denial of hospital staff privileges or access to hospital facilities may be determined under the "effect on commerce" test. *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980). See also *Mishler v. St. Anthony's Hospital Systems*, 694 F.2d 1225 (10th Cir. 1981).

To establish jurisdiction under the "effect on commerce" test plaintiff need *not* show that the defendants' challenged conduct *itself* had a substantial effect on interstate commerce. "If establishing jurisdiction required a showing that the unlawful [**14] conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases."⁸ *McLain v. Real Estate Board of New Orleans, supra*, 444 U.S. at 243. The plaintiff, then, must establish that there exists a sufficient nexus between the challenged activity and interstate commerce so that it can be said "as a matter of practical economics" there is "a not insubstantial effect on the interstate commerce involved." *Id. at 246*. In determining jurisdiction, there is no talismanic test. "Rather, jurisdiction must be determined using a case-by-case analysis of the relevant economic facts." *Heille v. City of St. Paul, Minnesota*, 671 F.2d 1134, 1136 (8th Cir. 1982). Moreover, "the impact defendant's professional activities may have upon interstate commerce . . . is a question of fact. . . ." *Williams v. St. Joseph Hospital*, 629 F.2d 448, 454 (7th Cir. 1980).

[**15] Here, it is conceded that the plaintiff, Dr. Konik, has been denied use of the facilities at the defendant hospital for delivery of anesthesia services because she failed to sign a contract for the rendering of such services. Dr. Konik alleges that this denial of access by the named defendants violated the antitrust laws under the Sherman Act.

In maintaining that the jurisdictional requirement of the Sherman Act has been met, Dr. Konik presents allegations in her complaint, accompanied by certain proof in depositions and affidavits, that:

1. plaintiff treated patients who traveled in interstate commerce;
- [*710] 2. plaintiff administered and prescribed a substantial quantity of pharmaceutical drugs and anesthesia supplies which were manufactured out of state;
3. a substantial portion of the fees charged by plaintiff was paid by out of state, third-party insurers and payers, including the federal government;
4. defendants treat a substantial number of patients who travel in interstate commerce;
5. the defendants purchase, administer, prescribe, and use drugs and supplies manufactured out of state;
6. defendants receive a substantial amount of revenues from third-party, [**16] out of state insurers and payers, including the federal government;
7. the defendant hospital has a direct link with interstate commerce by virtue of its contractual training programs for the medical students of the University of Vermont Medical School and the undergraduates at the University of Vermont; and
8. the defendants' activities are allegedly designed to prevent plaintiff and others from competing with defendants in the delivery of anesthesia services at defendant hospital.⁹

⁸ "Nor is jurisdiction defeated in a case relying on anticompetitive effects by plaintiff's failure to qualify the adverse impact of defendant's conduct. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-25, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-266, 90 L. Ed. 652, 66 S. Ct. 574 (1946)." *McClain v. Real Estate Bd. of New Orleans, supra*, 444 U.S. at 243.

This Court agrees with plaintiff that these allegations do fall within the "effect on commerce" test. See *Hyde v. Jefferson Parish Hospital District No. 2, 686 F.2d 286 (5th Cir. 1982)*; *Crane v. Intermountain Health Care, supra*; *Everhart v. Jane C. Stormont Hospital*, 1982-1 Trade Cases P 64,703 (D. Kan. 1982); *Malini v. Singleton & Associates, 516 F. Supp. 440 (S.D. Tex. 1981)*; *Williams v. Kleaveland, 534 F. Supp. 912 (W. D. Mich. 1981)*; *Robinson v. Magovern, 521 F. Supp. 842 (W. D. Pa. 1981)*; *Santos v. Columbus-Cuneo-Cabrini Medical Center*, 1982-1 Trade Cases P 64,498 (N.D. Ill. 1981), remanded on other grounds, *684 F.2d 1346 (7th Cir. 1982)*; *Stone v. William* [**17] *Beaumont Hospital*, 79-74212 (E. D. Mich. 1981).¹⁰

[**18] In the present case, defendants have moved for summary judgment in part, claiming that the plaintiff has failed, as a matter of law, to establish the jurisdictional elements of a Sherman Act claim. Defendants rely heavily on a recent case from the Eastern District of Pennsylvania, *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center, 536 F. Supp. 1065 (E.D. Pa. 1982)*. It is contended that *Cardio-Medical* is authority for the following two propositions: (1) in analyzing the nexus between defendants' challenged activities in interstate commerce, the courts must look only to the plaintiff's interstate commerce activities; and (2) the treatment of patients who travel in interstate commerce, the purchase of supplies from out of state sources and the receipt of revenues from out of state third-party insurers, do not satisfy the interstate commerce requirement of *antitrust law*. Neither proposition, this Court believes, is an accurate statement of the current state of the law in this area.

As to the first proposition, the court based its holding solely on *Nara v. American Dental Association, 526 F. Supp. 452 (W. D. Mich. 1981)*. In *Nara*, a dentist's membership [**19] in defendant's national organization was suspended as a result of plaintiff's [*711] violation of the Michigan Dental Code. Plaintiff alleged that this action by the American Dental Association violated the antitrust laws under the Sherman Act, and attempted to establish the jurisdictional element by claiming that the defendant organization was involved in interstate commerce. The *Nara* court rejected this approach.

However, *Nara* is factually distinguishable from the above cited denial of privileges and access cases which, as stated, held that *both* the plaintiffs' and defendants' interstate activities are to be analyzed in meeting the "effect on commerce" jurisdiction test. In *Nara*, the defendant was a national organization that did not provide dental services nor compete with individual practitioners. Moreover, the suspension of one member of the Association for misconduct did not effect competition within the dental profession. As noted earlier, *HN3*[↑] the underpinning of the denial of privileges and access cases is the fact that the defendants' challenged activities have the effect of eliminating competition which in turn affects interstate commerce activities of [**20] treating patients who travel in interstate commerce, purchases of out of state supplies, and receipt of revenue from out of state third-party insurers. This aspect of those denial cases is missing in *Nara*. Thus, viewed in light of the anticompetitive aspect of the denial cases, there does not exist in *Nara* a logical nexus between the defendant's challenged activities and interstate commerce. In other words, the *Nara* court, out of necessity, had to analyze the jurisdictional issue based solely on plaintiff's interstate commerce activities. Therefore, the *Cardio-Medical* court incorrectly relied on the

⁹ See Complaint, para. 28; Defendants' Admissions.

¹⁰ The above cases all involve physicians being denied staff privileges or access to defendant hospital's facilities as a result of alleged exclusive contractual arrangements among the named defendants. The underlying rationale of these cases is that defendants' activities *HN2*[↑] affect interstate commerce because they retard competition. This retardation affects interstate commerce in the following ways: first, by denying to physicians the opportunity to compete, prices will invariably stabilize at some fixed rate and this will affect the amount of payments made by out of state, third-party insurers. Allowing these plaintiff-physicians privileges and access will provide patients and third-party insurers the benefits of free and open competition. This in turn will affect the amount of payments made by out of state, third-party insurers. Second, the competition that will be generated by permitting physicians staff privileges and access will affect the volume of out of state patients treated and the volume of the out of state purchases of supplies. This point was specifically addressed in *Malini v. Singleton and Associates, supra*.

Nara case to support the proposition that a court must look only to plaintiff's interstate commerce activities to establish the nexus between the challenged activities and interstate commerce.¹¹

[**21] In addition, the second proposition enunciated in *Cardio-Medical*, first announced in [Spears Free Clinic and Hospital v. Cleere, 197 F.2d 125 \(10th Cir. 1952\)](#), that the treatment of patients who travel in interstate commerce, the purchase of supplies from out of state sources and the receipt of revenues from out of state third party insurers, do not satisfy the interstate commerce requirement of the Sherman Act, is equally without merit.¹² The Supreme Court, in [Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 48 L. Ed. 2d 338, 96 S. Ct. 1848 \(1976\)](#), rejected implicitly the idea that there cannot be a "substantial effect" on interstate commerce if coconspirators "succeed[ed] in blocking . . . petitioner's purchases of out-of-state medicines and supplies as well as its revenues from out-of-state insurance companies. . . ." [425 U.S. at 744. HN4](#)¹³ The "substantial effect" test, therefore, may be satisfied upon any showing that there existed an "unreasonable burden on the free and uninterrupted flow of interstate commerce." [Id. at 746.](#)

[**22] Moreover, the Third Circuit, which includes the *Cardio-Medical* Eastern District of Pennsylvania court, expressly rejected the *Spears* rationale in [Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48 \(3d Cir. 1973\)](#). "The [Spears] opinion even when it was written placed primary reliance on a series of cases that were no longer valid. . . . As a result, the reasoning [*712] of the opinion rested on flawed grounds when it was issued in 1952." [490 F.2d at 52.](#) The court further held, in contravention of the *Cardio-Medical* holding, that [HN5](#)¹⁴ the interstate commerce allegations of treating patients from out of state sources, of the trafficking in out of state goods, and of the receipt of revenues from out of state sources were sufficient to establish jurisdiction under the Sherman Act.¹⁵ [Id. at 53.](#)

[**23] Therefore, the *Cardio-Medical* jurisdictional holding appears to be contrary to the great weight of authority, and this Court declines to follow it. Consequently, the Court finds that plaintiff here has succinctly and sufficiently satisfied the Sherman Act's jurisdictional requirements.

Plaintiff's Per Se Arguments

Defendants argue that the rule of reason is the standard to be exclusively applied in this case. This Court disagrees.

Section 1 of the Sherman Act provides that [HN6](#)¹⁶ "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal." [15 U.S.C. § 1.](#) A literal reading of this section would give rise to a finding of violation in every commercial contract that affects interstate commerce. [National Society of Professional Engineers, 435 U.S. 679, 687-88, 55 L. Ed. 2d 637, 98 S. Ct. 1355 \(1978\); Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 \(1911\)](#). Consequently, the

¹¹ In addition, *Cardio-Medical* also relied upon [Hahn v. Oregon Physicians' Service, 508 F. Supp. 970 \(D. Or. 1981\)](#) to support this proposition. This Court notes that the Ninth Circuit recently overturned the district court's decision in *Hahn*. [Hahn v. Oregon Physicians' Service, 689 F.2d 840, 1982-2 Trade Cases P 64,970 \(9th Cir. October 5, 1982\)](#). Specifically, the Ninth Circuit held that the trial court erred when it determined the jurisdiction issue solely on the plaintiff's interstate commerce activities, since "jurisdiction may also be established directly by the defendants' activities." *Id.*

¹² The *Spears* rationale has been relied upon and followed in a number of cases. See [Wolf v. Jane Phillips Episcopal-Memorial Medical Center, 513 F.2d 684 \(10th Cir. 1975\); Riggall v. Washington County Medical Society, 249 F.2d 266 \(8th Cir. 1957\); Capili v. Shott, 487 F. Supp. 710 \(S.D.W. Va. 1978\), aff'd, 620 F.2d 438 \(4th Cir. 1980\); Nankin Hospital v. Michigan Hospital Service, 361 F. Supp. 1199 \(E. D. Mich. 1973\).](#)

¹³ Additionally, the Tenth Circuit has cast doubt on the validity of its holding in [Wolf v. Jane Phillips Episcopal-Memorial Center, supra.](#) "To the extent *Wolf* can be read as rejecting, as a matter of law, the possibility that an interstate flow of people seeking a purely local service can have a substantial effect on interstate commerce, it is no longer good law in light of *McLain*." [Crane v. Intermountain Health Care, Inc., supra, 637 F.2d at 726 n.4.](#)

Supreme Court has read the so-called "rule of reason" into the Sherman Act. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d ^{**241} 48 (1982); *Standard Oil Co. v. United States*, *supra*.

HN7 [↑] Under the "rule of reason," only unreasonable restraints of trade are forbidden. A restraint of trade is deemed unreasonable where the anti-competitive effects outweigh the procompetitive effects of the challenged activity. *National Society of Professional Engineers*, *supra*, 435 U.S. at 688-92. Certain business combinations, however:

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. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable . . . Among the practices which the courts have heretofore deemed to be unlawful in and of themselves ^{**25} are price fixing . . . division of markets . . . group boycotts . . . and tying arrangements.

Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958).

Despite the Supreme Court's strong endorsement of the use of the per se rule in cases involving the above-mentioned restraints of trade, some lower courts have been hesitant to apply this rule in cases where professionals in the health care field are involved. See *Everhart v. Jane C. Stormont Hospital*, *supra*; *Robinson v. Magovern*, *supra*. This argument has recently been rejected by the Supreme Court in *Arizona v. Maricopa County Medical Society*, *supra*.

In *Maricopa County*, the defendants, like the defendants in the instant case, argued that courts "should not apply the per ^{**713} se rule . . . because the judiciary has little antitrust experience in the health care industry." *73 L. Ed. 2d at 62*. However, the Court noted that "[this] argument quite obviously is inconsistent with *Socony-Vacuum*. In unequivocal terms, we stated that, 'whatever may be its peculiar problems and characteristics, **HN8** [↑] the Sherman Act, so far as price-fixing agreements are concerned, establishes ^{**26} one uniform rule applicable to all industries alike.'" *Id.*, citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222, 84 L. Ed. 1129, 60 S. Ct. 811 (1940). The Court also rejected the argument that the per se rule must be rejustified for every industry that has not been subject to significant antitrust litigation. *73 L. Ed. 2d at 63*. Therefore, although *Maricopa County* involved only allegations of horizontal price-fixing, this Court agrees with plaintiff that other per se violations, including group boycotts and tying arrangements, apply equally to the health care profession. See *Hyde v. Jefferson Parish Hospital District No. 2*, *supra*. The Court, then, will deal with plaintiff's per se theories seriatim.

1. Illegal Tying Arrangement.

Plaintiff's first per se argument is that the agreement between defendants hospital and AAP constitutes an illegal tying arrangement. **HN9** [↑] 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 Pacific Ry. Co. v. United States*, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). The Supreme Court has recognized ^{**27} that "the vice of tying arrangements lies in the use of economic power in one market to restrict the competition on the merits in another regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not." *Id. at 11*.

However, not all tying arrangements are proscribed by the Sherman Act. A tying arrangement is a per se violation of the Act when it exhibits the following four characteristics:

1. two separate products, the tying product and the tied product;

561 F. Supp. 700, *713 LEXIS 1983 U.S. Dist. LEXIS 18953, **27

2. sufficient market power in the tying market to coerce purchase of the tied product;¹⁴
3. involvement of a not insubstantial amount of interstate commerce in the tied market; **[**28]** and
4. anticompetitive effects in the tied market.

Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1037 (5th Cir. 1981).

Plaintiffs contend that a tying arrangement exists here because the users of the hospital's operating rooms (the tying product) are also compelled to purchase the hospital's chosen anesthesia service (the tied product). Thus, it is contended that we are dealing with two distinct services which a buyer should be able to purchase separately. In support of this per se tying arrangement argument, plaintiff cites *Hyde v. Jefferson Parish Hospital District No. 2, supra*.

In *Hyde*, a plaintiff anesthesiologist was denied staff privileges at a New Orleans hospital because that hospital had an exclusive contract with a professional medical corporation for the provision of anesthesia services. Plaintiff filed suit against the hospital, alleging that the exclusive contract between the hospital and the professional corporation constituted a per se illegal tying arrangement. The district court refused to apply the per se rules of antitrust in this situation and granted judgment to the defendant under the "rule of reason." *Hyde v. Jefferson Parish Hospital District No. 2, 513 F. Supp. 532 (E.D. La. 1981).*

The Court of Appeals for the Fifth Circuit reversed the district court and held that the per se rules of **antitrust law** apply in cases involving professionals in the **[*714]** health-care industry and that the exclusive contractual arrangement between the hospital and the professional corporation constituted a per se illegal tying arrangement. Moreover, the court specifically rejected the trial court's finding that plaintiff had failed to demonstrate that the hospital dominated the market for its services. *Hyde v. Jefferson Parish Hospital District No. 2, supra, 686 F.2d at 289.*

However, the starting point, the genesis, of the *Hyde* holding was that there existed an exclusive contract, a point that is hotly contested here. "This action was occasioned by the fact that the hospital had an exclusive contract with . . . a professional medical corporation, to provide anesthesia services." *Id. at 287.* Without the showing of an exclusive contract, which is at the core of this action and is obviously the gravamen of all of plaintiff's antitrust theories, the existence of a tying arrangement remains problematical. **[**30]** Therefore, summary judgment on this issue should be denied.¹⁵

¹⁴Indeed, the Second Circuit has stated that "actual coercion by the seller that in fact forces the buyer to purchase the tied product is an indispensable element of a tying violation." *Unijax, Inc. v. Champion Intern., Inc., 683 F.2d 678, 685 (2d Cir. 1982); Yentsch v. Texaco, Inc., 630 F.2d 46, 57 (2d Cir. 1980).*

¹⁵Even if plaintiff was to prove the existence of an exclusive contract, there exist many attendant problems with the tying arrangement theory, "market power" for one. Plaintiff is quite correct in contending that it **HN10** does not have to prove that the hospital totally dominated the market. All that plaintiff must show is that the hospital possessed "sufficient economic power to impose an appreciable restraint on free competition in the tied product. . . ." *Northern Pacific Ry. Co. v. United States, supra, 356 U.S. at 11.*

As a first step, in demonstrating "sufficient market power," plaintiff must demonstrate the relevant geographic market for the hospital's services. Then it must be shown that, within that geographic market, the seller (here hospital) "has the power . . . to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." *United States Steel v. Fortner Enterprises, 429 U.S. 610, 620-21, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977); International Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 2d, 68 S. Ct. 12 (1947); IBM Corp. v. United States, 298 U.S. 131, 80 L. Ed. 1085, 56 S. Ct. 701 (1936).*

[**31] [**715] 2. The agreement between the defendants constitutes an illegal price fixing agreement.

Plaintiff contends that section 3(c) of the agreement, which provides that "fees charged by the parties of the second and third parts shall be no greater than those charged by other anesthesiologists for similar work situations in Upstate New York,"¹⁶ [**32] establishes unlawful maximum price fixing between defendants. Although this Court

There exist many problems and pitfalls in establishing the above two factors. First, there is a serious question whether the relevant market area can be sliced so small as to embrace a single hospital. The district court in *Hyde* held that the relevant geographic area included an area of at least twenty hospitals, and therefore concluded that if both patient and surgeon are free to go to any one of a large number of competent institutions, the hospital does not possess the power to force the tied product upon consumers. *Hyde v. Jefferson Parish Hospital District No. 2, supra, 513 F. Supp. at 540*. Other courts have accepted this reasoning. See *Santos v. Columbus-Cuneo-Cabriani Medical Center, 684 F.2d 1346 (7th Cir. 1982)*; *Harron v. United Hospital Center, Inc., 522 F.2d 1133 (4th Cir. 1975)* (per curiam), cert. denied, *424 U.S. 916, 47 L. Ed. 2d 321, 96 S. Ct. 1116 (1976)*.

However, the Fifth Circuit in *Hyde* took note of several market imperfections in the health care industry. [HN11](#) [↑] "First, the prevalence of third party payment of bills eliminates a patient's incentive to compare the relative cost effectiveness of competing hospitals. A second market imperfection is the lack of complete information regarding the quality of medical care offered." *Hyde v. Jefferson Parish Hospital District No. 2, supra, 686 F.2d at 290*. Therefore, the Court concluded, patients tend to choose hospitals by location rather than price or quality, which means that the geographic market area apparently may subsume only an individual hospital.

Plaintiff here alleges that the defendant hospital is the *only* major facility in a tri-county service area, and moreover, it is the only hospital facility in Clinton County, New York. Plaintiff further alleges that patients flock to the hospital due to its size, location, reputation, scope of services offered, and also due to the fact that it is the area's only referral hospital. (Konik Affidavit, Ex. 8-12). If plaintiff is able to prove these allegations at trial, it is unnecessary for this Court to enter the fray concerning whether the relevant market area may be limited to a single hospital since the allegations here distill down to one contention that there exists *no* relevant competition among hospitals in the area. However, even if plaintiff fails to prove the above, a relevant market area may still be demonstrated, this Court believes, by showing that patients tend to choose hospitals by location, rather than by price or quality.

As for the second prong [HN12](#) [↑] of demonstrating "sufficient market power," that is, that within the relevant market area it must be shown that the hospital is able to coerce its purchasers of services into accepting "burdensome terms [here exclusive contract] that could not be exacted in a completely competitive market," *United States Steel v. Fortner Enterprises, supra, 429 U.S. at 620-21*; plaintiff must show that patients are compelled to purchase the hospital's chosen anesthesia service in return for the use of the hospital's operating room and analogous services. In other words, there must be evidence proffered that patients requested Dr. Konik, or other anesthesiologists, and were refused. There must have existed, then, competition between anesthesiologists insofar as patients are concerned. See *United States v. American Society of Anesthesiologists, Inc., 473 F. Supp. 147, 160 (S.D. N.Y. 1979)*. If this cannot be shown, the factor of impermissible coercion is missing from the tying arrangement equation and, consequently, plaintiff cannot prevail on this theory. A demonstrated exclusive contract would then be lawful.

Finally, there are two additional problems here. First, it is conceded that [HN13](#) [↑] if defendant hospital affords proof of a legitimate articulated medical reason for the existence of the tying arrangement, and further demonstrates that there does not exist a less restrictive way to accomplish the end which justifies that medical reason, defendant hospital will be insulated from liability. See *Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976)*; *Smith v. Northern Michigan Hospitals, Inc., 518 F. Supp. 644 (W.D. Mich. 1981)*. Here, defendant alleges that the tying arrangement provides for continuous coverage and medical competency. However, at least for purposes of this motion, these contentions appear to be refuted by Dr. Konik's assertion that all staff physicians must guarantee medical competency and needed round-the-clock services. (Konik Affidavit, Exs. 13, 14, 15, 16 and 46).

Second, this Court agrees with defendants that under the tying arrangement theory of liability, only the hospital may be liable. This is so since the AAP lacks sufficient market power in the tying product to have anticompetitive effects on the market, see, e.g., *Times Picayune Publishing Co. v. United States, 345 U.S. 594, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*; *IBM Corp. v. United States, supra*, and plaintiff has not pleaded a conspiracy to engage in a tying agreement between the hospital and the group. (Complaint, para. 42).

does not quarrel with plaintiff's assertion that maximum -- as well as minimum -- price fixing is a per se evil proscribed by the Sherman Act, see *Albrecht v. Herald Co.*, 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968),¹⁷ it is not clear that the hospital did not stand in the position of a buyer of anesthesia services, and, as such, had a right to set the fees at which it would then distribute those services. See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979). Moreover, the *sine qua non* of this, and plaintiff's other theories, that there exists an exclusive contract, has yet to be proven.

Instead, this Court believes that, with one exception,¹⁸ this matter should be properly treated, once the exclusivity of the contract has been demonstrated, as one involving a vertical combination. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979). Such HN15[↑] a vertical combination should be analyzed under the rule of reason. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982). As the name suggests, the rule of reason requires the trier of fact to decide whether under all of the circumstances of the case, the restrictive [*716] [**33] practice imposes an unreasonable restraint on competition. *Arizona v. Maricopa County Medical Society, supra*; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). "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." *National Society of Professional Engineers v. United States, supra*, 435 U.S. at 691 (quoting *Board of Trade v. United States*, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918)).

[**34] Here, in the context of a demonstrated exclusive dealing arrangement, the plaintiff may prevail only upon a showing that the agreement results in a substantial foreclosure of competition in an area of competition, that is, in a relevant market. *Tampa Electric Co. v. Nashville Coal Co., supra*, 365 U.S. at 327-28. Since these factors have not been amply demonstrated, summary judgment should be denied on the vertical combination contention. See *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978).

3. The fee schedule set by the members of AAP constitutes an illegal price-fixing arrangement.

In *Arizona v. Maricopa County Medical Society, supra*, the Supreme Court held that HN17[↑] a horizontal arrangement between physicians to establish the maximum fees they could claim in full payment for health services provided to policy holders of specified plans was a per se violation of the Sherman Act. In *Maricopa County*, seventh percent of the physicians in that county formed two non-profit foundations for the purpose of promoting fee-for-service medicine and to provide an alternative form of health insurance coverage. The physicians agreed to accept the fees set by the foundations [**35] as full payment for services provided patients insured under the foundations' plan. The foundations used relative values and conversion factors in compiling their fee schedule.¹⁹

¹⁶ See Appendix A, *infra*.

¹⁷ HN14[↑] "Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market." *Albrecht v. Herald Co., supra*, 390 U.S. at 152.

¹⁸ However, HN16[↑] plaintiff may prevail on a per se price fixing theory here if it can be shown that the agreement or combination was "formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity (here anesthesiology services) in interstate or foreign commerce. . . ." (emphasis added) *Arizona v. Maricopa County Medical Society, supra*, 73 L. Ed. 2d at 60 (quoting *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213, 95 L. Ed. 219, 71 S. Ct. 259 (1951)). This is a question of fact that remains to be proved, if possible, at trial.

¹⁹

Thus, for example, the conversion factors for "medicine" and "laboratory" were \$8.00 and \$5.50, respectively, in 1972, and \$10.00 and \$6.50 in 1974. The relative value schedule provides a numerical weight for each different medical service -- thus, an office consultation has a lesser value than a home visit. The relative value was multiplied by the conversion factor

In concluding [**36] that this scheme was a per se violation, the Court stated:

In this case the rule is violated by [HN18](#)[↑] a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

73 L. Ed. 2d at 61.

Here, plaintiff argues that defendant AAP has set a fee schedule similar to that of the foundations in the *Maricopa County* case, and, therefore, since there is no price competition among the individual members of the professional corporation, the fee schedule adopted by AAP constitutes an illegal price fixing arrangement, a per se violation of the Sherman Act.²⁰ Plaintiff, [*717] however, misses the point of the *Maricopa County* holding, which deals exclusively with a horizontal price fixing arrangement between hundreds of competing physicians. Here in contrast, [**37] we are dealing, concededly, with a professional corporation, a situation which is expressly exempted from the *Maricopa County* holding:

The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market. The agreement under attack is an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers. It is true that some are surgeons, some anesthesiologists, and some psychiatrists, but the doctors do not sell a package of three kinds of services. If a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price fixing agreement among the doctors would be perfectly proper. But the fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price fixing mold.

73 L. Ed. 2d at 66, 67.

to determine the maximum fee. The fee schedule has been revised periodically. The foundation board of trustees would solicit advice from various medical societies about the need for change in either relative values or conversion factors in their respective specialties. The board would then formulate the new fee schedule and submit it to the vote of the entire membership.

Arizona v. Maricopa County Medical Society, supra, 73 L. Ed. 2d at 56.

²⁰ Plaintiff alleges that AAP:

establishes its price based upon units. Two (2) distinct units are used, the first set is based upon the complexity of the procedure used; these units are established by the American Society of Anesthesiologists. The second set is based upon time: 15 minutes equals one unit. The classes of units are added together then multiplied by a dollar value to determine the fee charged. The dollar value is set by the P. C. [AAP]. This value has periodically been raised. No member of the P.C. has charged anything but the fees set by this arrangement. Any price modification is subject to unanimous agreement of all members of the P.C., at a board meeting. The P.C. also sets a flat fee for O.B. services provided. Again, no member of the P.C. has charged less than [sic] the fee established.

In addition to the doctors at the P.C. following this fee schedule the *nurse anesthetists* [sic] employed at the P.C. employ the same schedule. There is no differential in the dollar value assigned to units associated with a doctor at the P.C. than those associated with a nurse anesthetists [sic]. The fees charged by each are identical. In addition, there is no competition with the P.C. for the provision of anesthesia services at the defendant, medical center.

(Memorandum of Law, p.18).

[**39] Since the situation at bar involves a small professional corporation, the functional equivalent of a partnership arrangement for antitrust purposes, plaintiff's motion for summary judgment is denied on this price fixing contention and, conversely, granted in favor of the defendants as a matter of law.

4. Denying plaintiff access to the hospital facilities because of her refusal to partake in an allegedly illegal and exclusive price fixing agreement constitutes an illegal boycott.

Plaintiff argues that defendants, by refusing Dr. Konik access to the hospital facilities due to her refusal to join an allegedly illegal and exclusive price fixing agreement, are per se liable under an illegal boycott theory. It must be noted that cases applying per se illegality to collective refusals to deal fall into three categories.

The first group, exemplified by [Eastern States Retail Lumber Dealers Assoc. v. United States, 234 U.S. 600, 58 L. Ed. 1490, 34 S. Ct. 951 \(1914\)](#), have involved horizontal combinations among traders at one level of distribution, whose purpose was to exclude direct competitors from the market. See also [Silver v. New York Stock Exchange, 373 U.S. 341, 10 L. Ed. 1**401 2d 389, 83 S. Ct. 1246 \(1963\)](#); [Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 \(1945\)](#). [Klor's, Inc. v. Broadway-Hale Stores, supra](#), illustrates a second category of group boycott cases, involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some members of the combination.²¹ See also [Radiant Burners, \[*718\] Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 \(1961\)](#). The third group of cases, unlike the first two categories, has concerned combinations designed to influence coercively the trade practices of boycott victims rather than to eliminate them as competitors. The leading case in this group is [Fashion Originators Guild of America v. Federal Trade Comm'n, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 \(1941\)](#), in which a group of designers refused to sell their "creations" to retailers who purchased and sold copies of the original designs. In holding this refusal to deal illegal per se, the Court stated that even though the object of the boycott was to prevent the retailers from dealing with manufacturers of the copies and thereby [**41] eliminate "style piracy," the coercion practiced indirectly on a rival method of competition precluded application of the rule of reason.²²

In all of these cases, the cornerstone of per se illegality has been the *purpose and effect* of the questioned arrangement:

HN19 where exclusionary or coercive [**42] conduct has been present, the arrangements have been viewed as 'naked restraints of trade', and have fallen victim to the *per se* rule. On the other hand, where these elements have been missing, the *per se* rule has not been applied to collective refusals to deal.

[E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178, 187 \(5th Cir. 1972\)](#). Therefore, the resort to the *per se* rule is justified only when there exists the presence of exclusionary or coercive conduct which, when present, warrants the view that the arrangement is a "naked restraint of trade." Absent these factors, the rule of reason must be followed in determining the legality of the agreement. See [Oreck Corp. v. Whirlpool Corp., supra](#).²³

²¹ In *Klor's* a large appliance dealer, Broadway-Hale, used its purchasing power to induce defendants manufacturers and wholesalers to sell only at discriminatory prices to plaintiff, a competing appliance dealer. Since the effect of the agreement was to drive *Klor's* out of competition with Broadway-Hale, the Court found the tripartite agreement illegal *per se*, notwithstanding the fact that the manufacturers and wholesalers, not in competition with *Klor's*, probably had no anti-competitive motive.

²² See also [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 \(1951\)](#) (liquor manufacturers' collective refusal to sell to price-cutting wholesalers).

²³ Defendants cite [Oreck Corp. v. Whirlpool Corp., supra](#), for justification that plaintiff's group boycott theory should be analyzed solely under the rule of reason standard since only a "vertical" restraint exists here. However, it is clear that defendants have misread *Oreck*.

Oreck involved a case where a dealer's [*Oreck Corporation*] exclusive distributorship was cancelled by a manufacturer [*Whirlpool*]. The Second Circuit in *Oreck* distinguished the Supreme Court's holding in [Klor's Inc. v. Broadway-Hale Stores, Inc.](#),

[**43] Plaintiff claims here to fall under both the second and third type of per se group boycott. Specifically, plaintiff alleges that the purpose of the "exclusive" agreement between defendants was to either "drive her out of business" or to coerce her into entering or ratifying an illegal price fixing agreement. (Konik Affidavit, *supra*). It is clear, then, that if proof of these allegations exists, defendants will be liable under the per se group boycott analysis. However, it is equally clear to this Court that plaintiff's summary judgment motion on the above contentions is premature. There exists numerous factual issues remaining to be resolved in the group boycott claim.

5. Defendants have violated the essential facilities doctrine by denying plaintiff access to the hospital facilities.

[*719] The plaintiff has advanced the theory that the defendants have violated the essential facility doctrine. This doctrine, recently defined by the Court of Appeals for the District of Columbia, establishes the rule that [HN20](#) [↑] "where facilities cannot be practically duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal [**44] restraint of trade to foreclose the scarce facility." [*Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 992 \(D. C. Cir. 1977\)*](#) (quoting A. D. Neale, *The Antitrust Laws of the United States*, 67 (2d ed., 1970)).²⁴

[**45] The essential facility doctrine, also called the "bottleneck principle," derives from the Supreme Court's 1912 decision in [*United States v. Terminal R. R. Ass'n, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 \(1912\)*](#), and more recently was reaffirmed in [*Otter Tail Power Co. v. United States, 410 U.S. 366, 377-78, 35 L. Ed. 2d 359, 93 S. Ct. 1022 \(1973\)*](#). To be "essential," a facility need not be indispensable; it is sufficient if duplication of the facility would be economically unfeasible and if denial of its use inflicts a severe handicap on potential market entrants. See, e.g., [*Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317, 1320 \(9th Cir. 1975\)*](#), cert. denied, 423 U.S. 1053, 46 L. Ed. 2d 642, 96 S. Ct. 782 (1976). However, the *Hecht* court warned, "this principle must be carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately." [*570 F.2d at 992-93*](#).

Plaintiff claims that defendant hospital is an essential facility, since the hospital is the only major medical facility in the tri-county Plattsburgh area,²⁵ [*46] since it is operating continuously and providing major anesthesia services, since it is the area's only referral hospital and teaching institution, and since its reputation and the expertise of its staff are unequaled in the tri-county area. (Konik Affidavit). However, it is not clear, at this point, even assuming, *arguendo*, that defendant hospital is an "essential facility,"²⁶ that plaintiff has been unfairly denied use of the

supra, in that *Klor's* specifically exempted from per se liability a situation where a manufacturer and its dealer agreed to an exclusive distributorship. [*Klor's Inc. v. Broadway-Hale Stores, Inc., supra, 359 U.S. at 212*](#). Thus, "the present case, involving as it does an alleged agreement between a single manufacturer and a single dealer, is in essence, an exclusive distributorship controversy [and subject to rule of reason analysis], and the 'group boycott' doctrine is, therefore, not applicable." [*Oreck Corp. v. Whirlpool Corp., supra, 579 F.2d at 131*](#).

However, *Oreck* does not, as defendants contend, hold that all "vertical" restraint cases must be analyzed under the rule of reason standard. Such a view would nullify the *Klor's* and [*Fashion Originators Guild of America, supra*](#), holdings. Indeed, plaintiff's argument here is predicated, it seems, not on the cancellation of *her* agreement with the hospital (a theory that would place plaintiff under the *Oreck* case), but on a situation where it is alleged the defendants combined to exclude her from a market or to coerce her into ratifying the hospital-AAP "exclusive" contract (allegations that fall under *Klor's* and *Fashion Originators Guild*).

²⁴In *Hecht*, plaintiff attempted to acquire a professional football franchise in Washington, D.C., from the American Football League. To acquire a franchise, the plaintiff had to secure a stadium for the team. The only facility available was RFK Stadium. RFK Stadium was the home of the National Football League, Washington Redskins. The Redskins held a long-term lease at RFK Stadium. This lease contained a restrictive covenant which provided that no other football team could rent RFK Stadium during the lease term. The owners of RFK Stadium had tentatively arranged a lease with the plaintiffs for the use of RFK Stadium. However, the deal failed when the Redskins refused to waive their restrictive covenant. The Court in *Hecht* stated that although, "a restrictive covenant did not violate [Section 1](#) of the Sherman Act unless it is an unreasonable restraint of trade; when the restrictive covenant covers an essential facility, however, all possible competition is by definition excluded and the restraint is thus unreasonable per se." [*Hecht v. Pro-Football, Inc., supra, 570 F.2d at 993 n. 45*](#).

²⁵Clinton, Essex and Franklin Counties.

hospital facilities.²⁷ Indeed, it has not even been established that the contract between the defendants is an exclusive dealing agreement or that Dr. Konik was justified in not partaking in that agreement. Summary judgment on this issue also must be denied.

[47] Defendants' Further Summary Judgment Contentions**

Besides defendants' jurisdictional argument and their contention that there exist no facts which can support the presence of an exclusive dealing contract, illegal tying arrangement, group boycott and exclusive facility, all of which this Court believes are questions left to be resolved by the trier of facts, defendant hospital contends that its actions are exempt from Sherman Act liability under the *Colgate* doctrine. Under the doctrine, enunciated in [*720] [United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#), [HN21](#)[ unilateral policy decisions, motivated by "market strategy" or "business necessity," which impose a reasonable vertical restraint, cannot give rise to antitrust liability.²⁸ See also [Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1042 \(2d Cir. 1976\)](#), cert. denied, 429 U.S. 885, 50 L. Ed. 2d 166, 97 S. Ct. 236 (1976); [Modern Home Inst. Inc. v. Hartford Acc. & Indemnity Co., 513 F.2d 102, 108-09 \(2d Cir. 1975\)](#).

[48]** Here, it is argued that the hospital is acting in a reasonable manner by requiring an agreement to provide regularity in the delivery of anesthesiology services. However, it is not apparent that the agreement is necessary to provide such services. (Konik Affidavit, para. 33). Moreover, since plaintiff's group boycott theory remains to be established at trial, it would be inappropriate to grant summary judgment on behalf of defendant hospital under the *Colgate* doctrine.²⁹

[49]** Finally, defendants assert that the agreement between the parties cannot possibly be exclusive since Dr. Konik has been asked many times to become a signatory of the agreement. Therefore, the argument goes, since plaintiff's [Section 1](#) claims are all predicated on the existence of an exclusive agreement, the non-existence of exclusivity warrants summary judgment.

While this Court agrees with defendants that plaintiff's [Section 1](#) claims are predicated upon the existence of an exclusive agreement, the very fact that plaintiff refused to join in the agreement does not necessitate an award of summary judgment. This is true for two reasons. First, defendants' offer to join plaintiff to the agreement is only some evidence of non-exclusivity. Plaintiff may still demonstrate that, as to others, this agreement remains closed and that an exclusive dealing contract exists. Second, plaintiff alleges that the contract itself is unlawful. To force plaintiff to agree to, and abide by, the allegedly unlawful contract in order to be able to attack that agreement under the Sherman Act would present Dr. Konik with the ironic situation of litigating the lack of competition while being a party [\[**50\]](#) to the restraint of trade, a position that this Court finds untenable.

IV

²⁶ Defendants contend that there exist many hospitals in the tri-county area that duplicate defendant hospital's services.

²⁷ Defendant hospital, moreover, may demonstrate that an exclusive agreement may serve to improve the delivery of anesthesiology services and, thus, be justified under *Hecht*.

²⁸ In [United States v. Colgate, supra](#), the Court held that a seller has complete freedom to select his own customers absent an attempt to enforce retail price maintenance.

²⁹ As the Court in [Cernuto, Inc. v. United Cabinet Corporation, 595 F.2d 164, 168](#), (3rd Cir. 1979), stated:

when a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraint . . . However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer level.

561 F. Supp. 700, *720L 1983 U.S. Dist. LEXIS 18953, **50

In conclusion, since there are a number of material facts remaining to be resolved, plaintiff's motion for partial summary judgment is denied. *Adickes v. S.H. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).* Defendants' motion for summary judgment is granted to the extent that plaintiff's horizontal price-fixing claim is dismissed in accordance with the above, and denied in all other respects.

This Memorandum-Decision and Order is intended to support and modify the Order signed on February 1, 1983 denying summary judgment in this action.

It is so Ordered.

APPENDIX A

MEMORANDUM OF UNDERSTANDING

[EDITOR'S NOTE: THIS DOCUMENT IS REPORTED AT: [1983 U.S. Dist. LEXIS 20431.](#)]

End of Document



[Northrop Corp. v. McDonnell Douglas Corp.](#)

United States Court of Appeals for the Ninth Circuit

March 1, 1982, Argued and Submitted ; February 28, 1983

Nos. 81-5165, 81-5172

Reporter

705 F.2d 1030 *; 1983 U.S. App. LEXIS 30124 **; 1983-1 Trade Cas. (CCH) P65,245; 36 Fed. R. Serv. 2d (Callaghan) 102; 30 Cont. Cas. Fed. (CCH) P70,860

NORTHROP CORPORATION, Plaintiff/Appellant/Cross-Appellee, v. McDONNELL DOUGLAS CORPORATION, Defendant/Appellee/Cross-Appellant

Subsequent History: [\[**1\]](#) As Amended May 9, 1983.

Prior History: Appeal from the United States District Court for the Central District of California.

Disposition: Reversed in Part; Affirmed in Part; and Remanded.

Core Terms

technology, parties, teaming, aircraft, procurement, sales, regulations, land-based, district court, antitrust, license, immunity, marketing, military aircraft, anti trust law, contractor, fighter, argues, summary judgment, political question, rule-of-reason, attempt to monopolize, prime contractor, counterclaim, competitors, derivative, disclosure, military, commercial sale, unlimited right

LexisNexis® Headnotes

Governments > Federal Government > Claims By & Against

Governments > Courts > Courts of Claims

[HN1](#) [down arrow] Federal Government, Claims By & Against

[22 U.S.C.S. § 2356](#) waives sovereign immunity for claims within its scope, and provides that whether, in connection with the furnishing of assistance under this chapter information, which is protected by law, is disclosed by the United States Government or any of its officers, employees, or agents in violation of such restriction, the exclusive remedy of the owner is to sue the United States Government for reasonable and entire compensation for such practice or disclosure in district court or in the Court of Claims.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

[HN2](#)[] Dismissal, Involuntary Dismissals

In reviewing a dismissal for lack of subject matter jurisdiction, the court reviews the pleadings and evidence in the light most favorable to plaintiff.

Business & Corporate Law > Agency Relationships > Types > General Agents

Public Contracts Law > Types of Contracts > Multiyear Procurement

Business & Corporate Law > Agency Relationships > Agents Distinguished > General Overview

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > General Overview

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

[HN3](#)[] Types, General Agents

Under general agency principles, procurement contractors are ordinarily independent contractors unless the contract expressly makes them the Government's agents.

Business & Corporate Compliance > ... > Patent Law > Infringement Actions > Corporate & Government Infringers

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

Governments > Federal Government > Claims By & Against

Business & Corporate Compliance > ... > Patent Law > Ownership > Federal Government Inventions

[HN4](#)[] Infringement Actions, Corporate & Government Infringers

Suit against the Government under [28 U.S.C.S. § 1498](#) is the exclusive remedy for unlawful use of a patented invention by the Government.

Criminal Law & Procedure > ... > Firearms Licenses > Businesses > Applications

International Trade Law > International Commerce & Trade > Federal Legislation

Criminal Law & Procedure > ... > Firearms Licenses > Businesses > General Overview

Criminal Law & Procedure > ... > Firearms Licenses > Businesses > Inspections & Recordkeeping

Criminal Law & Procedure > ... > Weapons Offenses > Trafficking in Weapons > Elements

Governments > Federal Government > Domestic Security

Governments > State & Territorial Governments > Licenses

[**HN5**](#) Businesses, Applications

The International Traffic in Arms Regulations, 22 C.F.R. § 121.01 et seq. (1981), provide that a State Department license is required for export of equipment on the United States Munitions List; the license may be denied in furtherance of world peace, national security, or foreign policy; and that State Department approval is required before opening marketing talks with a prospective foreign buyer. 22 C.F.R. §§ 123.01, 123.05(a), and [123.16\(a\) \(1981\)](#). The regulations require that a proposed agreement regarding a license to manufacture abroad or the furnishing of technical assistance (the disclosure of technical data) relating to Munitions List items must be approved by the State Department; the agreement may be disapproved for the same reasons as above; and the sales pitch must be approved. 22 C.F.R. §§ 124.01, 124.05(a), and [124.12\(a\) \(1981\)](#).

International Trade Law > International Commerce & Trade > Federal Legislation

Patent Law > Infringement Actions > Infringing Acts > General Overview

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

[**HN6**](#) International Commerce & Trade, Federal Legislation

The regulations on proposed manufacturing license and technical assistance agreements require each agreement to state that: No liability shall be incurred by or attributed to the U.S. Government in connection with any possible infringement of privately owned patent or proprietary rights by reason of the U.S. Government's approval of this agreement. [22 C.F.R. § 124.10\(h\) \(1981\)](#). They also require the cover letter to state that State Department approval will not be construed as constituting either approval or disapproval of the business terms or conditions between the parties to the agreement. [22 C.F.R. § 124.11\(d\) \(1981\)](#). The regulations apply the same standards to the export of technical data. 22 C.F.R. §§ 125.03-05(1981).

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

[**HN7**](#) Compulsory Joinder, Necessary Parties

Joinder under [Fed. R. Civ. P. 19](#) entails a practical two-step inquiry. First, a court must determine whether an absent party should be joined as a "necessary party" under subsection (a). Second, if the court concludes that the nonparty is necessary and cannot be joined for practical or jurisdictional reasons, it must then determine under subsection (b) whether in equity and good conscience the action should be dismissed because the nonparty is "indispensable."

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

[**HN8**](#) Standards of Review, Abuse of Discretion

A reviewing court's standard of review of a lower court's decision that a party is a necessary and indispensable party to a lawsuit, is abuse of discretion.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Civil Procedure > Parties > Joinder of Parties > General Overview

[HN9](#) Compulsory Joinder, Necessary Parties

Fed. R. Civ. P. 19(a), defines two categories of parties that should be joined if feasible. To fit within the first category, it must appear that complete relief cannot be accorded between the parities to the lawsuit absent the joinder of the absent party. *Fed. R. Civ. P. 19(a)(1)*.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

[HN10](#) Compulsory Joinder, Necessary Parties

A nonparty to a commercial contract ordinarily is not a necessary part to an adjudication of rights under the contract.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

[HN11](#) Compulsory Joinder, Necessary Parties

All parties who may be affected by a suit to set aside a contract must be present.

Public Contracts Law > Contract Performance > Alterations & Modifications > Authorized Changes

Public Contracts Law > Bids & Formation > Mutual Obligation

Public Contracts Law > Contract Provisions > General Overview

Public Contracts Law > Contract Provisions > Changes Clauses

[HN12](#) Alterations & Modifications, Authorized Changes

The mere existence of the changes clause found in most Government military contracts does not permit a contractor to breach its preexisting contractual obligations to other private parties.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

[HN13](#) Compulsory Joinder, Indispensable Parties

Speculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under *Fed. R. Civ. P. 19*.

705 F.2d 1030, *1030LÁ1983 U.S. App. LEXIS 30124, **1

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN14 [] **Air & Space Transportation, Antitrust**

The Government is not a necessary party to what is essentially a contract and antitrust action between private parties solely because the dispute arises in the regulated military aircraft industry. Absent a more particularized and compelling governmental interest, private disputes arising within this important commercial sector shall be governed by traditional [Fed. R. Civ. P. 19](#) principles.

Civil Procedure > ... > Defenses, Demurrs & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN15 [] **Motions to Dismiss, Failure to State Claim**

In reviewing a dismissal for failure to state a claim, the court construes that material allegations in the complaint are true.

Civil Procedure > ... > Justiciability > Political Questions > General Overview

HN16 [] **Justiciability, Political Questions**

There are several considerations that help identify a non-justiciable political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding without an initial policy determination reserved for nonjudicial discretion; (4) the impossibility of deciding without expressing lack of respect for the coordinate branches of government; (5) unusual need for adherence to a political decision already made; and (6) the potentiality for embarrassment from multifarious pronouncements by various departments.

Civil Procedure > ... > Justiciability > Political Questions > General Overview

HN17 [] **Justiciability, Political Questions**

The mere fact that the challenged conduct occurs in a regulated industry does not alone alter its private commercial character.

International Law > Dispute Resolution > Act of State Doctrine

International Law > Dispute Resolution > General Overview

HN18 [] **Dispute Resolution, Act of State Doctrine**

Pursuant to the act of state doctrine, this nation's courts will not sit in judgment on the acts of another country. Even in private suits, American courts will not resolve issues requiring inquiries into the authenticity and motivation of the acts of foreign sovereigns.

International Law > Dispute Resolution > Act of State Doctrine

[**HN19**](#) [blue icon] **Dispute Resolution, Act of State Doctrine**

In determining whether the act of state doctrine compels dismissal of litigation, courts must carefully balance the relevant considerations. The justification for forbearance depends greatly on the importance of the issue's implications for United States foreign policy.

International Law > Dispute Resolution > Act of State Doctrine

[**HN20**](#) [blue icon] **Dispute Resolution, Act of State Doctrine**

Military procurement decisions by foreign sovereigns are acts of state.

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

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

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

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

[**HN21**](#) [blue icon] **Summary Judgment, Opposing Materials**

Summary judgment is appropriate under [*Fed. R. Civ. P. 56\(c\)*](#) only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The showing of a genuine issue for trial is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law. In reviewing the record to make this determination, the court must draw all inferences in the light most favorable to the party opposing the motion.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

[**HN22**](#) [blue icon] **Antitrust & Trade Law, Sherman Act**

Although summary judgment is sometimes appropriate in antitrust litigation, it is generally disfavored, especially when motive or intent is at issue.

Antitrust & Trade Law > Sherman Act > 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 > General Overview

[**HN23**](#) [down] Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. § 1 et seq. \(1979\)](#), bans all arrangements that are adopted to reduce competition, or which, regardless of purpose, have a significant tendency to reduce competition. Thus, arrangements that are adopted for and tend to achieve other purposes are not condemned by the Act merely because they carry some incidental and inconsequential restraining effect on competition. Although this determination is ordinarily made through a rule-of-reason analysis---a process calling for thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition---certain agreements or practices are so plainly anticompetitive and so lack any redeeming virtue that they are conclusively presumed illegal without the need for detailed rule-of-reason analysis. Horizontal market division is one of four main categories of competitive restraints, which the court holds to be unreasonable per se.

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

[**HN24**](#) [down] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

It is only after considerable experience with certain business relationships that courts classify them as per se antitrust violations.

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

[**HN25**](#) [down] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A new per se rule is not justified until the judiciary obtains considerable rule of reason experience with the particular type of restraint challenged.

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

[**HN26**](#) [down] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The critical inquiry in determining whether per se condemnation shall be extended to a previously unexamined business practice is whether the practice facially appears to be one that will always or almost always tend to restrict competition and decrease output, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive. Departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing.

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

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

705 F.2d 1030, *1030LÁ1983 U.S. App. LEXIS 30124, **1

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

HN27 [] Per Se Rule & Rule of Reason, Per Se Violations

Where the effect on competition is equivocal, it is appropriate to examine the purpose of the restraint in deciding whether to apply the per se rule.

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

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

HN28 [] Regulated Practices, Price Fixing & Restraints of Trade

Affiliated businesses cannot be held to conspire with each other where they function as essentially a single economic unit.

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Reciprocal Contracts

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

HN29 [] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Reciprocal license agreements are not per se violations if the technology is otherwise unobtainable by the licensee and the use limitation is reasonable.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

HN30 [] Sherman Act, Jurisdiction

Almost any activity that has interstate incidents satisfies the Sherman Act [15 U.S.C.S. § 1 et seq. \(1979\)](#), jurisdictional requirement.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

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

[**HN31**](#) [blue icon] **Actual Monopolization, Anticompetitive & Predatory Practices**

A manufacturer can attempt to monopolize a market by eliminating competition through predatory actions regardless of the product's sophistication and the limited number of its potential customers.

Antitrust & Trade Law > Regulated Industries > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

[**HN32**](#) [blue icon] **Antitrust & Trade Law, Regulated Industries**

Antitrust immunity is disfavored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. Pervasive regulations of an industry alone is insufficient to confer blanket immunity on every action taken within the industry. Immunity is especially disfavored where the antitrust implications of a business decision are neither compelled nor explicitly approved by a governmental regulatory body. Immunity from the antitrust laws is justified only where necessary to ensure that the regulatory scheme works, and even then only to the minimum extent necessary.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

[**HN33**](#) [blue icon] **Antitrust & Trade Law, Exemptions & Immunities**

Antitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct. There is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry. The area of immunity from antitrust laws is not coterminous with areas of agency jurisdiction or agency expertise.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

[**HN34**](#) [blue icon] **Antitrust & Trade Law, Exemptions & Immunities**

A regulatory mandate sufficient to confer implied antitrust immunity may in some cases exist where there is explicit congressional approval of the challenged conduct and its ultimate anticompetitive effect, and there is no inconsistency or plain repugnancy between the conduct and the express policies of the regulating body.

Criminal Law & Procedure > ... > Firearms Licenses > Businesses > Inspections & Recordkeeping

International Trade Law > International Commerce & Trade > Federal Legislation

[**HN35**](#) [blue icon] **Businesses, Inspections & Recordkeeping**

The principal regulatory provisions pertaining to the military aircraft industry are the International Security Assistance and Arms Export Control Act, [22 U.S.C.S. § 2751 et seq.](#), implemented, inter alia, by the International Traffic In Arms Regulations, 22 C.F.R. §§ 121.01 et seq. (1981), and the Armed Services Procurement Act, [10 U.S.C.S. § 2301 et seq.](#), implemented by Armed Servicemen's Procurement Regulations, 32 C.F.R. §§ 1-100 et seq. (1981).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract

Criminal Law & Procedure > ... > Firearms Licenses > Holders > Applications

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > General Overview

Military & Veterans Law > Armed Forces > Organization > US Department of Defense

[**HN36**](#) [blue] **Public Enforcement, State Civil Actions**

The Armed Services Procurement Act, [10 U.S.C.S. § 2301 et seq.](#), provides that a military procuring agency must notify the Attorney General whenever the agency has reason to believe that a violation of the antitrust laws has occurred. [10 U.S.C.S. § 2305\(d\)](#).

Antitrust & Trade Law > Regulated Industries > General Overview

Military & Veterans Law > Armed Forces > Organization > US Department of Defense

[**HN37**](#) [blue] **Antitrust & Trade Law, Regulated Industries**

Where the challenged conduct is the product of the regulated business' independent initiative and choice, it is properly subject to antitrust scrutiny.

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

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

[**HN38**](#) [blue] **Monopolies & Monopolization, Attempts to Monopolize**

At least two elements of proof are indispensable to make out a prima facie case of attempt to monopolize: (1) specific intent to control prices or destroy competition, and (2) predatory conduct designed to accomplish that unlawful purpose.

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

[**HN39**](#) [blue] **Monopolies & Monopolization, Attempts to Monopolize**

Evidence of market power, while not essential, may suggest the existence of specific intent to monopolize.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN40 [Actual Monopolization, Anticompetitive & Predatory Practices]

Although specific intent may be demonstrated by direct evidence of unlawful design, if corroborated, intent is, for practical reasons, more commonly proven through circumstantial evidence such as by inference from predatory conduct and market power.

Judges: Poole and Boochever, Circuit Judges, and Solomon, * Senior District Judge.

Opinion by: BOOCHEVER

Opinion

[*1035] BOOCHEVER, Circuit Judge

This appeal and cross-appeal present complex issues concerning the extent to which private parties may obtain redress for alleged issues concerning the extent to which private parties may obtain redress for alleged injuries occurring in the heavily regulated military aircraft industry. The principal issues are whether: (1) suit against the Government pursuant to [22 U.S.C. § 2356](#) (disclosure of proprietary data) is the exclusive remedy; (2) the Government is a necessary party; (3) the claims present non-justiciable political or foreign policy questions; [*1036] (4) certain agreements between the parties are per se illegal restraints of trade; and (5) the Government so pervades the relevant market that no trade or commerce exists for Sherman [**2] Act purposes.

The case arises out of a series of "teaming" agreements that Northrop and McDonnell Douglas ("McDonnell") entered into at the Government's request to develop military aircraft. The agreements allegedly limited Northrop to marketing those aircraft developed through the teaming effort that were suitable for land-based operation and McDonnell to marketing those suitable for aircraft-carrier operation. Despite its extensive involvement in the military aircraft industry, the Government is not a formal party to either the agreements or this action.

The trouble giving rise to Northrop's complaint and McDonnell's counterclaim began when McDonnell was awarded a large Navy contract, Northrop lost the competition for a similar Air Force contract, and McDonnell subsequently began marketing land-based aircraft to foreign countries. Northrop contends that McDonnell's marketing of land-based aircraft violated the agreements. It filed suit claiming, inter alia, fraud, breach of contract, economic coercion, refusal to deal, unfair competition, and industrial espionage. McDonnell subsequently filed a counterclaim seeking, inter alia, a declaration of rights under the agreements [**3] and damages for Northrop's allegedly illegal conduct and breaches of the agreements.

After some preliminary procedural maneuvering, the district court dismissed Northrop's first amended complaint in its entirety and, alternatively, granted McDonnell summary judgment as to five of the eight counts in the complaint. [*Northrop Corp. v. McDonnell Douglas Corp., 498 F. Supp. 1112 \(C.D.Cal.1980\)*](#). The district court also dismissed

* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

McDonnell's counterclaim and, alternatively, granted Northrop summary judgment on the ground that the counterclaim was the "mirror image" of Northrop's complaint.

We conclude that dismissal and summary judgment were inappropriate as to Northrop's complaint and McDonnell's counterclaim. Accordingly, except for the denial of a motion to modify a finding of fact, which we affirm, the decision of the district court is reversed and the matter remanded for further proceedings.

I

Background

A. Facts

Between 1965 and 1972 Northrop devoted substantial resources toward developing a lightweight, moderately priced, multi-mission jet fighter. This development effort produced an aircraft design Northrop termed the P-530.

In 1972, the United States Air Force [**4] awarded Northrop a multi-million dollar contract to produce two prototype aircraft (designated the "YF-17") based generally on the P-530 design. The Air Force concurrently awarded a similar contract to General Dynamics Corporation to produce two prototypes based on an alternative design concept (designated the "YF-16"). Both contracts were awarded as part of the Air Force's Air Combat Fighter ("ACF") competition for prototype development of lightweight land-based fighters. In keeping with its usual procurement policy (see generally Armed Services Procurement Regulations ["ASPR"], 32 C.F.R. §§ 7-104.9, 9-201(d), and 9-202.2(b) (1981)), the Government obtained unlimited rights through the contracts in the technology incorporated in the YF-16 and YF-17 prototypes.

McDonnell did not compete for an ACF contract. Instead, McDonnell concentrated on improving its F-15 design, which was for a more specialized and expensive land-based fighter than the YF-16 and YF-17 designs.

In 1974, the United States Navy announced the Navy Air Combat Fighter ("NACF") competition to develop a lightweight fighter suitable for aircraft carriers. To cut costs, Congress directed the Navy to [*1037] [**5] make maximum use of the technology already developed and paid for in the Air Force's ACF program. The Navy was thereby forced to limit its NACF competition to proposals based on General Dynamics's YF-16 and Northrop's YF-17 technology. Because of the headstart possessed by General Dynamics and Northrop in this technology and the limited funds the Navy had available to compensate other companies for the expense of catching up, the NACF competition was effectively limited to General Dynamics and Northrop.

Although General Dynamics and Northrop were essentially the only NACF competitors, neither possessed significant experience in producing carrier-suitable aircraft. To overcome this shortcoming, the Defense Department and Navy urged them to "team"¹ with companies having greater Navy experience. McDonnell was one of three or four companies that possessed the requisite Navy experience. Although, as noted by the district court, the parties dispute who was the pursuer and who the pursued,² the outcome of the corporate courtship is clear. On October 2,

¹ In teaming arrangements, often used in large military projects, two or more private contractors pool their financial and technological resources to work on a project they would be unable to handle alone. See [Experimental Engineering v. United Technologies Corp., 614 F.2d 1244, 1245 \(9th Cir. 1980\).](#)

² See [498 F. Supp. at 1115](#). The record supports the district court's view that Northrop and McDonnell "desperately needed each other if they -- jointly and severally -- were to succeed in tapping the great potential of the opportunity presented by the Navy's need for a new aircraft. . . ." Id. For instance, a McDonnell executive noted in an internal memorandum that a teaming agreement:

was the only crap game in town, so we had to play it. . . . The Navy wasn't going to let us propose our own airplane and win with it, so we had to go this way.

Similarly, although both parties make extravagant claims about their respective contributions to the eventual teaming effort, it seems clear that neither party would have gotten far without the other.

1974, Northrop and McDonnell executed a "Teaming Agreement" to develop and propose variants of the YF-17 to the Air Force and Navy. [**6]

[**7] The Teaming Agreement was the first of three major written agreements between the parties. The parties agreed that Northrop would concentrate on the Air Force's ACF competition while McDonnell concentrated on the Navy's NACF competition. The proposal submitted to the Air Force listed Northrop as prime contractor and McDonnell as associate contractor; the roles were reversed in the proposal submitted to the Navy. The Agreement was intended "to be the basis for later agreements to be definitized."

On January 14, 1975, Northrop's YF-17 lost the ACF competition to General Dynamic's YF-16. On May 2, 1975, the Navy announced that McDonnell's proposed fighter had won the NACF competition, designating the winning design the "F-18". Approximately two months later, the parties entered into a "Basic Agreement" drawn along the same lines as the prior Teaming Agreement.³ The Basic Agreement has five key provisions:

1. In the "Definition" clause, the F-18 is defined as "a carrier-based derivative of [Northrop's] YR-17 aircraft. . . ."
2. In the "Objective" clause, the parties expressed their commitment to:

work together (without in any manner intending to create a joint venture [**8] or otherwise incur or imply joint or several liability) for the purpose of obtaining and performing contracts for the development and production of derivatives of [Northrop's] YF-17 aircraft that are responsive to the requirements of the U.S. Navy and foreign customers.

3. In the "Contract Responsibilities" clause that is at the heart of this dispute, the parties agreed:

3.(a) . . . that [McDonnell] will be prime contractor in connection with [*1038] contracts with the U.S. Navy for the development of the F-18 and for the production of those F-18 aircraft purchased by the U.S. Navy for its own use. Furthermore, in the event a foreign customer desires to procure from [McDonnell] . . . F-18 aircraft of basically the same configuration . . . [McDonnell] will be prime contractor. . . .

(b) [Northrop] may elect to be prime contractor on any or all contracts for the development and production of aircraft derived from the [Northrop] YF-17 other than those referred to in paragraph (a) above.

(emphasis added). The parties dispute whether the underscored phrase "of basically the same configuration" limits McDonnell to providing only carrier-suitable derivatives [**9] of the F-18.

4. The "Data Exchange" clause mutually obligates the parties to exchange available information on the F-18 and YF-17 technology. Pursuant to this clause, the exchanged technology "may be used by the receiving party only in furtherance of the contracts referred to in paragraph 3. . . ." ⁴

5. The "Division of Effort" clause provides that, absent a contrary Navy directive, all F-18 production was to be performed according to the distribution of labor specified by the parties in the agreement (see the "Workshare" discussion, *infra*, at § III).

The Government subsequently awarded McDonnell a prime [**10] contract for over \$1.06 billion to make the F-18 operational. McDonnell, in turn, awarded Northrop the principal subcontract for the project. Under the prime contract, the Government paid McDonnell for interim design activities not covered by prior contracts. This payment was "flowed down" to the subcontract, reimbursing Northrop for its previously unfunded interim design work. Both the prime contract and subcontract granted the Government unlimited rights in F-18 technology and incorporated by

³Both the Teaming and Basic Agreements were drafted in apparent accordance with ASPR 32 C.F.R. § 4-117 (1981) (authorizing "contractor team arrangements"). The Government was not a party to either agreement.

⁴The parties sharply dispute whether this clause reflects a "license" of technology, or is merely a new teaming arrangement consistent with ASPR 32 C.F.R. § 4-117 (1981).

reference an addendum (No. 438 to MIL-D-8706) that authorized the use and submission of any YF-17 technology found applicable to the F-18.

In late 1975 and early 1976, Iran commenced negotiations with Northrop to become the first customer of a YF-17 derivative land-based fighter. Northrop's land-based derivative was designated the F-18L; McDonnell's Navy design had become known by this time as the F-18A. Concerned that Northrop's sales of F-18L fighters to Iran might undermine its F-18A program, the Navy persuaded the parties to enter a new agreement on August 26, 1976.

The August 26, 1976 Agreement essentially reaffirms the Basic Agreement, but contains a more explicit provision [**11] regarding the type of fighter Northrop could develop and market. The August 26th Agreement provided that Northrop "has elected to design, develop and produce for sale to the United States and to foreign governments all aircraft designed only for land-based operations which are derived from the YF-17."⁵ Northrop's agreement to limit its F-18L production to land-based aircraft assured the Navy that Northrop's efforts would not interfere with McDonnell's completion of the carrier-suitable F-18A. The August Agreement also satisfied the Navy's demand that the parties agree upon a Foreign Military Sales Master Plan pursuant to Defense Department Directive 5105.38M.

B. Procedural Posture

Northrop initiated the present action on October 26, 1979. In its first amended complaint, Northrop alleged that McDonnell has waged a deliberate campaign to monopolize the market for YF-17 derivative [**12] aircraft by crippling Northrop as a viable competitor. Although Northrop attacked on a broad front, its numerous allegations [**1039] generally related to one of four main theories of wrongful conduct on the part of McDonnell.⁶ First, McDonnell allegedly delayed production of all F-18 derivatives, including Northrop's F-18L, in order to promote sales of its own land-based F-15 in the interim. Second, McDonnell allegedly attempted to restrict Northrop's F-18L to a specialized class of limited-use fighters known as "day fighters" so that McDonnell's F-15 and F-18A fighters would be more attractive to customers desiring multi-mission aircraft. Third, McDonnell allegedly breached its obligations under the Basic Agreement to exchange F-18 technology and to subcontract the specified share of work to Northrop on F-18A aircraft sold in foreign countries. Finally, McDonnell allegedly breached paragraph 3 of the Basic Agreement by representing to foreign customers, particularly Israel, that McDonnell could serve as prime contractor on any version of the F-18, including a land-based version. McDonnell subsequently filed its counterclaim.

[**13] II

Dismissal of Northrop's Claims

⁵ The August 26th Agreement expressly provided that McDonnell's rights under the Basic Agreement were left unchanged.

⁶ The relief sought by Northrop in the first amended complaint may be summarized as follows:

Count One -- injunctive relief to prevent McDonnell from misappropriating Northrop's property by breaching the Agreements.

Count Two -- injunctive relief to prevent McDonnell from misappropriating Northrop's property by exceeding the "license" of technology granted under the Agreements.

Count Three -- a declaration of the parties' rights under the Agreements.

Count Four -- damages for fraud by McDonnell in the inducement to enter the Agreements.

Count Five -- an accounting for profits earned by McDonnell as a result of its breaches of the Agreements.

Count Six -- injunctive relief and damages for McDonnell's alleged attempt to monopolize the domestic and foreign markets for F-18's in violation of section 2 of the Sherman Act.

Count Seven -- injunctive relief and damages for McDonnell's acts of unfair competition.

Count Eight -- recovery in quantum meruit for contributions to the joint business relationship for which Northrop has not been compensated.

The district court dismissed Northrop's complaint for (A) lack of subject matter jurisdiction; (B) failure to join an indispensable party -- the United States; and (C) failure to state a claim because of non-justiciable political and foreign policy questions. Northrop challenges each of these determinations on direct appeal (No. 81-5165).^{6a}

[14] A. Subject Matter Jurisdiction: Exclusivity of [22 U.S.C. § 2356](#)**

The district court held that the "Government's clear agency in [Foreign Military] sales [FMS] and its, at least putative, agency relationship in the licensing of commercial sales permissible only in the best interest of United States foreign policy can only be clarified in an action brought pursuant to [22 U.S.C. § 2356](#)."⁷ [498 F. Supp. at 1119](#). **[*1040]** It then dismissed the entire complaint for lack of jurisdiction,⁸ because [§ 2356](#) makes suit against the United States the exclusive remedy. Northrop argues that its claims do not involve McDonnell's disclosures but rather, *inter alia*, fraud, breach of contract, and attempt to monopolize, none of which are within the statute. McDonnell characterizes misuse and misappropriation as the *sine qua non* of all of Northrop's claims, states that those are within the statute, and argues that it was the Government's agent in using the information.

[15] [Section 2356](#),** on its face, does not encompass Northrop's claims for fraud, breach of contract, attempt to monopolize, or anything else not pertaining to disclosure of proprietary information.⁹ Moreover, even if, *arguendo*, misuse and misappropriation were the *sine qua non* of such claims, McDonnell's alleged misuse and misappropriations are not covered by the statute because, as discussed below, it is not an agent of the Government.¹⁰

Because at least some **[**16]** of Northrop's claims can arguably be construed as challenging McDonnell's disclosure of proprietary data, it is appropriate to consider whether McDonnell is the Government's "agent" within

^{6a}We discern no merit in McDonnell's contention that Northrop has abandoned the claims in counts 4-8 of its complaint by not explicitly challenging the district court's rulings that Northrop could not show injury in fact and failed to allege an unlawful combination. The two rulings are found in the order drafted for the court by McDonnell, but are not mentioned in the court's findings or opinion. Our review of the findings and opinion demonstrate that, notwithstanding the inconsistent language in its order, the court considered itself precluded from examining the injury issue by the political question and act of state doctrines. The application of those doctrines has been challenged on appeal. Northrop's discussion in its Opening Brief of the evidence of an unlawful combination suffices to preserve the claim.

The conduct and relief at issue in counts 4-8 overlap and are inextricably intertwined with that in counts 1-3. We decline to seize upon the variance between the district court's order and its findings and opinion to effect an abandonment of claims, particularly given that the evidence relevant to the allegedly abandoned claims is so similar to that underlying the other claims that must be tried on remand in any event.

⁷ [22 U.S.C. § 2356 \(1976\)](#) **HN1** [↑] waives sovereign immunity for claims within its scope, and provides that:

(a) Whether, in connection with the furnishing of assistance under this chapter --

(1) * * *

(2) information, which is (A) protected by law, . . . , is disclosed by the United States Government or any of its officers, employees, or agents in violation of such restriction, the exclusive remedy of the owner . . . is to sue the United States Government for reasonable and entire compensation for such practice or disclosure in . . . district court . . . or in the Court of Claims. . . .

⁸ The court denied McDonnell's motion to dismiss with respect to [10 U.S.C. § 2273 \(1976\)](#) and [28 U.S.C. §§ 1346\(a\)\(2\)](#) and [1491 \(1980\)](#). [498 F. Supp. at 1119-20](#). McDonnell has not cross-appealed that denial.

⁹ **HN2** [↑] In reviewing a dismissal for lack of subject matter jurisdiction, we review the pleadings and evidence in the light most favorable to plaintiff. See [Western Waste Service Systems v. Universal Waste Control](#), [616 F.2d 1094, 1095](#) (9th Cir.), cert. denied, [449 U.S. 869, 101 S. Ct. 205, 66 L. Ed. 2d 88 \(1980\)](#).

¹⁰ To a certain extent, our discussion of why the Government is not a necessary party under [Rule 19](#) applies here. Northrop is not claiming that the Government has misused proprietary information or that it has directed McDonnell to do so.

the meaning of [§ 2356](#) in disclosing information to potential foreign buyers. In addressing this question it is important to note that there are principally two types of foreign sales -- FMS sales and commercial sales. Commercial sales are distinguishable from FMS sales in that:

Commercial sales are made directly between a private contractor and a foreign country; the sale does not go through the government-to-government channels which foreign military sales go through. Consequently, the FMS rules do not apply to commercial sales. Although not a party to the sale, the government plays a substantial role inasmuch as a contractor must obtain an export license before it can conclude a commercial sale.

Scherzer, Janik and Green, Foreign Military Sales: A Guide to the United States Bureaucracy, 13 Geo.Wash.J. of Int'l. & Econ. 545, 555 (1979).

Neither the district court nor the parties have offered any explicit guidance regarding the extent to which the disclosure claims, if any, pertain to [\[**17\]](#) FMS rather than commercial sales. We leave that question for resolution on remand. To the extent that any disclosure claims involve FMS sales, [§ 2356](#) is the exclusive remedy. Northrup does not challenge that position. To the extent, however, that any disclosure claims involve commercial sales, [§ 2356](#) is inapplicable.¹¹

[\[**18\] \[*1041\]](#) The Foreign Assistance Act defines "officer or employee", terms carried over from the Mutual Security Act of 1954, as "civilian personnel and members of the Armed Forces of the United States Government." Id., § 644 at 515. The legislative history of the Act states that the section is a "rewrite and simplification, without substantial change" of the previous version. S.Rep. No. 612, 87th Cong., 1st Sess. (1961), reprinted in [1961] U.S.Code Cong. & Ad.News 2472, 2501. It therefore does not appear that the addition of the term "agent" in 1961 broadened the scope of [§ 2356](#).

Neither the language nor the legislative history of [§ 2356](#) suggests that the section encompasses disclosure by Government contractors. Indeed, we are unable to find a single case in which a private contractor has been found to be an agent of the Government under [§ 2356](#). Even [HN3](#) under general agency principles, procurement contractors are ordinarily independent contractors unless the contract expressly makes them the Government's agents. See generally [United States v. Township of Muskegon](#), 355 U.S. 484, 486, 78 S. Ct. 483, 485, 2 L. Ed. 2d 436 (1958); [Deltec Corp. v. United States](#), 164 Ct. Cl. [\[**19\]](#) 432, 326 F.2d 1004, 1005 n. 1 & 1006-07 (Ct.Cl.1964).

¹¹ [Section 2356](#) was originally promulgated as § 517 of the Mutual Security Act of 1951, Pub.L. No. 165, 65 Stat. 373, 382. That section referred to the "disclosure of information by reason of acts of the United States or its officers or employees." Reprinted in [1951] U.S.Code Cong. & Ad.Serv. 517, 526. The available legislature history refers only to disclosure by the Government. See S.Rep. No. 703, 82d Cong., 1st Sess. (1951), reprinted in id. 2250 at 2298. The provision was carried over as § 506 of the Mutual Security Act of 1954, Pub.L. No. 665, 68 Stat. 832, 852. That section also referred only to Government disclosure. Cf. [Kaplan v. United States](#), 153 F. Supp. 787, 790, 139 Ct. Cl. 682, 114 U.S.P.Q. (BNA) 248 (1957) (dismissing a claim under the section because the product manufactured for the Government was not used "in connection with the furnishing of any assistance in furtherance of the purpose of this Act"; noting that the Government assumes liability under the section for certain disclosures by "United States Government officials").

The section was reenacted in its present form as Section 606 of the Foreign Assistance Act of 1961, Pub.L. No. 87-195, 75 Stat. 424, 440. The Foreign Assistance Act authorized the President to "furnish military assistance . . . to any friendly country . . . by - (a) acquiring from any source and providing . . . any defense article or defense service. . . ." Id. § 503; reprinted in [1961] U.S.Code Cong. & Ad.News 470, 482-83. Specifically, it permitted the President to "furnish defense articles from the stocks of the Department of Defense" or enter into procurement contracts. Id., § 507 at 484. It did not mention export licenses for commercial sales. Therefore, "the furnishing of assistance under this Act" in section 606 (now [§ 2356](#)) does not expressly include commercial sales such as McDonnell's.

McDonnell argues that [§ 2356](#) embodies the same policy as [28 U.S.C. § 1498 \(1976 & Supp. 1980\)](#):¹² "to insulate contractors from lawsuits disruptive of the procurement process." H.R. Rep. No. 872, 82d Cong., 1st Sess. 1420 (1951). It also relies on [Hughes Aircraft Co. v. United States, 209 Ct. Cl. 446, 534 F.2d 889, 192 U.S.P.Q. \(BNA\) 296](#), (Ct.Cl.1976), in arguing that [§ 2356](#) extended [§ 1498](#) to foreign sales. The language of the two section, however, is very different.¹³ Moreover, both the legislative history that McDonnell quotes and the Hughes court were discussing the language "by or for the United States" of [§ 1498](#). They did not address the disclosing parties encompassed within [§ 2356](#).

[**20] McDonnell argues that it is an agent of the Government because of [HN5](#)¹⁴ the International Traffic in Arms Regulations ("ITARS"), 22 C.F.R. §§ 121.01 et seq. (subchapter M) (1981). These regulations provide that a State Department license is required for export of equipment on the United States Munitions List; the license may be denied in furtherance of world peace, national security, or foreign policy; and that State Department approval is required before opening marketing talks with a prospective foreign buyer. 22 C.F.R. § 123.01, 123.05(a), and [123.16\(a\) \(1981\)](#). The regulations require that a proposed agreement regarding a license to manufacture abroad or the furnishing of technical assistance (the disclosure of technical data) relating to Munitions List items must be approved by the State Department; the agreement may be disapproved for the same reasons as above; and the sales pitch must be approved. 22 C.F.R. §§ 124.01, 124.05(a), and [124.12\(a\) \(1981\)](#).

When the Government permits disclosures abroad, it does not concern itself with the commercial ramifications of the arrangement. The regulations make this [*1042] explicit with respect to proposed manufacturing license [**21] and technical assistance agreements. For instance, [HN6](#)¹⁵ the regulations on proposed manufacturing license and technical assistance agreements require each agreement to state that:

No liability shall be incurred by or attributed to the U.S. Government in connection with any possible infringement of privately owned patent or proprietary rights . . . by reason of the U.S. Government's approval of this agreement.

[22 C.F.R. § 124.10\(h\) \(1981\)](#). They also require the cover letter to state that State Department approval will not be construed "as constituting either approval or disapproval of any of the business terms or conditions between the parties to the agreement." [22 C.F.R. § 124.11\(d\) \(1981\)](#). Finally, the regulations apply the same standards to the export of technical data. 22 C.F.R. §§ 125.03 n. 2, 125.03-05 (1981). See generally Sherzer, Janik and Green, *supra*, 13 Geo.Wash.J. of Int'l L. & Econ., at 581-90. Therefore, McDonnell's contention that the ITARS confer agency status on it also fails.¹⁴ Accordingly, McDonnell is not the Government's agent in making commercial sales for purposes of [§ 2356](#) so as to justify dismissal of Northrop's complaint on the ground that its [**22] exclusive remedy is against the Government.

B. Joinder of the Government

¹² [HN4](#)¹⁶ Suit against the Government under [§ 1498](#) is the exclusive remedy for unlawful use of a patented invention by the Government.

¹³ For instance, in contrast to the "officers, employees, or agents" language of [§ 2356](#), [§ 1498](#) provides that:

For the purposes of this section, the use or manufacture of an invention described in an covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

[28 U.S.C. § 1498\(a\) \(1976\)](#) (emphasis added).

¹⁴ 32 C.F.R. § 7.104.9(7) (1981) provides that the Government may "have or permit others" to disclose information in which it has unlimited rights. "Permitting" McDonnell to disclose information by granting it an export license, however, does not make it an agent of the Government under [§ 2356](#).

1. **HN7** Joinder under [Fed.R.Civ.P. 19](#) entails a practical two-step inquiry.^{14a} First, a court must determine whether an absent party should be joined as a "necessary party" under subsection (a). Second, if the court concludes that the nonparty is necessary and cannot be joined for practical or jurisdictional reasons, it must then determine under subsection (b) whether in "equity and good conscience" the action should be dismissed because the nonparty is "indispensable." See generally [Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 108-25, 88 S. Ct. 733, 737-46, 19 L. Ed. 2d 936 \(1968\)](#); [Eldredge v. Carpenters](#) 46, 662 **[**23]** F.2d at 537.

[24]** The district court concluded that the Government was "both necessary and indispensable," [498 F. Supp. at 1119](#), because: Northrop's claims "called into question" the Government's unfettered right to "designate the who, what, when and where of weapons system production," [498 F. Supp. at 1117](#); injunctive relief would "necessarily limit the United States Government in its F-18 procurement activities," [id. at 1118](#); **[*1043]** and relief would impinge on the Government's conduct of foreign relations by limiting the source of land-based F-18's for foreign buyers.¹⁵ The court apparently concluded that the Government could not be joined because Congress has not authorized such suits against the Government.¹⁶ [Id.](#) **HN8** Our standard of review of the district court's decision is abuse of discretion. [Bakia v. County of Los Angeles, 687 F.2d 299 \(9th Cir. 1982\)](#) (per curiam), and [Walsh v. Centeio, 692 F.2d 1239 \(9th Cir. 1982\)](#). We hold that the court abused its discretion in holding that the government is a necessary party. Because, as discussed below, we conclude that the Government is not a necessary party to this action, we need not determine whether joinder is feasible, and, if not, whether **[**25]** the Government's presence would be indispensable.

^{14a} Due to the rigid, formalistic approach taken by some early courts, [Rule 19](#) was revised in 1966 to emphasize that the appropriate focus is on the practical ramifications of joinder versus nonjoinder. [Eldredge v. Carpenters](#) 46, 662 F.2d 534, 537 (9th Cir. 1981), cert. denied, [459 U.S. 917, 103 S. Ct. 231, 74 L. Ed. 2d 183 \(1982\)](#). The Rule now provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .

(b) Determination by court Whenever Joinder not Feasible.

If a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the Court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

¹⁵ Review of the district court's decision is complicated by its failure to articulate clearly the considerations underlying its conclusions as to each step in the [Rule 19](#) inquiry. For example, after reciting the factors in subsection (b)'s test for an indispensable party, the court observed that Northrop "disclaims the necessity of joinder," a consideration pertinent to subsection (a). [Id. at 1117-18.](#)

The confusion that frequently accompanies joinder rulings is attributable in part to the degree to which the factors cited in [Rule 19](#)'s two subsections overlap each other. Impairment of the absent party's ability to protect its interest (19(a)(2)(i)) is similar to the prejudice to the absent party consideration under subsection (b); risk of leaving a defendant exposed to inconsistent obligations (19(a)(2)(ii)) is similar to the prejudice to the defendant factor under (b); and whether complete relief can be accorded (19(a)(1)) is similar to the adequacy of relief inquiry under (b).

¹⁶ Although the district court's opinion does not discuss the feasibility of joining the Government, one of its conclusions of law provides that "no act of Congress would permit Northrop to bring this particular action against the United States" (emphasis added). Because the Government is not a necessarily party, we need not address Northrop's contention that the court should have joined the Government in a claim under [22 U.S.C. § 2356\(a\)\(2\)](#) (waiving sovereign immunity for disclosure of protected information) (see Section IIA, *infra*) rather than find it indispensable.

[**26] Subsection (a) of [Rule 19 HN9](#)[↑] defines two categories of parties that should be joined if feasible. If the Government fit within either category it would be a necessary party. [Eldredge, 662 F.2d at 537](#); [A.J. Kellogg Construction Co. v. Balboa Insurance Co., 495 F. Supp. 408, 414 \(S.D.Ga.1980\)](#), rev'd on other grounds, [661 F.2d 402 \(5th Cir. 1981\)](#). We conclude that it does not.

To fit within the first category, it must appear that "complete relief" cannot be accorded between Northrop and McDonnell absent the Government's joinder. [Rule 19\(a\)\(1\)](#). See generally 3A J. Moore & J. Lucas, *Moore's Federal Practice*, para. 19.07-1[1], at 19-128 (2d ed.1982). This factor is concerned with consummate rather than partial or hollow relief as to those already parties, and with precluding multiple lawsuits on the same cause of action. [Advisory Committee's Note, 39 F.R.D. 89, 91 \(1966\)](#). McDonnell does not directly contend that the Government's absence would preclude the district court from being able to fashion meaningful relief as between the parties, and we discern no reason for so concluding.

McDonnell's necessary party argument is founded upon two contentions: (1) the Government would allegedly [**27] lose a valuable source of supply if Northrop were granted any of the requests; and (2) any decree entered in Northrop's favor would allegedly expose McDonnell to conflicting obligations. McDonnell's two contentions track the alternative subparts (i) and (ii) of [Rule 19\(a\)\(2\)](#), concerning prejudice to the absent party or to those already parties. Subparts (i) and (ii) are contingent, however, upon an initial requirement that the absent party claim a legally protected interest relating to the subject matter of the action. Cf. [Central Council of Tlingit & Haida Indians v. Chugach Native Association, 502 F.2d 1323, 1326 \(9th Cir. 1974\)](#), cert. denied, [421 U.S. 948, 95 S. Ct. 1680, 44 L. Ed. 2d 102 \(1975\)](#) (Secretary of the Interior not a necessary party to a boundary dispute between Native American groups because he claimed no protectable interest).

The Government is not a party to any of the teaming agreements, and has never asserted a formal interest in either the [*1044] subject matter of this action or the action itself. On the contrary, the record reflects that the Government has meticulously observed a neutral and disinterested posture, and regards this as a private dispute. [**28] The Navy has declared its intent to respect the teaming relationship, and has consistently advised the parties to resolve their disagreements in accordance with law and their private agreements. McDonnell offers no cogent reason why we should second-guess the Government's assessment of its own interests.

[HN10](#)[↑] A nonparty to a commercial contract ordinarily is not a necessary part to an adjudication of rights under the contract. See, e.g., [Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc., 564 F.2d 816, 820 \(8th Cir. 1977\)](#); [Trans Pacific Corp. v. South Seas Enterprises, Ltc., 291 F.2d 435, 436-37 \(9th Cir. 1961\)](#); 7 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1613, at 135 (1972). This rule is not inapplicable merely because the absent party happens to be the Government. See, e.g., [Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102, 1108 \(4th Cir. 1980\)](#); [Fidelity & Casualty Co. v. Reserve Insurance Co., 596 F.2d 914, 918 \(9th Cir. 1979\)](#); [R.C. Hedreen Co. v. Crow Tribal Housing Authority, 521 F. Supp. 599, 608 \(D.Mont. 1981\)](#). The correlative rule that [HN11](#)[↑] all parties who may be affected by a suit to set aside a contract must be present, [**29] see [Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 \(9th Cir. 1975\)](#), cert. denied, [425 U.S. 903, 96 S. Ct. 1492, 47 L. Ed. 2d 752 \(1976\)](#), is inapplicable here because Northrop is not seeking to set aside or enjoin performance under any contract between McDonnell and the Government.

McDonnell correctly points out that this case differs from the usual commercial dispute in that the absent party, the Government, is involved with the agreements at issue, even though it is not a party to them. The Government prompted the parties to enter the teaming agreements and, due to its extensive involvement in the military procurement arena, exerts a tremendous influence on them. Although we have previously adjudicated disputes between federal defense contractors where the Government was not a party, see [Experimental Engineering, Inc. v. United Technologies Corp., 614 F.2d 1244 \(9th Cir. 1980\)](#); [American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 \(9th Cir. 1961\)](#), we have found no decision directly addressing the necessity of joining the

Government when such disputes are litigated.¹⁷ We are therefore reluctant to rely too heavily on the rules applicable to ordinary commercial [**30] contracts and will take a closer look at the nature of the Government's interest in this dispute.

McDonnell's contention that the Government's interest will be prejudiced -- the controlling inquiry under [Rule 19\(a\)\(2\)\(i\)](#) -- springs from the erroneous premise that Northrop is challenging the Government's rights in the data and technology surrounding the F-18 development effort and right to control weapons system production. First, neither Northrop's allegations regarding McDonnell's use of YF-17 derivative technology nor its requested relief would in any way challenge the Government's "unlimited rights"¹⁸ to use and dispense that data. The Government's rights in that data, although [**31] unlimited, were neither sole nor exclusive and did not divest Northrop of the residual right to continue to use the technology itself and to share it with other private parties. See [*Regents of University of Colorado v. K.D.I. Precision Products, Inc., 488 F.2d 261, 264 \(10th Cir. 1973\)*](#) (interpreting language [*1045] identical to that in 32 C.F.R. § 7-104.9(a) [see note 14, *supra*]).

Second, Northrop seeks no relief from the Government and no relief against McDonnell that would preclude McDonnell from complying with any Governmental directive or from producing a particular aircraft. As Northrop represented below:

If the Government . . . goes to McDonnell and says "we have unlimited rights in this data and taking those unlimited rights and [**32] giving them to you we want you to do this," the Government [is] free to do that. They can go to Grumman, they can go to LTV, they can go to Lockheed. They have unlimited rights. That is not anything we are contesting here.

It is undisputed that McDonnell may use the YF-17 derivative data in responding to a Government procurement request. Unlike other contractors, however, McDonnell would be liable to Northrop if, in electing to respond, it violated its antecedent promises to Northrop.

Focusing on [Rule 19\(a\)\(2\)\(ii\)](#), McDonnell argues that Northrop's construction of the agreements would deter McDonnell from responding to such a Government request by saddling it with inconsistent obligations, and, in so doing, would interfere with the Government's procurement prerogatives. To reach this conclusion, however, it would be necessary to make several assumptions that are unwarranted on this limited record and at this preliminary stage of the proceedings. We would have to hypothesize both that the Government will ask McDonnell to develop land-based F-18's and that, when presented with the opportunity to participate as prime contractor in such a procurement request, McDonnell would [**33] forego that opportunity because of its prior contractual agreements with Northrop. To conclude that such a hypothetical election by McDonnell would impair the Government's unlimited right to use F-18 technology, we would have to assume further that the Government has an enforceable expectation that a defense contractor like McDonnell will fill a procurement request.¹⁹ [**34] The Record is replete with evidence to the contrary. There are any number of commercial considerations, including existing contractual obligations, that routinely prompt defense contractors to decline to participate in a particular Government procurement offering. As Northrop cogently argues in its brief, a contractor's commercially based decision to forego

¹⁷ The most useful decision appears to be [*Coastal Modular Corp. v. Laminators, Inc., 635 F.2d at 1108*](#), where the Fourth Circuit held that the Navy was not a necessary party to a contract action between airport contractors merely because the defendant "theorize[d] the possibility that the Navy would institute suit against it."

¹⁸ "Unlimited Rights" are defined in 32 C.F.R. § 7-104.9(a)(7) (1981) as the "rights to use, duplicate or disclose technical data or computer software in whole or in part in any manner and for any purpose whatsoever, and to have or permit others to do so."

¹⁹ McDonnell cannot avoid this fallacy in its argument by suggesting that the Government might ask it to modify the carrier-suitable features of the F-18A under the "changes clause" of its prime contract with the Navy. First, no such change order has been issued. [HN12](#)[] Second, the mere existence of the changes clause found in most Government military contracts does not permit a contractor to breach its preexisting contractual obligations to other private parties. See [*Westinghouse Electric Corp. v. Garrett Corp., 437 F. Supp. 1301, 1338 n.53 \(D.Md. 1977\)*](#), aff'd, [*601 F.2d 155 \(4th Cir. 1979\)*](#).

a military contract does not impair the Government's unlimited rights in the desired product's technology or right to control military procurement activity.²⁰

[35] [*1046]** We conclude that the Government's hypothetical interest in having McDonnell serve as prime contractor for land-based F-18's does not mandate joinder under [Rule 19\(a\)](#).²¹ **HN13**[] Speculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under [Rule 19](#). See [Coastal Modular Corp., 635 F.2d at 1108](#); [Arthur v. Starrett City Associates, 89 F.R.D. 542, 547 \(E.D.N.Y. 1981\)](#); [Sierra Club v. Leslie Salt Co., 354 F. Supp. 1099, 1105 \(N.D.Cal. 1972\)](#). **HN14**[] The Government is not a necessary party to what is essentially a contract and antitrust action between private parties solely because the dispute arises in the regulated military aircraft industry. Cf. [Grumman Corp. v. LTV Corp., 665 F.2d 10 \(2d Cir. 1981\)](#) (resolving an antitrust and securities law dispute between private manufacturers of military aircraft with no suggestion that the Government's joinder was necessary). Absent a more particularized and compelling governmental interest, private disputes arising within this important commercial sector should be governed by traditional [Rule 19](#) principles. Finally, if Northrop eventually **[**36]** succeeds on any or all of its claims, a matter on which we express no opinion, we believe that adequate relief could be shaped that would neither impair a significant Government interest nor subject McDonnell to any greater inconsistent obligation than it freely assumed.

C. Failure to State a Claim

The district court held that the complaint failed to state a claim because the political question and act of state doctrines precluded judicial inquiry into the subject matter of this dispute. The act of state doctrine is essentially the foreign counterpart to the political question doctrine. Both doctrines require courts to defer to the executive or legislative branches of government when those branches are better equipped to handle a politically sensitive issue. [International \[*37\] Association of Machinists v. OPEC, 649 F.2d 1354, 1358 \(9th Cir. 1981\)](#), cert. denied, [454 U.S. 1163, 102 S. Ct. 1036, 71 L. Ed. 2d 319 \(1982\)](#). Neither doctrine is susceptible to inflexible definition, and both must be applied on a case-by-case basis by balancing a variety of factors. [Id. at 1358-59](#). With that in mind, we turn to the case at hand.²²

1. Political Question: The district court construed the complaint as asking the court to decide "WHO will be the exclusive builder (prime contractor) for the carrier-suitable or land-based versions of the F-18 weapons system" and to be, in effect, "the super-procurer and sales licensor of a military weapons system." [498 F. Supp. at 1120](#). It held that the case therefore presented a nonjusticiable political question under [Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 \(1962\)](#). [Id.](#)

²⁰ Northrop points out that:

The impact on the government that would result from an award of declaratory or monetary relief to Northrop in this case is no different from that which would occur if [McDonnell], when presented with the opportunity for a federal contract, determined that it had insufficient capacity to perform any resulting contract unless it diverted facilities and personnel currently dedicated to the production of DC-9's and DC-10's for its commercial airline customers. In such an event, [McDonnell] would be required to balance the value of the added federal business against the liabilities it would incur by abandoning its prior contractual commitments to the airlines. And if [McDonnell] elected to pursue the later-presented federal opportunity, the airlines would be entitled to seek declaratory and/or monetary relief under their contract with [McDonnell]. Clearly, the United States would not be indispensable to such litigation. To so hold would -- contrary to all precedent -- pervert [Rule 19](#) by transforming it into a haven for sellers like [McDonnell] who, when they find it expedient or profitable, elect to disavow prior commitments by subsequently entering into contracts that are inconsistent with their previous contractual promises.

²¹ Any interest the Government may have in McDonnell's production efficiencies and sunk costs, if cognizable, is at most a disputed question of fact that was not addressed below and therefore does not justify dismissal at this juncture.

²² **HN15**[] In reviewing a dismissal for failure to state a claim, we construe that material allegations in the complaint as being true. [Benson v. Arizona State Board of Dental Examiners, 673 F.2d 272, 275 n.7 \(9th Cir. 1982\)](#).

Baker contains [HN16](#)²³ several considerations that help identify a political question: (1) a textually demonstrable constitutional [[**38](#)] commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding without an initial policy determination reserved for nonjudicial discretion; (4) the impossibility of deciding without expressing lack of respect for the coordinate branches of government; (5) unusual need for adherence to a political decision already made; and (6) the potentiality for embarrassment from multifarious pronouncements by various departments. 369 U.S. 217, 82 S. Ct. at 710. See also *Goldwater v. Carter*, 444 U.S. 996, 998, 100 S. Ct. 533, 534, 62 L. Ed. 2d 428 (1979) (Powell, J., concurring) (summarizing indicia of a political question). The district court did not identify which of the Baker factors suggests that Northrop's entire [[*1047](#)] action presents a political question. McDonnell invokes the last three Baker factors because the Government approved McDonnell's sale of F-18's to Canada, has authorized it to export F-18 technology to several other countries, and has allegedly asked it to make a presentation about the F-18 to the Air Force and a Defense Department committee.²³

[[**39](#)] We discern no support for characterizing Northrop's claims as political questions regardless of which factors are considered. Northrop does not challenge the wisdom or legality of any governmental act or decision. Instead, it seeks to restrain and recover damages from McDonnell for the latter's allegedly improper tactics in marketing F-18's. The challenged activity by McDonnell was neither authorized nor directed by any branch of Government. [HN17](#)²⁴ The mere fact that the challenged conduct occurred in a regulated industry does not alone alter its private commercial character. The issues presented for trial are not political questions -- they are legal issues, involving private commercial activity which the judiciary is uniquely equipped to resolve. Northrop's claims do not seek the kind of direct interjection of the judiciary into the Government's procurement activity that would transform this private suit into a political question. See [Gilligan v. Morgan](#), 413 U.S. 1, 93 S. Ct. 2440, 37 L. Ed. 2d 407 (1973) (court supervision of National Guard training constituted a political question); [Sarnoff v. Connally](#), 457 F.2d 809, 809-10 (9th Cir.), cert. denied, 409 U.S. 929, 93 S. Ct. 227, [[**40](#)] 34 L. Ed. 2d 186 (1972) (action challenging war-power provisions of the Foreign Assistance Act presented a political question); [Rappenecker v. United States](#), 509 F. Supp. 1024, 1028-30 (N.D.Cal. 1980) (claim that President was negligent in responding to seizure of American cargo vessel by Cambodian gunboats dismissed as political question).²⁴

2. Act of State: [HN18](#)²⁵ Pursuant to the act of state doctrine, this nation's courts will not "sit in judgment on the acts of" another country. [Underhill](#) [[**41](#)] *v. Hernandez*, 168 U.S. 250, 252, 18 S. Ct. 83, 84, 42 L. Ed. 456 (1897). Even in private suits, American courts will not resolve issues requiring "inquiries . . . into the authenticity and motivation of the acts of foreign sovereigns." [Occidental Petroleum Corp. v. Buttes Gas & Oil Co.](#), 331 F. Supp. 92, 110 (C.D.Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950, 93 S. Ct. 272, 34 L. Ed. 2d 221 (1972). The doctrine has no explicit fountainhead in our Constitution or statutes, and derives principally from the judiciary's desire not to interfere with the conduct of foreign policy by the political branches of government. [International Association of Machinists v. OPEC](#), 649 F.2d at 1359; [Timberlane Lumber Co. v. Bank of America, N.T. & S.A.](#), 549 F.2d 597, 605 (9th Cir. 1976). In [HN19](#)²⁶ determining whether the doctrine compels dismissal, courts must carefully "balance [the] relevant considerations." [Timberlane](#), 549 F.2d at 606, 607 (quoting [Banco Nacional de Cuba v. Sabbatino](#), 376 U.S. 398, 428, 84 S. Ct. 923, 940, 11 L. Ed. 2d 804 (1964)). The justification for forbearance depends greatly on the importance of the issue's implications for our foreign policy. Id.

McDonnell [[**42](#)] argued below that Northrop's claims would require the district court to review the procurement actions of foreign sovereigns in order to decide whether McDonnell's alleged conduct was causally connected to Northrop's lost foreign F-18 sales. The court stated that "if" McDonnell was correct in its assertion, the doctrine

²³ Although the record offers little evidence of a Government request for such a presentation, and Northrop vigorously disputes it, we assume it to be true for purposes of this issue.

²⁴ McDonnell's reliance on [Haig v. Agee](#), 453 U.S. 280, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981) and [Rostker v. Goldberg](#), 453 U.S. 57, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981) is misplaced. In contrast to Northrop, the plaintiffs in Agee and Rostker directly challenged the propriety of decisions made by the President and Congress. Agee challenged the validity of the President's revocation of his passport. Rostker involved an equal protection challenge to the validity of the males only provision of the Military Selective Service Act.

mandated dismissal. [498 F. Supp. at 1121.](#) [*1048] The court failed, however, to determine whether McDonnell was in fact correct and never identified a foreign act of state that would require review to adjudicate Northrop's claims.

Northrop concedes that [HN20](#) military procurement decisions by foreign sovereigns are acts of state. The issue here, however, is whether resolution of Northrop's claims would necessitate direct judicial inquiry into such decisions. We conclude that it would not.

Northrop's damage allegations pertain to McDonnell's private commercial conduct and are not inextricably bound up in any foreign act of state.²⁵ The claims relating to the increased costs associated with duplicating technology that McDonnell was allegedly contractually obligated to furnish Northrop will not require the court to inquire into any foreign procurement decisions because [***43] Northrop can establish the fact of damage without reference to lost sales by proof of increased costs. Northrop has alleged injury of a type and amount sufficient to avoid dismissal. See [Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659-60, 81 S. Ct. 365, 367-68, 5 L. Ed. 2d 358 \(1961\)](#) (per curiam). Whether Northrop can eventually establish the amount of damages without implicating foreign procurement decisions, and whether that implication is permissible, are disputed questions which we need not address at this stage of the proceedings. See [Williams v. Curtiss-Wright Corp., 694 F.2d 300, 304 \(3d Cir. 1982\); Industrial Investment Development Corp. v. Mitsui & Co., 594 F.2d 48, 55](#) (5th Cir.), reh. denied, 599 F.2d 449 (1979), cert. denied, 445 U.S. 903, 100 S. Ct. 1078, 63 L. Ed. 2d 318 (1980). The same conclusion applies to Northrop's contract and tort claims for monetary relief.

[**44] We decline to construe the act of state doctrine to shield all violators of private agreements that involve some foreign governmental act. As noted by the Fifth Circuit in reaching this same conclusion:

Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action. [Plaintiff] must only question that government's motivation to the extent of measuring its damage. No ethical standard is set by which the propriety of its decision is tested. Surely the limited nature and effect of determining the proportional cause of plaintiffs' damage allocable to defendants' conduct does not trigger the type of special political considerations protected by the act of state doctrine.

Id.

McDonnell's contention that Northrop's claims for injunctive relief are barred is also unpersuasive. Even if Northrop's harm from future misconduct would be measured solely by lost sales, there is no reason to extend the act of state doctrine to future decisions by foreign governments. The court need only find a likelihood that McDonnell's [***45] actions will cost Northrop some amount of future sales. That finding would not create the foreign policy tensions that the act of state doctrine was designed to avoid.

A comparison of this case with OPEC and Timberlane, this court's most comprehensive forays into act of state analysis, confirms that the doctrine is inapplicable here. The doctrine compelled dismissal in OPEC because the plaintiff directly sued a cartel of sovereign nations, charging them with violating this country's antitrust laws, and sought to enjoin and recover damages from the nations. [649 F.2d at 1361](#). In Timberlane, we refused to invoke the doctrine even though the activity complained of (conspiracy to monopolize Honduran lumber export business) primarily involved foreign [*1049] citizens, took place in a foreign nation, and had the greatest impact on the foreign nation. We reasoned that the plaintiff did not seek to name any foreign nation or officer as a defendant and did not directly challenge the foreign nation's conduct in a way that would threaten relations with the country. [549 F.2d at 608](#). We emphasized that "there is no indication that the actions of the Honduran [government]

²⁵ Although "seemingly commercial activity" can trigger act of state concerns, see [OPEC, 649 F.2d at 1360](#) (alleged oil price-fixing by cartel of foreign nations), purely commercial activity ordinarily does not require judicial forbearance under the act of state doctrine. [Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 698, 96 S. Ct. 1854, 1863, 48 L. Ed. 2d 301 \(1976\)](#).

reflected [**46] a sovereign decision that [plaintiff's commercial] efforts should be crippled or that trade with the United States should be restrained." Id.

Timberlane is clearly the more analogous decision. In contrast to the OPEC plaintiff, Northrop does not seek monetary or injunctive relief against any sovereign and does not ask the court to pass judgment on any foreign sovereign's act or policy. As noted in Timberlane, the act of state doctrine "does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government".²⁶ [549 F.2d at 606](#).

III

Workshare Claims

Northrop requested that McDonnell be [**47] enjoined from subcontracting to anyone else the share of work Northrop was entitled to under the teaming agreements and Navy subcontract. Neither the district court's opinion nor its Finding of Fact and Conclusions of Law address Northrop's workshare claims. The court's order stated that those claims "are moot and not ripe for determination in light of [McDonnell's] stipulation of November 28, 1979." That stipulation apparently involved the parties' respective share of the work generated by Canadian sales.

Northrop argues that the court erred in finding that the stipulation mooted its Canadian workshare claims and that, in any event, the workshare claims are not limited to Canada. McDonnell does not argue the mootness issue. It contends that the workshare claims were properly dismissed for absence of an indispensable party, lack of subject matter jurisdiction, and nonjusticiability, "regardless of whether [they] were moot."

Our disposition of the dismissal rulings relied on by McDonnell makes it necessary to address the mootness issue. On remand, the district court should make specific findings and conclusions regarding the scope of the stipulation and the extent to which [**48] Northrop's workshare claims are mooted by it. If, as Northrop contends, the stipulation was purely pendente lite or was limited to Canadian sales, wholesale dismissal for mootness was clearly inappropriate.

IV

Summary Judgment

The district court granted McDonnell summary judgment on the grounds that: (1) the contract-responsibility clause of the Basic Agreement, as amplified in the August 26, 1976 Agreement, was per se unreasonable under [section 1](#) of the Sherman Act; and (2) Northrop had failed to establish a prima facie case of attempt to monopolize under section 2 of the Sherman Act. We conclude that summary judgment was inappropriate on either ground.

Before turning to the specifics of the two issues, we note by way of overview that the summary judgment rulings reflect two basic inconsistencies. The first inconsistency pertains to the jurisdictional requirement of interstate commerce. The court held that no "trade or commerce" existed for section 2 purposes because the Government exercised absolute control over the relevant markets, yet, concomitantly, ruled that sufficient interstate commerce would be restrained by Northrop's interpretation of the contract-responsibility [**49] clause to justify [*1050] holding the practice per se unreasonable under [section 1](#). The second inconsistency stems from the court holding that there was nothing so unique about this practice or industry to warrant rule-of-reason analysis under [section 1](#), but that this case is so unlike those cases where section 2 sanctions have traditionally been applied that the section was inapplicable here.

A. Applicable Standard

²⁶ In a similar vein, the court noted that "mere governmental approval or foreign governmental involvement which the defendants had arranged does not provide a defense". Id. Accord, [Continental Ore Co. v. Union Carbide & Carbon Corp.](#), 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962); [United States v. Sisal Sales Corp.](#), 274 U.S. 268, 47 S. Ct. 592, 71 L. Ed. 1042 (1927).

HN21[] Summary judgment is appropriate under [Fed.R.Civ.P. 56\(c\)](#) only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [Bank of California, N.A. v. W.H. Opie, 663 F.2d 977, 979 \(9th Cir. 1981\)](#); [Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 438-39 \(9th Cir. 1979\)](#). This court has noted that "the showing of a genuine issue for trial is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law." [Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376, 1381 \(9th Cir. 1981\)](#), cert. denied, 454 U.S. 831, 102 S. Ct. **[**50]** 128, 70 L. Ed. 2d 109 (1982). In reviewing the record to make this determination, the court must draw all inferences in the light most favorable to Northrop, the party opposing the motion. [Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 624 \(9th Cir. 1977\)](#). **HN22**[] Although summary judgment is sometimes appropriate in antitrust litigation, see, e.g., [Thomsen v. Western Electric Co., 680 F.2d 1263, 1265 \(9th Cir. 1982\)](#); [Ron Tonkin Gran Turismo, 637 F.2d at 1381](#); [Thi-Hawaii, Inc. v. First Commerce Financial Corp., 627 F.2d 991 \(9th Cir. 1980\)](#), it is generally disfavored, especially when motive or intent is at issue. See, e.g., [Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 \(1962\)](#); [Betaseed, Inc. v. U. & I. Inc., 681 F.2d 1203, 1207 \(9th Cir. 1982\)](#); [A.H. Cox & Co. v. Star Machinery Co., 653 F.2d 1302, 1305 \(9th Cir. 1981\)](#); [California Steel & Tube v. Kaiser Steel Corp., 650 F.2d 1001, 1003 \(9th Cir. 1981\)](#).

B. Restraint of Trade

Northrop challenges the district court's ruling that the "contract-responsibility" clause (quoted [supra at 5-6](#)) at issue in counts 1-3, 6, and 7 of Northrop's complaint is per se unreasonable as a market-allocation **[**51]** restraint of trade under [section 1](#) of the Sherman Act. We conclude that the court erred in applying per se, rather than rule-of-reason, analysis in this novel context.

Generally speaking, **HN23**[] the Sherman Act bans all arrangements that are adopted to reduce competition, or which, regardless of purpose, have a significant tendency to reduce competition. Thus, arrangements that are adopted for and tend to achieve other purposes are not condemned by the Act merely because they carry some incidental and inconsequential restraining effect on competition. L. Sullivan, Antitrust, § 63 at 166 (1977).

Although this determination is ordinarily made through rule-of-reason analysis -- a process calling for thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition -- certain agreements or practices are so "plainly anticompetitive", [National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 \(1978\)](#); [Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, 97 S. Ct. 2549, 2558, 53 L. Ed. 2d 568 \(1977\)](#), and so "lack [] any redeeming virtue," [Northern Pacific **\[**52\]** Railway v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 \(1958\)](#), that they are conclusively presumed illegal without the need for detailed rule-of-reason analysis. Horizontal market division, the practice claimed to exist here, is one of four main categories of competitive restraints this court has held unreasonable per se. See [A.H. Cox & Co. v. Star Machinery, 653 F.2d at 1305](#); [Gough v. Rossmoor Corp., 585 F.2d 381, 386 \(9th Cir. 1978\)](#), cert. denied, 440 U.S. 936, 99 S. Ct. 1280, 59 L. Ed. 2d 494 (1979). Nevertheless, even within this class of restraints, there **[*1051]** are recognized circumstances where rule-of-reason analysis remains appropriate. See e.g., [Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 \(1978\)](#) (blanket licensing arrangement between horizontal competitors not per se illegal); [Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 821-24](#) (9th Cir.) (as amended) (temporal market allocation provision of lease drafted by horizontal competitors not per se illegal), cert. denied, 456 U.S. 1011, 102 S. Ct. 2308, 73 L. Ed. 2d 1308 (1982).

Northrop argues that three such circumstances make rule-of-reason **[**53]** analysis appropriate here: (1) neither the exact type of teaming arrangement at issue in this case nor the military aircraft industry in general have been subjected to prior antitrust scrutiny; (2) the arrangement actually enhanced competition by introducing a new competitor, McDonnell, into a market from which it was otherwise foreclosed; and (3) the contract-responsibility clause is an essential aspect of, and reasonable limitation upon, the agreement to exchange technology. We agree that the case involves novel antitrust considerations, and reject McDonnell's contention that this is simply a run-of-

the-mill case of market allocation between horizontal competitors.²⁷ We shall discuss each of these factors supporting the rule of reason.

[**54] 1.Judicial experience with the challenged conduct: This factor strongly supports application of rule-of-reason analysis. As recognized in *United States v. Topco Associates*, 405 U.S. 596, 607-08, 92 S. Ct. 1126, 1133-34, 31 L. Ed. 2d 515 (1972), and recently reaffirmed in *Broadcast Music*, 441 U.S. at 9, 99 S. Ct. at 1557, "it is only after considerable experience with certain business relationship that courts classify them as per se violations. . . ." Neither the district court nor McDonnell point to a single instance in which the military aircraft industry in general or Government prompted contractor teaming agreements in particular have received judicial scrutiny in a Sherman Act context.

McDonnell reads Broadcast Music too narrowly. McDonnell argues that because the contract-responsibility clause can be viewed as a simple market-splitting device and because market-splitting devices have been held per se unreasonable in other contexts, per se treatment was appropriate here. According to McDonnell, a court need go no further than determining the general type of "practice" at issue in deciding whether to apply rule-of-reason analysis. This is precisely the type of "literalness" [**55] expressly condemned in Broadcast Music:

The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad.

...

HN24 [↑] "it is only after considerable experience with certain business relationships that courts classify them as per se violations. . . ." See *White Motor Co. v. United States*, 372 U.S. 253, 263/83 S. Ct. 696, 702, 9 L. Ed. 2d 738] (1963). We have never examined a practice like this one before; indeed, the Court of Appeals recognized that "in dealing with performing rights in the music industry we confront conditions both in copyright law and in **antitrust law** which are sui generis. " 562 F.2d, at 132. And though there has been rather intensive antitrust scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a per se restraint of trade.

441 U.S. at 9-10, 99 S. Ct. at 1557.

In Maricopa County, the Court rejected the contention that it should not apply the usual per se rule against horizontal price [*1052] fixing [**56] because the judiciary had little antitrust experience with the health-care industry. The Court rejected the argument because "so far as price-fixing agreements are concerned, [the Sherman Act] establishes one uniform rule applicable to all industries alike." *457 U.S. at 349, 102*, S. Ct. at 2476, quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222, 60 S. Ct. 811, 843, 84 L. Ed. 1129 (1940). The Court was careful to point out, however, that its decision "should not be confused with the established position that **HN25** [↑] a new per se rule is not justified until the judiciary obtains considerable rule of reason experience with the particular type of restraint challenged." *457 U.S. at 349, 102 S. Ct. at 2476 n. 19* (emphasis in the original). We find no significant judicial rule-of-reason experience with either the particular practice or industry at issue here and therefore conclude that imposing a new per se rule would be premature.

2. Effect on competition: This is the most troubling and conceptually elusive of the three factors. Echoing the district court, McDonnell argues that the agreements destroy competition because they split the market into product categories -- limiting [**57] Northrop to selling land-based F-18L's and McDonnell to selling carrier-suitable F-

²⁷ In doing so, we note that the contract-responsibility clause at issue here differs significantly from the horizontal price-fixing arrangements the Supreme Court has uniformly subjected to per se condemnation. See, e.g., *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980) (per curiam).

18A's. Although tenable, the argument is overly simplistic and is not an entirely accurate reading of either the agreements or the relief sought by Northrop.

[HN26] The critical inquiry in determining whether per se condemnation should be extended to a previously unexamined business practice is whether the "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, 441 U.S. at 19-20, 99 S. Ct. at 1562* (citations omitted). Accord, *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1356 (9th Cir. 1982)*. In making this inquiry, we are mindful of the Court's admonition that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 2561-62, 53 L. Ed. 2d 568 (1977)*.

The agreements call for a joint effort by both "teammates" in the production and sale [**58] of all F-18's. The agreements allocate which party may act as prime contractor and which as principal subcontractor (depending on the type of F-18); they do not foreclose, at least in the traditional market-splitting sense, these competitors from competing in regard to their respective versions of the jointly developed F-18 fighter concept. There is evidence, which must be accepted as true at this posture of the proceedings, that the agreements have not eliminated head-to-head competition in international markets between the two variants of the joint F-18 development effort -- a surprising procompetitive occurrence in an industry typified by single-source products.²⁸ For example, Canada, the first international purchaser of an F-18, chose McDonnell's carrier-suitable F-18A over Northrop's land-based F-18 even though it intended to base the aircraft on land. The market appeal of carrier-suitable aircraft for land-based operation was demonstrated during the 1970's by McDonnell's successful marketing of its carrier-suitable F-4 "Phantom" for land-based use.

[**59] More important, however, is the fact that but for the teaming effort General Dynamics and other manufacturers of aircraft fitting the same general buyer needs as the F-18 would have had neither F-18 variant to compete against. Thus, not only do the agreements not preclude all competition between the parties' respective variants of the F-18, they actually foster competition by [*1053] allowing both parties to compete in a market from which they were otherwise foreclosed.²⁹

Thus, McDonnell's impact-on-competition argument is misleading in the special context of this industry and practice. For although the agreements suppress competition between the parties in the sense that they designate which party will be the prime contractor [**60] for different versions of the F-18, there would be no competition but for the agreements. As noted by one deponent:

The agreements between Northrop and [McDonnell] do not have the effect of limiting competition to an extent greater than the naturally existing limitations brought about by . . . the Congressional mandate limiting the Navy to choosing between a General Dynamics YF-16 and a Northrop YF-17. Without the opportunity of teaming with Northrop, [McDonnell] would not have been able to participate in the Navy competition and would not be in a position to participate in sales of current generation YF-17 type fighters either in the United States or abroad.

Given this evidence, it would be a reversion of the kind to "formalistic line drawing" eschewed in *GTE Sylvania, 433 U.S. at 58-59, 97 S. Ct. at 2561-2562*, to hold this novel teaming arrangement a per se violation of the Sherman Act solely because it arguably has some characteristics of a horizontal restraint.**[HN27]**

²⁸ The record indicates that almost every military aircraft marketed by an American manufacturer since World War II has, for all practical purposes, been available from only a single source. One obvious reason for this phenomenon is the magnitude of the economic and technological bases necessary to enter the military aircraft markets where a single product such as the F-18 reflects nearly a decade of development and sells for over \$15 million each.

²⁹ Moreover, the agreements do not impinge upon the parties' unfettered right to develop and market aircraft suitable for any type of basing so long as the new aircraft are not "of basically the same configuration" as the team produced F-18 (see Para. 3 of the Basic Agreement).

Where the effect on competition is equivocal, it is appropriate to examine the purpose of the restraint in deciding whether to apply the per se rule. [Broadcast Music, 441 U.S. at 19-20, 99 S. Ct. at 1562-1563](#). The [**61] teaming effort at issue here was done at its customer's request (the Government). The undisputed purpose of the teaming effort was to develop a particular weapons system desired by the Government. There is evidence that the contract-allocation clause was included to avoid repeating a previous military-aircraft contracting "fiasco" ³⁰ that occurred due to lack of teaming, not to suppress competition. Thus, viewing the evidence in the light most favorable to Northrop, the agreements are not the sort of "naked restraint of trade with no purpose except stifling competition," [White Motor Co., 372 U.S. at 263, 83 S. Ct. at 702](#), for which per se condemnation is appropriate.

We note by way of conclusion on this point, without deciding on the basis of the incomplete record before us, that there is a question as to whether it even matters if [**62] the agreements foreclosed some competition between Northrop and McDonnell. In distinguishing the price-fixing practice fashioned by the health-care foundation in Maricopa County from the blanket licenses in Broadcast Music, the Court stated that:

The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market.

[Maricopa County, 457 U.S. at 356, 102 S. Ct. at 2479-80](#). As the Court notes, [HN28](#)[] affiliated businesses cannot be held to conspire with each other where they function as essentially a single economic unit. Accord, [Murray v. Toyota Motor Distributors, Inc., 664 F.2d 1377, 1379](#) (9th Cir.) (per curiam), cert. denied, 457 U.S. 1106, 102 S. Ct. 2905, 73 L. Ed. 2d 1314 (1982). See also [Thomsen v. Western Electric Co., 680 F.2d 1263, 1266 \(9th Cir. 1982\)](#). No adverse effect on competition need be shown here if it develops on [*1054] remand that, despite the disavowal of a joint venture contained in the agreement, Northrop [**63] and McDonnell should be viewed as "teammates" constituting a single economic unit for purposes of the F-18 market.

3. Limitation upon license of technology: As an additional basis for holding per se treatment inappropriate, Northrop argues that the agreements are reciprocal licenses of technology and that the contract-responsibility clause is a reasonable use limitation. [HN29](#)[] Reciprocal license agreements are not per se violations if the technology was otherwise unobtainable by the licensee (McDonnell) and the use limitation is "reasonable." [A & E Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 715 \(9th Cir. 1968\)](#).

McDonnell argues that the YF-17 technology transferred by Northrop was otherwise available to McDonnell, albeit in less useful form, because the Government had purchased unlimited rights in such technology. McDonnell argues further that the use limitations sought by Northrop are unreasonable because: (1) they are broader and of longer duration (arguably for as long as F-18's can be marketed) than is necessary to protect Northrop's legitimate interests; (2) the F-18 product they are sought to be imposed on is far different from the "paper" technology and YF-17 prototype [**64] technology provided by Northrop; (3) the Government provided the business opportunity (i.e., the chance to compete for the Navy contract), not Northrop; and (4) territorial restraints are unreasonable where the parties receive their quid pro quo in the mutual exchange of valuable information.

The fatal weakness in McDonnell's argument is that, although advanced in support of summary judgment, it hinges on bitterly contested facts. Also, McDonnell's position regarding the availability of the technology appears somewhat disingenuous -- for if the technology was readily obtainable and usable, why do the memoranda by McDonnell's top executives indicate the necessity of teaming to obtain the technology? Although Northrop's licensing theory alone is probably an insufficient reason to require rule-of-reason analysis, it does add weight to the other factors, especially the argument that the antitrust implications of such teaming/technology/licensing arrangements in the military aircraft industry are *sui generis*.

C. Attempt to Monopolize

³⁰ This occurred when a single contractor was unable to resolve the conflicting design demands of producing variants of a single aircraft for both the Air Force and Navy.

Northrop contends that McDonnell breached the agreements in such a manner as to attempt to monopolize the F-18 market.³¹ McDonnell argues that even [**65] if its conduct contravened the terms of the agreements, there was sufficient governmental involvement by regulation and licensing of foreign sales efforts to support dismissal.

The parties characterize the district court's ruling very differently. Northrop contends that the court held that McDonnell's conduct in the F-18 markets was "immune" from section 2 of the Sherman Act because the military aircraft industry is subject to such pervasive federal regulation. McDonnell argues that the ruling is based, not on an immunity theory, but, rather, on the conclusion that two of the requisite elements of attempted monopolization are absent -- namely, "dangerous probability of success" and "monopolistic intent."

Careful study of the district court's opinion and findings fails to disclose the exact basis for the ruling. The truth appears to lie somewhere between the extremes advocated by the parties.

The [**66] most tenable reading of the district court's opinion is that, although the court based its decision on the pervasive role of the government in the military-aircraft industry (rather than on the absence of the elements of attempt to monopolize), it did not squarely base its decision on immunity [*1055] grounds.³² The court appears to have reasoned that the Government so controls the normal competitive process -- from the inception of the F-18 design to its eventual marketing -- that no "trade or commerce" as defined by the Sherman Act exists.³³ The district court's ruling is erroneous regardless of whether it is evaluated as being based on "trade or commerce," "immunity," or "failure to prove a *prima facie* case" grounds.

[**67] 1. Interstate commerce: Viewing the record in the light most favorable to Northrop, we cannot conclude as a matter of law that Northrop's section 2 claim fails for lack of a sufficient nexus with interstate commerce. Neither party disputes the district court's findings that the relevant product market is the "F-18 weapons system" and that the relevant geographic market is "arguably the world." [498 F. Supp. at 1123](#). The fact that the Government exercises significant control over the entry of private parties into these markets does not mean that there is no trade or commerce involved in competing in such markets. As noted by Northrop, there is undisputed evidence that the F-18 is being assembled in at least two different states, using materials and components shipped by vendors from all over the country and world. The Supreme court has repeatedly observed that, consonant with the broad purposes of the antitrust laws, [HN30](#) [↑] almost any activity that has "interstate incidents" satisfies the Sherman Act's jurisdictional requirement. See, e.g., [McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 100 S.](#)

³¹ See footnote 6 *supra*, and accompanying text for a more specific description of Northrop's claims.

³² This reading of the decision is corroborated by the absence of any direct immunity analysis or case law references in the opinion and by the fact that McDonnell did not explicitly argue for immunity in the lengthy memorandum it submitted in support of its motion for summary judgment.

³³ In the district court's words:

The concern of product and geographic market from the traditional antitrust viewpoint becomes unimportant here for one very basic reason. The United States Government has the absolute and over-riding control of both the production and sales potential of the product that brings these parties into vitriolic conflict.

What strikes the Court under such circumstances is that there is not the "trade or commerce among the several States, or with foreign nations" essential to antitrust concerns of monopolization including the critical inquiry here -- attempt to monopolize. The United States Government is the market concerned with production and distribution of weapons systems for governmental military establishments. As such, this differs from the basic thrust of antitrust laws applicable to governmental procurement practices in competition with consumer enterprises buying goods generally available in the marketplace.

. . . No single group of producers has any power to expand a market share beyond that considered by the United States Government in the implementation of domestic defense and foreign policy which is in the best interest of its citizens.

Political considerations aside, the monopoly, if any, enjoyed or threatened by MDC is a governmental creation outside the reaches of the Sherman Act Section 2.

Ct. 502, 62 L. Ed. 2d 441 (1980); Hospital Building Co. v. Trustees of Rex Hospital, [*68] 425 U.S. 738, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976). Accord, *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823, 827 (9th Cir. 1981) (need only affect a "not insubstantial" amount of interstate commerce).

The fact that the Government is the sole domestic purchaser and regulates foreign F-18 sales does not mean that no market exists which a competitor can attempt to monopolize. HN31[ A manufacturer can attempt to monopolize a market by eliminating competition through predatory actions regardless of the product's sophistication and the limited number of its potential customers. The record does not indicate as a matter of law that the military aircraft industry enjoys some sort of natural monopoly that renders inapplicable the premise of the antitrust laws that competition will assure the consumer the best product at the lowest price.

The Record is replete with evidence regarding the competitive nature of the military aircraft industry. The Air Force and Navy competitions alone are evidence of the [*1056] competitive process fostered by the Government to ensure its choice of the best weapons system at the lowest cost. In foreign F-18 markets, the Government's role is **69 limited to determining what technologies may be exported to what countries. Once this determination is made, the Government allows the foreign buyer to choose freely between the competing offerings of exportable technologies.

2. Implied immunity: To the extent, if any, that the district court's decision can be viewed as a determination that Congress intended to confer blanket antitrust immunity on private conduct in the military aircraft industry by virtue of its extensive regulation of that industry, the decision is in error. Although there are no reported antitrust decisions involving this industry, treatment of the immunity question in regard to other regulated industries is instructive.³⁴

**70 Courts have generally framed the immunity issue in terms of whether Congress intended to repeal the antitrust laws with respect to the particular industry when it enacted the regulatory scheme. Phonetel, Inc. v. American Tel. & Tel. Co., 664 F.2d 716, 726, 731-32 (9th Cir. 1982) (as amended). See generally Comment, The Application of Antitrust Law to Telecommunication, 69 Calif.L.Rev. 497, 505-14 (1981). HN32[ Antitrust immunity is disfavored and "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." National Gerimedical Hospital v. Blue Cross of Kansas City, 452 U.S. 378, 388, 101 S. Ct. 2415, 2421, 69 L. Ed. 2d 89 (1981), quoting United States v. National Association of Securities Dealers, 422 U.S. 694, 719-20, 95 S. Ct. 2427, 2442-43, 45 L. Ed. 2d 486 (1975). Pervasive regulations of an industry alone is insufficient to confer blanket immunity on every action taken within the industry. Otter Tail Power Co. v. United States, 410 U.S. 366, 372-75, 93 S. Ct. 1022, 1027-28, 35 L. Ed. 2d 359 (1973); United States v. R.C.A., 358 U.S. 334, 346, 79 S. Ct. 457, 464, 3 L. Ed. 2d 354 (1959). Immunity is especially disfavored where **71 the antitrust implications of a business decision are neither compelled nor explicitly approved by a governmental regulatory body. Gerimedical Hospital, 452 U.S. at 389, 101 S. Ct. at 2421-22; National Association of Securities Dealers, 422 U.S. at 730-34, 95 S. Ct. at 2448-50; Gordon v. New York Stock Exchange, 422 U.S. 659, 689-90, 95 S. Ct. 2598, 2614-15, 45 L. Ed. 2d 463 (1975). Immunity from the antitrust laws is justified only where necessary to ensure that the regulatory scheme works, and even then only to the minimum extent necessary. Silver v. New York Stock Exchange, 373 U.S. 341, 357, 83 S. Ct. 1246, 1257, 10 L. Ed. 2d 389 (1963).

Applying these standards to the present case demonstrates the inappropriateness of granting blanket immunity, especially at the summary judgment stage. Although both McDonnell and the district court speak at length about the extensive matrix of federal regulations under which the military aircraft industry operates, neither points to a

³⁴ In looking at the treatment accorded other regulated industries, we are cognizant of Professor Sullivan's warning that:

It is important to recognize that there is no single conception which defines the scope of the exemption for a regulated industry. Although one can draw on case law from one industry for guidance as to outcome in another, there are, in a sense, as many sets of exemption doctrines as there are industries subject to state or federal regulation. In each industry the process of accommodating regulatory doctrine to antitrust doctrine is responsive to particulars such as those here referred to and, in some degree no doubt, to the degree of confidence which the court has in the quality of the regulatory performance by the particular regulatory agency. Antitrust, *supra*, § 239 at 743-44.

single instance in which the predatory conduct alleged by Northrop was either compelled or directly approved by a governmental body.

As we noted in rejecting a similar immunity claim in Phonotele:

[HN33](#) [↑] Antitrust [**72] immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct. There [*1057] is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry . . . the area of immunity from antitrust laws is not coterminous with areas of agency jurisdiction or agency expertise.

[664 F.2d at 729](#) (citations omitted). [HN34](#) [↑] A regulatory mandate sufficient to confer implied antitrust immunity may in some cases exist where there is explicit congressional approval of the challenged conduct and its ultimate anticompetitive effect, and there is no inconsistency or "plain repugnancy" between the conduct and the express policies of the regulating body. [Id. at 731-32](#). As in Phonotele, no such mandate is evident here. [HN35](#) [↑]

The principal regulatory provisions pertaining to the military aircraft industry are the International Security Assistance and Arms Export Control Act ("ISAAEC Act"), [22 U.S.C. §§ 2751 et seq.](#), implemented, inter alia, by the International Traffic In Arms Regulations ("ITARS"), 22 C.F.R. §§ 121.01 et seq. (1981), and the Armed [**73] Services Procurement Act ("ASP Act"), [10 U.S.C. §§ 2301 et seq.](#), implemented by ASPR Regulations ("ASPR"), 32 C.F.R. §§ 1-100 et seq. (1981). These provisions contain no affirmative indication that Congress intended to modify or eclipse the application of the antitrust laws to the military aircraft industry. Indeed, there are several indications that Congress intended private conduct in the industry to be subject to the antitrust laws. For instance, the ITARS require the inclusion of a clause in all technical assistance agreements that expressly acknowledges that license approval by the Office of Munitions Control is not to be construed as "passing on the legality of the agreement from the standpoint of antitrust laws." 22 C.F.R. § 124.11(d) (1981). Similarly, the ASP Act [HN36](#) [↑] provides that a military procuring agency must notify the Attorney General whenever the agency has reason to believe that a "violation of the antitrust laws" has occurred. [10 U.S.C. § 2305\(d\)](#). Finally, ASPR § 4-117, which describes and authorizes "contractor team arrangements" and was the basis for the agreements now in issue, provides that "these [teaming] policies do not authorize arrangements in [**74] violation of anti-trust statutes. . ." ³⁵ ASPR § 4-117(b).

The Court held in Otter Tail that because the regulatory scheme in question preserved the right of voluntary action by private actors, its pervasiveness could not be construed to mean that the scheme was intended to supplant the antitrust laws. [410 U.S. at 373, 93 S. Ct. at 1027](#). A similar conclusion is warranted in this case. [HN37](#) [↑] Where, as here, the challenged conduct is the product of the regulated business' independent initiative and choice, it is properly subject to antitrust scrutiny. [Phonotele, 664 F.2d at 1**751 735 n. 49.](#)

3. Prima facie case of attempt to monopolize: In addressing this issue, it is appropriate to bear in mind the admonition that summary judgments are most disfavored in antitrust cases where, as with this issue, "motive and intent play leading roles." [California Steel & Tube, 650 F.2d at 1003](#). [HN38](#) [↑] At least two elements of proof are indispensable to make out a prima facie case of attempt to monopolize: (1) specific intent to control prices or destroy competition, and (2) predatory conduct designed to accomplish that unlawful purpose. [BLair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 669 \(9th Cir. 1980\); Greyhound Computer Corp. v. IBM Corp., 559 F.2d 488, 504 \(9th Cir. 1977\)](#), cert. denied, 434 U.S. 1040, 98 S. Ct. 782, 54 L. Ed. 2d 790 (1978). Although this court has periodically stated that dangerous probability of successful monopolization is also an indispensable element, e.g., [William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1027](#) [*1058] (9th Cir.) (as amended), cert. denied, 459 U.S. 825, 103 S. Ct. 58, 74 L. Ed. 2d 61, 103 S. Ct. 57 (1982); [Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 853 \(9th Cir. 1977\)](#), cert. denied, [**76] 439 U.S. 829, 99 S. Ct. 103, 58 L.

³⁵ Another factor militating against immunity is the apparent inadequacy of nonexistence of agency structures to remedy anticompetitive behavior in the military aircraft industry. See [Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 224, 86 S. Ct. 781, 787, 15 L. Ed. 2d 709 \(1966\)](#), modified, [383 U.S. 213, 86 S. Ct. 781, 15 L. Ed. 2d 709 \(1966\); Phonotele, 664 F.2d at 734-735](#). See also, Comment, supra, 69 Calif.L.Rev. at 511.

Ed. 2d 122 (1978), there is also Ninth Circuit authority for the view that probability of success is merely circumstantial evidence of intent. E.g., [Forro Precision, Inc. v. IBM Corp., 673 F.2d 1045, 1059 \(9th Cir. 1982\)](#); [Blair Foods, Inc., 610 F.2d at 669](#); [Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 \(9th Cir.\)](#), cert. denied, 377 U.S. 993, 84 S. Ct. 1920, 12 L. Ed. 2d 1046 (1964).³⁶ We need not add further fuel to the controversy by adding our opinion regarding the inquiry's proper significance, because, as discussed below, there was sufficient evidence of McDonnell's probability of success to avoid summary judgment. Finally, [HN39](#)[] evidence of market power, while not essential, may suggest the existence of specific intent to monopolize. [Janich Bros., 570 F.2d at 853](#). The interplay between these elements is exhaustively discussed in *Continental Baking*, 668 F.2d at 1027-31 ("Each element interacts with the others in significant and unexpected ways", *id.* at 1027).

[**77] [HN40](#)[] Although specific intent may be demonstrated by direct evidence of unlawful design, if corroborated, *Continental Baking*, 668 F.2d at 1028, intent is, for practical reasons, more commonly proven through circumstantial evidence such as by inference from predatory conduct and market power. [Forro Precision, 673 F.2d at 1059](#); [California Computer Products v. IBM Corp., 613 F.2d 727, 736-37 \(9th Cir. 1979\)](#). The combination of direct and circumstantial evidence of McDonnell's intent was sufficient to avoid summary judgment. The memoranda prepared by top McDonnell executives offer strong direct evidence of McDonnell's alleged intent to monopolize. The record also contains evidence that McDonnell possesses great leverage in the relevant market and, through its allegedly predatory actions, has a dangerous probability of successfully monopolizing that market. These latter factors offer additional evidence in support of Northrop's allegation of monopolistic intent. See [Blair Foods, 610 F.2d at 669](#).

Northrop's assertions in the pleadings of predatory conduct are also adequate to avoid summary judgment. We cannot accept McDonnell's contention that its alleged breaches of the agreements, fraud [**78] in the inducement, and various other unfair practices could not be found predatory in the circumstances of this case. The alleged activity is clearly conduct "without legitimate business purpose." [Janich Bros., 570 F.2d at 853](#). McDonnell's argument is unpersuasive for two reasons. First, McDonnell appears to concede that this alleged conduct would be predatory if as we have already determined, it enjoyed market power. See [Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 925 \(9th Cir. 1980\)](#), cert. denied, 450 U.S. 921, 101 S. Ct. 1369, 67 L. Ed. 2d 348 (1981). Second, McDonnell focuses too closely on each of the individual practices complained of without reference to the intent motivating them or to their overall effect on Northrop's ability to remain McDonnell's principal competitor in the F-18 market. Cf. [Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 1410, 8 L. Ed. 2d 777 \(1962\)](#) (plaintiff should be given "the full benefit of [its] proof without tightly compartmentalizing the various factual components. . . .").

V.

McDonnell's Cross-Appeal

McDonnell concedes that most of its counterclaim is a "mirror image" of Northrop's [**79] complaint and that the disposition of one should be consistent with the other. [*1059] The disposition of the motions to dismiss and for summary judgment of Northrop's complaint dictated that the counterclaim be treated similarly in that it was subject to the same perceived flaws. In light of our reversal of the district court's rulings on Northrop's claims, it is necessary to remand for further consideration of the counterclaim.³⁷

VI

³⁶ The significance of the dangerous-probability-of-success inquiry "has been controversial . . . within this circuit." [Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 925 \(9th Cir. 1980\)](#), cert. denied, 450 U.S. 921, 101 S. Ct. 1369, 67 L. Ed. 2d 348 (1981).

³⁷ In the two limited aspects of the counterclaim that can arguably be construed as nonmirror images of Northrop's claims, McDonnell essentially sought an affirmative declaration of what the court held below. Had we affirmed the district court in regard to Northrop's complaint, there may have been some justification for treating those two claims as non-mirror images. Given the present posture of the case, however, summary treatment of those aspects of the counterclaim is unwarranted.

Conclusion

We reverse the district court's dismissal and summary judgment rulings [****80**] as to Northrop's complaint and McDonnell's counterclaim; affirm the denial of the motion to modify finding of fact #31;³⁸ and remand the matter for further proceedings consistent with this opinion.

[81]** REVERSED, in part; AFFIRMED, in part; and REMANDED.

End of Document

³⁸ McDonnell contends that it was clearly erroneous for the district court to strike the words "Northrop claims that" from the beginning of the second sentence of McDonnell's proposed finding of fact #31. The finding goes on to say that both parties intended the agreements to limit McDonnell to marketing carrier-suitable aircraft and Northrop to land-based aircraft. The district court denied to McDonnell's motion to reinstate the deleted phrase. Although conceding that the phrase "is not material to the [district] court's orders", McDonnell argues that the deletion is inconsistent with other findings that the parties intended different interpretations of the Agreements and sought different relief based upon their respective interpretations.

McDonnell's objection to the deletion is apparently aimed at protecting itself from being caught in contradictory positions in responding to Northrop's claims and in pressing its own counterclaims. Our disposition of this appeal renders this fear more illusory than real. For this and other reasons, we find no abuse of discretion.



Tom Lazio Fish Co. v. Castle & Cooke, Inc.

United States District Court for the Northern District of California

February 28, 1983

No. C-83-0085 SAW

Reporter

557 F. Supp. 559 *; 1983 U.S. Dist. LEXIS 18924 **; 1983-1 Trade Cas. (CCH) P65,258

Tom Lazio Fish Co., Inc. v. Castle & Cooke, Inc., CHB Foods, Inc., H.J. Heinz Corp., Ralston Purina, Inc., Star-Kist Foods, Inc., and Does I through XXX

Core Terms

tuna, markets, federal law, state court, Cooper, federal court, brand name, albacore, federal jurisdiction, petition to remove, defendants', original jurisdiction, plaintiff's claim, anti trust law, state grounds, fishermen's, violations, Remanding, antitrust, join

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Elements for Removal > General Overview

Civil Procedure > ... > Removal > Elements for Removal > Removability

HN1 [] **Exemptions & Immunities, Collectives & Cooperatives**

Any civil action brought in state court of which the district courts of the United States have original jurisdiction founded on a claim arising under federal law "shall be removable" to federal court. [28 U.S.C.S. § 1441\(b\)](#).

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN2 [] **Subject Matter Jurisdiction, Federal Questions**

A claim arises under federal law only if a question of federal law forms a direct and essential element of the plaintiff's cause of action.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN3 Exemptions & Immunities, Collectives & Cooperatives

The assertion of a federal defense is an insufficient basis for federal jurisdiction.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN4 Subject Matter Jurisdiction, Federal Questions

Where a plaintiff's claim contains both a federal ground and a state ground, the plaintiff is free to ignore the federal question and pitch his claim on the state ground. The artful pleading doctrine creates an exception to this general rule only when the plaintiff by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, has made his claim a federal one.

Counsel: **[**1]** For plaintiff: Francis O. Scarpulla and Stephen V. Scarpulla, of Scarpulla & Scarpulla, San Francisco, California. For defendants: Keith E. Pugh, Jr., Edward P. Henneberry, and James H. Curtin, of Howrey & Simon, Washington, District of Columbia (Timothy E. Carr, San Francisco, California, co-counsel), for H.J. Heinz Corp. and Star-Kist Foods, Inc.; Allen M. Katz, of Munger, Tolles & Rickershauser, Los Angeles, California, for CHB Foods, Inc.; Gordon Hampton, of Sheppard, Mullen, Richter & Hampton, Los Angeles, California, for Ralston Purina, Inc.; Lloyd W. McCormick, of McCutchen, Doyle, Brown & Enersen, San Francisco, California, for Castle & Cooke, Inc.

Judges: Weigel, J.

Opinion by: WEIGEL

Opinion

[*560] Order Granting Plaintiff's Motion for an Order Dismissing Defendants' Petition for Removal and Remanding to State Court

WEIGEL, J.:

Plaintiff is a fish processing business in Eureka, California. Defendants are the major purchasers, processors, and marketers of albacore tuna on the west coast of North America. Defendant Castle & Cooke, Inc. is an Hawaiian corporation, which markets tuna under the "Bumble Bee" brand name; defendant Star-Kist Foods, Inc. is a wholly-owned subsidiary **[**2]** of defendant H.J. Heinz Corporation, a Pennsylvania corporation, which markets tuna under the "Star-Kist" brand name; defendant Ralston Purina, Inc. is a Missouri corporation, which markets tuna under the

brand name "Chicken-of-the-Sea"; defendant CHB Foods, Inc. is a California Corporation, which markets tuna under the brand name "Pan Pacific."

On December 7, 1982, plaintiff filed this antitrust suit in Superior Court of the State of California, City and County of San Francisco, claiming violations of California's Cartwright Act, [Cal. Bus. & Prof. Code \[*561\] §§ 16700 et seq.](#), and Unfair Trade Practices Act, [Cal. Bus. & Prof. Code §§ 17000 et seq.](#) Plaintiff claims that defendants unlawfully conspired to fix, raise, maintain, and stabilize the prices of fresh albacore tuna and canned albacore tuna. On January 6, 1983, defendants removed the case here on the grounds that this Court has original jurisdiction pursuant to [28 U.S.C. §§ 1331, 1337](#), and [15 U.S.C. § 15](#). Plaintiff moves for an order dismissing defendants' petition for removal and remanding the case to state court. Defendants move to dismiss for failure to join a party or, in the alternative, for an order that [\[**3\]](#) a party be joined.¹

[HN1](#) Any civil action brought in state court of which the district courts of the United States have original jurisdiction founded on a claim arising under federal law "shall be removable" to federal court. [28 U.S.C. § 1441\(b\)](#). Defendants assert that because they purchase albacore tuna primarily from a fishermen's cooperative association which enjoys immunity from federal antitrust laws under the Fisheries Cooperative Marketing Act, [15 U.S.C. § 521 et seq.](#), plaintiff's complaint, even though it presents a prima facie claim solely under state law, challenges an entire federal regulatory scheme and thus "aris[es] under" federal law pursuant to [28 U.S.C. § 1441\(b\)](#). [HN2](#) A claim arises under federal law only if a question of federal law forms "a direct and essential element of the plaintiff's cause of action." [Smith v. Grimm, 534 F.2d 1346, \[**4\] 1350](#) (9th Cir.), cert. denied, 429 U.S. 980, 50 L. Ed. 2d 589, 97 S. Ct. 493 (1976); see [Guinasso v. Pacific First Federal Sav. & Loan Ass'n, 656 F.2d 1364, 1367](#) & nn. 7-8 (9th Cir. 1981), cert. denied, 455 U.S. 1020, 102 S. Ct. 1716-17, 72 L. Ed. 2d 138 (1982). Defendants do not argue that plaintiff relies on a federal right, remedy, or relationship in asserting his claim; rather, they seek to anticipate a possible federal defense based upon the antitrust immunity conferred upon agricultural and fishermen's cooperatives.² It is well established that [HN3](#) the assertion of a federal defense is an insufficient basis for federal jurisdiction. [Guinasso, supra, 656 F.2d at 1366](#); C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 3722, at 550 & n. 11 (1976).

[\[**5\]](#) Defendants also urge that plaintiff has attempted to conceal the federal nature of his claim through "artful pleading." They assert that large portions of plaintiff's complaint are copied from a complaint filed in 1974 in federal court by plaintiff's counsel, on behalf of a different plaintiff, against four of the five defendants named in this suit.³ Because the earlier case was federal, defendants contend that this Court cannot lack jurisdiction over the instant suit merely because plaintiff has deleted any references to federal law in his complaint.

Defendants misconstrue the proper scope of the so-called "artful pleading" doctrine. [HN4](#) Where, as here, plaintiff's claim contains both a federal ground and a state ground, plaintiff "is free to ignore the federal question and pitch his claim on the state ground." 1A Moore's *Federal Practice* para. 0.160, at 185 (2d ed. 1982) (footnote [\[*6\]](#) omitted). The artful pleading doctrine creates an exception to this general rule "only when the plaintiff by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, [\[*562\]](#) has made his claim a federal one." [Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566, 572, 575](#) & n. 8 (N.D. Cal. 1981); see [Federated Dept. Stores v. Moitie, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 \(1980\)](#)

¹ Because the Court grants plaintiff's motion, and remands the case to state court for further proceedings, the Court need not reach defendants' motion.

² Thus, defendants' reliance on [Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 65 L. Ed. 577, 41 S. Ct. 243 \(1921\)](#), is misplaced. In that case, plaintiff, a shareholder in a trust company, challenged the company's proposed investment in certain bonds on the ground that the federal statutes authorizing issuance of the bonds were unconstitutional. Hence, an essential element of plaintiff's claim was the alleged unconstitutionality of the federal statutes involved, and federal jurisdiction was proper. By contrast, in the instant case plaintiff's claim does not necessarily rely upon rights conferred by the Fisheries Cooperative Marketing Act, [15 U.S.C. § 521 et seq.](#), or upon the unconstitutionality of that statute or upon rights conferred by any other federal statute.

³ *Western Fishboat Owners Association, et al. v. Castle & Cooke, Inc., et al.*, C 74-1748 LHB (N.D. Cal.) (filed August 19, 1974).

557 F. Supp. 559, *562 (1983 U.S. Dist. LEXIS 18924, **6

(case filed in state court after identical federal suit dismissed properly removed to federal court); C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, § 3722, at 174 (Supp. 1981); cf. *Vitarroz v. Borden, Inc.*, 644 F.2d 960, 964-65 (2d Cir. 1981). Here, plaintiff seeks to bring his claim for the first time, has pleaded only violations of state **antitrust law**, and has chosen to pursue his claim in a state forum. Thus, plaintiff has in no way "acced[ed] to federal jurisdiction."

Accordingly,

It Is Hereby Ordered that defendants' petition for removal is dismissed.

It Is Further Hereby Ordered that this case is remanded to state court for further proceedings. [**7]

End of Document



Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau

United States Court of Appeals for the Ninth Circuit

August 4, 1982, Argued and Submitted ; March 4, 1983, Decided

No. 81-3608.

Reporter

701 F.2d 1276 *; 1983 U.S. App. LEXIS 29952 **; 1983-1 Trade Cas. (CCH) P65,254; 36 Fed. R. Serv. 2d (Callaghan) 472

KLAMATH-LAKE PHARMACEUTICAL ASSOCIATION, an Oregon non-profit corporation, on behalf of its assignors, Plaintiff-Appellant, v. KLAMATH MEDICAL SERVICE BUREAU, an Oregon non-profit corporation, and Klamath Bureau Pharmacy, Inc., a now dissolved Oregon profit corporation, Defendants-Appellees

Subsequent History: [**1] As Amended April 1, 1983.

Prior History: Appeal from the United States District Court for the District of Oregon.

Disposition: Affirmed.

Core Terms

pharmacy, Provider, insureds, boycott, district court, exemption, drugs, antitrust, insurance business, summary judgment, products, prescription drug, healthcare, anti trust law, prescriptions, regulation, policyholders, assignors, terms, health insurance, purchases, policies, Shield, costs, tie, Sherman Act, reimbursement, health insurance policy, McCarran-Ferguson Act, consumer

LexisNexis® Headnotes

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

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

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

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

HN1[Summary Judgment, Opposing Materials

Summary judgment, dependent as it is on the absence of a genuine issue as to any material fact, requires an assessment of evidence regarding issues of material fact in the light most favorable to the party opposing the motion to grant such judgment.

701 F.2d 1276, *1276LÁ1983 U.S. App. LEXIS 29952, **1

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > Assignment of Claims

HN2 [down] **Bad Faith & Extracontractual Liability, Assignment of Claims**

An assignment of claims does not prevent the assignors from receiving the benefits of the litigation.

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > Assignment of Claims

HN3 [down] **Bad Faith & Extracontractual Liability, Assignment of Claims**

It is not necessary that assignors forfeit all interest in possible damages before consolidating their claims in a more efficient class suit.

Civil Procedure > Parties > Capacity of Parties > General Overview

HN4 [down] **Parties, Capacity of Parties**

Fed. R. Civ. P. 17(a) is designed to ensure that lawsuits are brought in the name of the party possessing the substantive right at issue.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN5 [down] **Price Discrimination, Buyer Liability**

Any difference in the prices of similar goods is, of course, price discrimination. To be forbidden, however, the discrimination must be illegal. A buyer who receives a price differential cannot be liable under the Robinson-Patman Act, 15 U.S.C.S. § 13, unless the seller is in violation of the Act as well.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN6 [down] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

See the McCarran-Ferguson Act, 15 U.S.C.S. § 1012(b) and § 1013(b).

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN7 [down] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The underwriting or spreading of risk is held to be an indispensable characteristic of insurance.

701 F.2d 1276, *1276LÁ1983 U.S. App. LEXIS 29952, **1

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN8 [down] Exemptions & Immunities, McCarran-Ferguson Act Exemption

Unless the practice amounts to a boycott, the states are free to regulate it or choose not to regulate. They do not have to expressly authorize a specific activity, or proscribe it, for the exemption to apply. It is enough that a detailed overall scheme of regulation exists.

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

Insurance Law > ... > Company Representatives > Agents > General Overview

Insurance Law > ... > Insurance Company Operations > Company Representatives > General Overview

HN9 [down] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Boycotts are not merely limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group, but extended to refusals to deal with customers of some or all of those engaged in the boycott.

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

HN10 [down] Tying Arrangements, Clayton Act

To prevail on a tying claim, whether under the Sherman Act, [15 U.S.C.S. § 1](#), or the Clayton Act, [15 U.S.C.S. § 14](#), a plaintiff must first identify a tie between separate products. Separateness is determined in part by whether the products are normally sold or used as a unit and whether their joint sale effects savings beyond those of combined marketing. The critical factor is the extent to which a producer's offerings are in response to independently structured consumer demand. Products that function together and are sold in combination may still be separate if consumers would prefer to buy them individually at the price necessary to market them separately.

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

HN11 [down] Price Fixing & Restraints of Trade, Tying Arrangements

Tying denotes illegal coercion: Rules governing tying arrangements are designed to strike, not at the mere coupling of physically separable objects, but rather at the use of a dominant desired product to compel the purchase of a second, distinct commodity. Whether a producer's combined products should be considered as separate can be decided only by looking at consumer behavior. It is the relationship of the producer's selling decision to market demand, not the physical characteristics of the products alone, that determines the existence of legally separable products.

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

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

[HN12](#) [blue icon] Price Fixing & Restraints of Trade, Tying Arrangements

Rules governing tying arrangements are designed to strike solely at practices employed to impede competition on the merits.

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

[HN13](#) [blue icon] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Although conspiracy sufficient to survive summary judgment may be inferred from circumstantial evidence, the plaintiff must come forward with significant probative evidence that supports its conclusion.

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

[HN14](#) [blue icon] Price Fixing & Restraints of Trade, Vertical Restraints

The court has established narrow grounds for imputing per se illegality to restrictions on vertical distribution: they must always or almost always tend to restrict competition and decrease output and not increase economic efficiency and render markets more, rather than less, competitive.

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

[HN15](#) [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the rule of reason analysis, plaintiff has the burden to uncover either anticompetitive intent or specific anticompetitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

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

[HN16](#) [blue icon] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Economic injury to competitors is not a per se violation of the antitrust laws. It is injury to the market, not to individual firms, that is significant. A plaintiff must show that the defendant intended to or did reduce the ability of others to compete before it has shown an actionable restraint of trade.

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

HN17 [] **Corporate Formation, Corporate Existence, Powers & Purpose**

The general freedom of a single business to select its partners is an established part of **antitrust law**.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN18 [] **Relief From Judgments, Altering & Amending Judgments**

Although within the trial court's discretion, leave to amend shall be freely given when justice so requires.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN19 [] **Relief From Judgments, Altering & Amending Judgments**

The court is required to review the exercise of the trial court's discretion to deny a motion to amend strictly. Where the record does not clearly dictate the district court's denial, the court is unwilling to affirm absent written findings, and has reversed findings that are merely conclusory.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN20 [] **Relief From Judgments, Altering & Amending Judgments**

Futile amendments should not be permitted.

Judges: Kilkenny, Snead, and Skopil, Circuit Judges.

Opinion by: SNEED

Opinion

[*1279] SNEED, Circuit Judge:

This appeal was filed by Klamath-Lake Pharmaceutical Association (Association), the assignee of the antitrust claims of a group of pharmacies that service the Klamath Falls, Oregon area. Association's assignors have been losing business to a local nonprofit health care provider, Klamath Medical Service Bureau (Provider), ever since it began to offer prescription drugs in kind under its group health insurance policies. Association in 1978 sued Provider and Klamath Bureau Pharmacy, Inc. (Pharmacy), a local for profit pharmacy Provider once used to distribute prescription drugs under its pharmacy benefit. The district court, after allowing Association to conduct extensive discovery, could not find any wrongdoing and dismissed the lawsuit in a series of partial summary judgments. For the reasons stated below, we affirm.

I.

STATEMENT OF FACTS

At the time Association brought this suit, Provider offered two different group policies.¹ Both had major medical [**2] coverage and a package of basic benefits, but only one included a pharmacy benefit. This supplemental benefit, available for a higher [*1280] policy premium, entitled insureds to purchase prescription drugs for a small processing fee. The nominal "copay" amount was set at one or two dollars per prescription. Provider's success in marketing its pharmacy benefit led to this lawsuit.

Until July 1, 1976, Provider supplied pharmacy benefits exclusively through Pharmacy. Provider at one point considered expanding its distribution network. Its board of directors voted at their August 1974 meeting to invite local pharmacies to participate if they would accept reimbursement for each prescription at pharmacy cost plus ten percent, minus a copay amount of one dollar. The pharmacies' response, outlined in a letter from pharmacist Robert Gion, was to insist on receiving average [**3] wholesale cost plus \$2.50 per prescription, minus the copay amount. This rate, which was modeled after Blue Cross' reimbursement policies, would have increased Provider's direct cost for most prescriptions. An expanded program would also have been more expensive to operate. Ted Dicken, Provider's executive director, estimated to the board of directors that increasing the number of participating pharmacies would result in a three-percent increase in administrative costs. The board referred the question to its consumer advisory committee, which recommended that the program not be expanded on these terms. The board agreed, deciding, in Dicken's words, that "at this time it would not be feasible to open the K.M.S.B. Prescriptive drug benefit to other prescription outlets." The increase in premiums and in administrative complexity outweighed the benefit of any added convenience to subscribers.

In 1976 Provider decided to distribute drugs directly. It bought out Pharmacy, dissolved it, and set up a pharmacy on its own premises. Thus, as of July 1, 1976, insureds with few exceptions had to get their prescriptions filled by Provider if they used the pharmacy benefit.

Competing pharmacies [**4] were not entirely cut off from business with the insureds of Provider. Groups without the pharmacy benefit had no incentive to shop at Pharmacy while it supplied drugs for Provider because it charged them full market rates. Furthermore, once Provider began to fill prescriptions, it limited sales to insureds using the pharmacy benefit. This restriction forced other policyholders, and all uninsured customers, to use the community pharmacies. The 10,000 policyholders without the pharmacy benefit were still entitled to reimbursement under their major medical provision for 80% of their medical expenses, including prescription drugs, subject to a fifty or hundred dollar deductible. Their purchases constituted a substantial amount of business of the pharmacies. Even policyholders with the pharmacy benefit were free to patronize other pharmacies after hours or during holidays. Although these purchases were made at full cost, reimbursement of 100% of this cost less the copay amount was provided under the terms of the pharmacy benefit. This privilege was important because Provider's pharmacy was only open until 6:00 P.M. on weekdays and 3:00 P.M. on Saturday. Policyholders traveling [**5] outside of the

¹ Provider's other two policies, one an individual policy and the other a group Medicare supplement, are not at issue in this lawsuit.

Klamath Falls area, and those living in outlying communities, could also use local pharmacies and be repaid under the terms of the pharmacy benefit.

Nonetheless, Provider's prescription drug program cut substantially into the business of local pharmacies. Provider's prescriptions more than doubled between 1974 and 1978, from 33,440 to 77,541; several local pharmacies went out of business and the sales of others dropped rapidly. In response seven pharmacies assigned their antitrust claims to Association, which then brought this lawsuit.

II.

THE ISSUES ON APPEAL

Association alleged three causes of action in its complaint. First, it accused Pharmacy and Provider of receiving prescription drugs on terms unavailable to its members, in violation of the Robinson-Patman Act, [15 U.S.C. § 13\(f\)](#). Second, it claimed that Pharmacy and Provider conspired with affiliated [*1281] affiliated physicians, public and private signatories of the group contracts, and labor unions in an attempt to monopolize and restrain trade by compelling insureds to boycott Association's members, in violation of [sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1-2](#). Third, it alleged that [**6] the insurance contracts tied the health care policy to the prescription drug benefit, in violation of [section 3](#) of the Clayton Act, [15 U.S.C. § 14](#).

Provider and Pharmacy answered with the affirmative defense of exemption from the antitrust laws under the McCarran-Ferguson Act, [15 U.S.C. §§ 1011-1015](#). Association sought summary judgment on this issue in March, 1979. The district court agreed to strike the defense as it affected the agreement between Provider and Pharmacy.
2

In October 1979 Provider filed for partial summary judgment asserting that the [**7] McCarran-Ferguson Act shielded it from both the charges of tying and those parts of the boycott claim that rested on the health insurance contract between Provider and its insureds. The court agreed.

This left for resolution only the Robinson-Patman charge and the boycott claim as it applied to Provider's agreement with Pharmacy. Provider and Pharmacy moved for summary judgment on these remaining claims in August 1981. They sought, in the alternative, dismissal of the action under [Fed.R.Civ.P. 17\(a\)](#) because Association was not a real party in interest. They also argued that the assignments did not convey all of the assignors' claims. The district court granted the motion to dismiss. Because of the likelihood of appeal, it went on to reach the merits of the remaining issues. It held for the defendants on these as well. The Robinson-Patman claim fell because Association had turned up only one minor price variation in the thousands of invoices it reviewed during discovery. The court then summarily denied the residual boycott and tying claims.³ Association appealed.

[**8] The issues that must be considered by this court are as follows. First is the validity of the assignments. If Association cannot act as assignee, this appeal must be dismissed. Next are the major substantive problems: the merits of the Robinson-Patman claim, the affirmative defense based on the McCarran-Ferguson Act to the tying and boycott claims, and the merits of these two claims. Last is Association's argument that the district court should have allowed it to amend or supplement its claim. After considering briefly the use of summary judgment in antitrust cases, we will address these issues in order.

III.

² This motion was granted on stipulation, with Pharmacy and Provider free to renew the defense for the provider agreement if the Ninth Circuit later found a claim of exemption available in the aftermath of [Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 99 S. Ct. 1067, 59 L. Ed. 2d 261 \(1979\)](#). Such a defense has not become available. See [Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 647 \(9th Cir.1981\)](#).

³ As we read the district court's earlier amended opinion, it had in fact already disposed of the tying claim in full. The meaning of its amended opinion is discussed in notes 13 & 15 *infra*.

SUMMARY JUDGMENT AS APPLIED TO ANTITRUST CASES

HN1[] Summary judgment, dependent as it is on the absence of a "genuine issue as to any material fact," requires an assessment of evidence regarding issues of material fact in the light most favorable to the party opposing the motion to grant such judgment. *ILGW v. Sureck*, 681 F.2d 624, 628-29 (9th Cir. 1982); *Heiniger v. City of Phoenix*, 625 F.2d 842, 843 (9th Cir. 1980). Summary judgment traditionally has been used sparingly in antitrust litigation because of the factual intricacy of many antitrust issues. See *Poller* [^{**91}] v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962). At the same time, however, antitrust litigation, if made immune from summary judgment, could become an anticompetitive activity itself. For example, a losing competitor could employ an antitrust suit to harass its victorious [^{**1282}] opponents. So employed the antitrust laws would impose unwarranted economic costs on the marketplace. Thus, to keep these costs in check we should use summary dispositions to dispose of antitrust complaints that lack any significant supporting evidence. See, e.g., *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289-90, 88 S. Ct. 1575, 1592-93, 20 L. Ed. 2d 569 (1968); *Betaseed, Inc. v. U & I, Inc.*, 681 F.2d 1203, 1207-08 (9th Cir. 1982). Our analysis in this case is guided by these principles.

IV.

THE VALIDITY OF THE ASSIGNMENT TO ASSOCIATION

The district court found that Association was not a real party in interest as required by *Rule 17(a)*, but was merely a nominal party which should not have been allowed to prosecute this action. It reached this result because, in its view, the assignors "retained their interest in the [^{**10}] outcome of the litigation." Association's request for treble damages for the assignors was taken as an indication that no true transfer of claims had occurred.

The district court **HN2**[] erred. An assignment of claims does not prevent the assignors from receiving the benefits of the litigation. *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), cert. denied, 425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204 (1976). Thus, in *Sunkist Growers* we upheld an award of damages to fresh fruit growers in litigation brought on assignment by their trade association. See *id. at 1200*. The consideration that moved to Association in this case consists of the transfer to it of authority to bring this suit and to allocate the proceeds. In exchange Association undertook to bring the suit. **HN3**[] It is not necessary that the assignors forfeit all interest in possible damages before consolidating their claims in a more efficient class suit.⁴ *Rule 17(a)* is **HN4**[] designed to ensure that lawsuits are brought in the name of the party possessing the substantive right at issue. See 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1541, at [^{**11}] 635-36 (1971 & Supp. 1982). It is not to prevent a consolidation of individual claims such as occurred here.

[**12] The district court also found the transfer of Clayton and Robinson-Patman Act claims ineffective because of a lack of specificity in the assignment. Whether this is correct presents a question of law reviewable de novo by this

⁴The cases cited by Provider to challenge the assignment involve defects in the party bringing suit that are not present in this case. In *Archie v. Shell Oil Co.*, 110 F. Supp. 542 (E.D.La. 1953), aff'd per curiam, 210 F.2d 653 (5th Cir.), cert. denied, 348 U.S. 843, 75 S. Ct. 64, 99 L. Ed. 665 (1954), the nominal plaintiff was an unpaid yardboy for an attorney who had given him a subsequently invalidated interest in real property via a third party. The district court dismissed the "strange document," which gave the nominal plaintiff the third party's power of attorney over the interest in land and, as consideration, conveyed the interest itself, as void under Louisiana law. *Id. at 544*. *California League of Indep. Ins. Producers v. Aetna Casualty & Sur. Co.*, 175 F. Supp. 857 (N.D.Cal. 1959), did note in dictum that a suit brought by an association of insurance agents would have to be dismissed if the association were a "mere agent for collection," but it added that the association could maintain the suit as an "assignee for collection." *Id. at 861*. *District Distrib. Inc. v. Heublein, Inc.*, 1971 Trade Cases (CCH) P. 73,695, at 90,901 (D.D.C. 1971), involved an ultra vires assignment that was also void for lack of consideration and champerty. In *Cordova v. Bache & Co.*, 1971 Trade Cases (CCH) P. 73,406, at 89,651 (S.D.N.Y. 1970), the president of an association of employees in the securities industry was denied standing to maintain an action in his own name without an assignment from the employees. In the absence of similar defects, there is no need to prevent Association from bringing this lawsuit. The rule that an assignor can prosecute its case even if it must later account to the assignees for the proceeds is a seasoned part of Oregon law. See *Hibernia Sec. Co. v. United Mfg. Co.*, 59 P.2d 384, 388, 154 Or. 369, 379 (1936).

court. *Maykuth v. Adolph Coors Co.*, 690 F.2d 689, 693 (9th Cir. 1982); *Martin v. United States*, 649 F.2d 701, 703 (9th Cir. 1981); *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 626 F.2d 95, 98 (9th Cir. 1980), cert. denied, 449 U.S. 1079, 101 S. Ct. 861, 66 L. Ed. 2d 802 (1981). Because there are no disputed factual circumstances, this issue is also ripe for summary disposition.

[*1283] We again find that the district court erred. Our task is to enforce the intent of the parties. *Sunkist Growers*, 526 F.2d at 1208. Each assignment contained three descriptions of the claims transferred. An initial paragraph described the transfer as covering all claims arising "by reason of any violation of the Sherman Antitrust Act, as amended, 15 U.S.C. § 1, et seq." Association for its part promised to seek relief "under the federal antitrust laws." The paragraph following this phrase then waived the assignors' rights "under [*13] the antitrust laws to proceed as an individual named plaintiff." The district court held that the first description should be given controlling weight and be read to limit the assignment to Sherman Act claims, leaving the pharmacies free to relitigate claims under the Clayton and Robinson-Patman Acts.

We do not find this a plausible interpretation. The contract must be read as a whole. The common-sense meaning of the transfer under the Sherman Act, "as amended," when read in conjunction with Association's broad promise to pursue relief "under the federal antitrust laws" and the assignors' equally broad waiver of their rights to proceed "under the antitrust laws," is that it conveys *all* antitrust claims against Provider and Pharmacy. This is what the parties to the assignment intended. Provider has not suggested any reason for them to have intended otherwise. Association's assignors, whose interests do not diverge, understandably sought to secure more vigorous prosecution of a common opponent, and to increase the likelihood of recovery for related injuries. The added expense of separate actions on non-Sherman Act claims makes Provider's theory of reservation for later prosecution [*14] implausible. Furthermore, had the assignors sought to save their claims for later use, they would not have employed the language in question. The assignments are not exemplars suitable to guide future litigants; they are, however, adequate to effectuate a full assignment of all claims. We therefore proceed to Association's substantive claims.

V.

PRICE DISCRIMINATION IN PROVIDER'S PURCHASE OF DRUGS FROM LEDERLE

The district court found no merit in Association's complaint of price discrimination. Provider produced over 7,000 documents that covered its purchases from 1974 until mid-1979. Among these Association turned up only one instance of alleged discrimination. Provider purchased drugs from Lederle Laboratories on a ten percent volume discount during 1978 and early 1979. The discount was available to any buyer with purchases over \$300. Although its members did not remember having received the offer, Association presented no other evidence of unavailability. This is not enough.

The district court was correct in holding that there was no violation. *HN5* Any difference in the prices of similar goods is, of course, price discrimination. *FTC v. Anheuser-Busch, Inc.* [*15], 363 U.S. 536, 549-51, 80 S. Ct. 1267, 1274-75, 4 L. Ed. 2d 1385 (1960); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1040 (9th Cir. 1981), cert. denied, 459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61, 103 S. Ct. 58 (1982). To be forbidden, however, the discrimination must be *illegal*. A buyer who receives a price differential cannot be liable under the Robinson-Patman Act unless the seller is in violation of the Act as well. *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 75-78, 99 S. Ct. 925, 930-931, 59 L. Ed. 2d 153 (1979). Association did not prove any violation by Lederle. It offered no proof that Lederle's discount injured competition substantially. It therefore failed to make the showing required of it. See *Inglis*, 668 F.2d at 1039-40; *Janich Brothers v. American Distilling Co.*, 570 F.2d 848, 854-55 (9th Cir. 1977), cert. denied, 439 U.S. 829, 99 S. Ct. 103, 58 L. Ed. 2d 122 (1978); *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 806-07 (9th Cir. 1969).

Nor did Association attempt to show that Provider knowingly induced or received Lederle's discriminatory offer. *15 U.S.C. § 13(f)*; *Automatic* [*16] *Canteen Co. v. FTC*, [*1284] 346 U.S. 61, 73 S. Ct. 1017, 97 L. Ed. 1454 (1953); *J.R. Simplot*, 418 F.2d at 803-06. Construing the evidence in the light most favorable to Association, we hold that there was no Robinson-Patman violation.

Association argues that it should have been allowed additional discovery that would enable it to examine Provider's records for recent years. Provider produced documentation for its purchases through mid-1979. Some two years elapsed before the district court issued its final opinion in October 1981. In September 1981 Association filed a request to extend discovery to cover this period, complaining that "since mid-1979 Provider has engaged in a major expansion of its activities, and said expansion is highly relevant to the . . . issues raised by the pending summary judgment motion."

The district court denied the request. In doing so it acted well within its discretion. Association does not indicate what it might expect to discover. At some point, the possibility that additional investigation might turn up a real lead becomes less important than the injustice to a defendant against whom no significant evidence has been produced. We [**17] have reached that point in this case. The district court did not abuse its discretion. See [Portland Retail Druggists Association \(PRDA\) v. Kaiser Foundation Health Plan, 662 F.2d 641, 646 \(9th Cir.1981\)](#); [Program Engineering, Inc. v. Triangle Publications, Inc., 634 F.2d 1188, 1193 \(9th Cir.1980\)](#).

VI.

THE TYING CLAIM

A. As Between The Basic Health Care Contract And The Pharmacy Benefit

We now turn to Association's allegation of tying. Association alleged a tie between "the basic prepaid health care contract, and the optional prescription drug benefit that can be obtained only if the subscriber has the basic plan." The district court rejected Association's argument because it found that both the *basic health care contract* and the *optional drug benefit contract* came with the McCarran-Ferguson exemption. We agree.

1. The business of insurance

The antitrust exemption for the "business of insurance" arose in response to the Supreme Court's decision in [United States v. South-Eastern Underwriters Association, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 \(1944\)](#), which overruled prior holdings placing insurance outside the reach of the *commerce clause*. [**18] Congress, wishing to protect the states' traditional role in the regulation of insurance and to avoid endangering the cooperative ratemaking that had played a major role in the industry's development, see [Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 217-24, 99 S. Ct. 1067, 1076-79, 59 L. Ed. 2d 261 \(1979\)](#), quickly passed the McCarran-Ferguson Act. The Act removed the "business of insurance" from antitrust enforcement if (1) it was subject to state regulation and (2) did not amount to a boycott under the Sherman Act.⁵

[**19] The Supreme Court in *Royal Drug* excluded health insurers' agreements with third party providers from the business of insurance. Blue Shield, the defendant in *Royal Drug*, invoked the insurance exemption when a group of pharmacists challenged the administration of the pharmacy benefit in Blue Shield's health insurance policy. Blue Shield's benefit, although similar to Provider's in many respects, did not supply drugs directly to its insureds. Independent pharmacies could participate in the plan if they accepted Blue Shield's reimbursement schedule. Most pharmacies [*1285] chose to participate and signed a provider agreement with Blue Shield.⁶

⁵ [Section 2\(b\), 15 U.S.C. § 1012\(b\)](#), provides in part that [HN6↑](#) "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." [Section 3\(b\), 15 U.S.C. § 1013\(b\)](#), adds the qualification that "nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

⁶ Both nonparticipating and participating pharmacies brought the antitrust suit against Blue Shield. The headnotes to the Supreme Court opinion and that of the Fifth Circuit identify the plaintiffs as nonparticipating pharmacists. [440 U.S. at 205, 99 S. Ct. at 1070](#); 556 F.2d at 1375. In fact, half of the eighteen plaintiffs participated in Blue Shield's program, see [Royal Drug Co. v. Group Life & Health Ins. Co., 415 F. Supp. 343, 347 \(W.D.Tex.1976\)](#), rev'd, [556 F.2d 1375 \(5th Cir.1977\)](#), aff'd, [440 U.S. 205, 99](#)

[**20] The question before the Supreme Court was whether the exemption covered the agreements with third party providers. The Court held that it did not; provider agreements between health care insurers and participating pharmacies were not part of the business of insurance. Such agreements were subject to normal antitrust scrutiny.

HN7 [↑] The "underwriting or spreading of risk" was held to be an "indispensable characteristic of insurance." [*Id. at 212, 99 S. Ct. at 1073*](#). Cost-cutting efforts pursued through such arrangements as provider agreements, however, were no different than the acts of "any enterprise with the responsibility to minimize costs and maximize profits." [*Id. at 217, 99 S. Ct. at 1076*](#). Such business activities affected only the method of payment -- not the spreading of risk. The provider agreements were further distinguishable from the business of insurance because they were not part of the contract between the insurer and its insureds and because they involved the insurer's relationship with entities outside of the insurance industry. [*Id. at 215-17, 231-32, 99 S. Ct. at 1075-76, 1083*](#).

The Court applied *Royal Drug* in [*Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 \(1982\)*](#). Pireno, a New York chiropractor, challenged an insurer's practice of conditioning reimbursement of unusually high chiropractic fees on the decisions of a peer review committee staffed by the New York State Chiropractic Association.⁷ The Court tested the referral policy under three requirements drawn from *Royal Drug*: (1) whether the practice transferred or spread a policyholder's risk; (2) whether it lay at the heart of the relationship between insurer and insured; and (3) whether it was limited to entities within the insurance industry. [*Id. 102 S. Ct. at 3009*](#). It held that the referral practice did not transfer risk; it merely reduced costs. The insurance policy transferred risk and was the indispensable component of insurance. Although the policy defined the burden transferred as the cost of "necessary" treatments and "reasonable" charges, standards apparently applied in practice by the chiropractors' committee, this did not make the committee's involvement the business of insurance. This involvement was "logically and temporally unconnected to the transfer of risk accomplished by ULL's insurance policies." [**22] [*Id.*](#)⁸

[**23] [*1286] The Court also held that the insurer's relationship with the peer review committee failed *Royal Drug*'s second and third requirements. The peer review arrangement was beyond the primary relationship between insurer and insured. [*Id. at 3009-10*](#). And the peer review board was not an "entity" in the insurance industry. Its assistance in regulating fees was but cost-cutting activity. [*Id. at 3010-11*](#).

2. The business of insurance exemption and tying between the basic health care contract and the pharmacy benefit

Association's tying claim, as already noted, strikes at the health care contract and the pharmacy benefit appended to it. *Royal Drug* requires that we consider the possibility that the health insurance contract here involved, even when shorn of a pharmacy benefit contract, does not fit the insurance exemption. [*440 U.S. at 225-30*](#) & n. 37, [*99 S. Ct. 1067, 59 L. Ed. 2d 261 \(1979\)*](#).

[*S. Ct. 1067, 59 L. Ed. 2d 261 \(1979\)*](#). Their role in the case may have resulted more from a desire to hedge their bets than to correct an antitrust violation.

⁷ The insurer, Union Labor Life Insurance Company (ULL), would reimburse only charges it decided were reasonable and necessary, a determination in which it deferred to the committee. Pireno had once sought review of his fees voluntarily, because he believed that going directly to peer review would permit him to avoid a cumbersome substantiation process. [*Pireno v. New York State Chiropractic Ass'n, 650 F.2d 387, 389 n.2 \(2d Cir. 1981\)*](#), aff'd sub nom. [*Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 \(1982\)*](#). His enthusiasm for the process waned when ULL began submitting his claims independently and the committee began rejecting them. [*Id.*](#)

⁸ The Court left the contours of its distinction unclear. It explained that the decision to honor a claim rested "entirely" with ULL. [*Pireno, 102 S. Ct. at 3010*](#). Under this analysis, the peer review committee was only an "aid" in making this decision. It did not affect the policyholder directly because his only concern was "whether the claim is paid, not why it is paid." [*Id.*](#) (emphasis in original). But if Pireno was correct that ULL always followed the committee's decisions -- an allegation the Court was to weigh most favorably to Pireno when considering ULL's motion for summary judgment -- then ULL's decision "whether" to pay chiropractors would turn exclusively on the review board's actions. The questions "whether" and "why" a claim was paid would both rest with the chiropractors' association. Compare [*id. 102 S. Ct. at 3011 n. 8*](#) (peer review merely ancillary to claims adjustment because non-binding, even when ULL acted on committee's advice).

Ct. at 1080-82 & n. 37. We have thus far skirted the issue in other situations. See *Hahn v. Oregon Physicians Service*, 689 F.2d 840, 843 n. 2 (9th Cir. 1982); *Portland Retail Druggists Association v. Kaiser Foundation Health Plan*, 662 F.2d 641, 647 (9th Cir. 1981); see also *St. Bernard Hospital v. Hospital Service Association*, 618 F.2d 1140, 1144-45 & nn. 3-5 (5th Cir. 1980). We cannot do this here because Provider argues that the exemption attached to its health insurance policy and also shielded the alleged tying agreement.

We hold that it does. Our decision turns on the Supreme Court's reasoning in *Royal Drug*. The insurer-insured agreement embodied in the basic health care contract and its supplemental pharmacy benefit settles the distribution of the risk that insureds will need medical goods and services, including prescription drugs. It defines the relationship between insurer and insured. And it is limited to these two traditional actors in the insurance industry.

The Court in *Royal Drug* did observe that health insurance was not a common form of insurance in 1945, the year Congress passed the McCarran-Ferguson Act. 440 U.S. at 225-30, 99 S. Ct. at 1080-82.⁹ It did not, however, exclude the business of health insurance from the exemption. All it said was, "This is not to say that the contracts offered by Blue Shield to its policyholders, as distinguished from its provider agreements with participating pharmacies, may not be the 'business of insurance' [**25] within the meaning of the Act." *Id. at 230 n. 37, 99 S. Ct. at 1082 n. 37.*

We do not believe that the Court intended to remove the business of health insurance from the McCarran-Ferguson exemption. Had it so intended its detailed analysis of the limits of the insurance exemption in *Royal Drug* would have been unnecessary. Nor does *Pireno* suggest otherwise. There both the majority and the dissenters discussed the health care policies without once suggesting that the business of health insurance was not included in the business of insurance. Although the insurer was a traditional insurer, not, as in this case, a health care provider, this should not be determinative. It is the business of insurance, not merely the business [**26] of traditional insurers, that activates the exemption. See *id. at 217, 99 S. Ct. at 1076, quoted in Pireno, 102 S. Ct. at 3008, 3010.*

Isolation of risk distribution as the primary characteristic of the business of insurance also weighs against limiting that business to risks being shifted by traditional insurers in 1945. It is the actuarial uncertainty inherent in projecting risks and the insurance industry's corresponding need for cooperation that makes its exemption from the antitrust laws appropriate. See *Royal Drug, 440 U.S. at 221-22, 99 S. Ct. at 1078*. Health insurance also has these characteristics. The business of insurance, within the [*1287] meaning of the McCarran-Ferguson exemption, should not be closed to policies that shift risks not ordinarily so shifted in 1945. Thus, Provider's policies with its insureds, insofar as they shift the risks of medical costs, including pharmacy costs, fully qualify as the business of insurance.

3. The state regulation requirement

Having settled that Provider's policies, insofar as they shift the risks of medical and pharmacy costs, partake of the business of insurance, we must next determine whether these [**27] policies were subject to state regulation. 15 U.S.C. § 1012(b). We hold that they were. Oregon unquestionably regulated health insurance policies. Specific regulations for health care service contractors were included in the Insurance Code, Or.Rev.Stat. §§ 750.005-340 (1981), as were guidelines for group health insurance, *id.* §§ 743.522-558. More generally, the State authorized the Insurance Commissioner to issue regulations banning "any unfair or deceptive act or practice," *id.* § 746.240, and directed insurers to refrain from "anything which is detrimental to free competition in the business or injurious to the insuring public," *id.* § 746.160(3). It specifically prohibited abuses like rate control, *id.* § 746.160(1), and those tying practices that it found undesirable, see *id.* § 746.130 (prohibiting insurers from tying sale of property or services to insurance without a separate charge); *id.* § 746.191 (prohibiting tying of insurance to sale of property or

⁹The Court's attempt to demonstrate that the McCarran-Ferguson Congress did not consider health service plans insurance policies drew a detailed response from the four dissenters. 440 U.S. at 233, 99 S. Ct. at 1084 (Brennan, J., joined by Burger, C.J., and Marshall & Powell, JJ.).

real estate). Furthermore, insurers were subject to state antitrust regulation to the extent free of state insurance regulation. *Id.* § 646.740(4).

This meets the McCarran-Ferguson requirement [**28] that the state regulate the challenged activity. See *Addrisi v. Equitable Life Assurance Society of the United States*, 503 F.2d 725, 727-28 (9th Cir. 1974), cert. denied, 420 U.S. 929, 95 S. Ct. 1129, 43 L. Ed. 2d 400 (1975).¹⁰

[**29] 4. *The boycott exclusion*

The shelter of the exemption does not extend to practices amounting to a boycott under [15 U.S.C. § 1013\(b\)](#). This requirement, however, does not stand in the way of an exemption for Provider's policy. The definition of a boycott for purposes of the McCarran-Ferguson exemption is set forth in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978). *St. Paul* rejected prior definitions that restricted the scope of the term to boycotts among insurers and agents, see, e.g., *Addrisi*, 503 F.2d at 728-29. The Court held that the boycott exception should take its broad Sherman Act meaning. Thus, [HN9](#)¹¹ boycotts were not merely limited "to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group," but extended to refusals to deal with customers of some or all of those engaged in the boycott. [438 U.S. at 552, 98 S. Ct. at 2935](#).

[*1288] To foreclose an exemption for Provider's health insurance policies, however, Association had to prove that the policies constituted an "agreement to boycott, coerce, or intimidate." This it has not [**30] done. Association asserts that the conspirators induced policyholders to boycott the local pharmacies by the "effective economic compulsion" derived from its pharmacy benefits. It is true that Provider offered an effective economic inducement for customers to buy drugs from it. And it is undisputed that policyholders who had chosen the pharmacy benefit had to patronize Pharmacy and, later, Provider's on-premises pharmacy to use the benefit.¹¹ Reimbursement for after-hours and emergency prescriptions purchased elsewhere probably did little to diminish the appeal of Provider's pharmacy benefit. But this does not establish that the health insurance policies implemented a boycott. Insureds remained free to purchase drugs from Association's members if they chose to do so. Provider offered to the public an attractive package which sold well to the detriment of Association's members. The package is part of the many changes affecting the delivery of health care in our time. We are not prepared to hold that the package

¹⁰ [HN8](#)¹² Unless the practice amounts to a boycott, the states are free to regulate it or choose not to regulate. They do not have to expressly authorize a specific activity, or proscribe it, for the exemption to apply. *Addrisi*, 503 F.2d at 728. It is enough that a detailed overall scheme of regulation exists. *Id.*; see, e.g., *Freier v. New York Life Ins. Co.*, 679 F.2d 780, 782 (9th Cir. 1982). Our opinion in *United States v. Crocker Nat'l Corp.*, 656 F.2d 428 (9th Cir. 1981), cert. granted sub nom *BankAmerica Corp. v. United States*, 456 U.S. 1005, 102 S. Ct. 2294, 73 L. Ed. 2d 1299 (1982), did not narrow this requirement. *Crocker* indicated only that regulation of interlocking directorates among insurance companies would not be construed to protect interlocking directorates between insurance companies and banks. We did state that the "most obvious reason for rejecting a claim of immunity is the absence of any state law regulating the challenged activity." *Id. at 452*. It is wrong to read this, as did the Court of Appeals for the District of Columbia in *Proctor v. State Farm Mut. Auto. Ins. Co.*, 218 U.S. App. D.C. 289, 675 F.2d 308, 317 n. 17 (D.C. Cir.), cert. denied, 459 U.S. 839, 103 S. Ct. 86, 74 L. Ed. 2d 81 (1982), to require that a regulation specifically affect the challenged practice for it to be exempt. *Crocker* only applies in the absence of any general scheme of regulation governing insureds' corporate interlocks with banks. We distinguished cases where, as here, a general system of regulation might imply an affirmative decision to allow the behavior not specifically prohibited. [656 F.2d at 453 n. 88](#). Thus *Crocker* did not narrow the general language in *Addrisi*. See *id.*

¹¹ Provider claimed that these insureds could also buy prescriptions under their major medical plan. For those making numerous purchases of low-priced drugs, it could be cheaper to pay 20% of drug charges and the deductible, as the major medical required, rather than the copay charge of one or two dollars for every purchase under the pharmacy benefit. Association reads Provider's policy to prohibit those with the pharmacy benefit from getting prescription reimbursement under any other provision. This was a major issue throughout this litigation. Although we find Provider's reading of its contract fully credible, we are unwilling to reject Association's further argument that the deductible amount was a sufficiently effective deterrent to prevent the major medical policy from being fully substitutable for the pharmacy benefit. As we find no merit in Association's claims, our decision does not turn on the question whether the major medical provisions further weakened Association's charges that the pharmacy benefit created an "effective boycott" of its members.

should be banned from the marketplace by the antitrust laws. Only such a holding would yield the result the plaintiff seeks.

[**31] Such a holding would be particularly inappropriate in this case. Provider not only did not exclude Association's members from competing for its policyholders; it also gave them a chance to join the business. Their response was to offer to participate only under terms more favorable to them. When this was rejected they chose to sell less at a higher price rather than more at a lower price. They are entitled to make that choice. They are not entitled to employ the antitrust laws to obtain the market position that will produce both greater sales and higher prices.

Thus, we agree with the district court that the health care policy between Provider and its insureds constituted part of the business of insurance; that Provider was regulated by the State of Oregon; and that its pharmacy benefit did not embody a boycott of Association's members. The tying claim, resting as it does on the agreements in the policy, accordingly must fail.¹²

[32] B. As Between The Pharmacy Benefit And The Restrictions On The Sources From Which Drugs Can Be Purchased**

Association had two tying theories. The first, as already demonstrated, alleged a tie between Provider's standard health policy and the pharmacy benefit addition. The second is more nebulous. Association's initial complaint read as follows:

A Provider subscriber desiring a prescriptive drug benefit was and is compelled to purchase the benefit as part of a Provider health care policy that "ties" said benefit to purchase of prescription drugs under the policy to a Provider-designated [**1289] pharmacy and forbids the subscriber, at the risk of losing the benefit, from obtaining prescription drugs under the policy from any competitor of Provider-designated pharmacy.

The district court took the mention of the designated pharmacy to raise, in addition to the tie in the insurance policy, a tie based on Provider's agreement with Pharmacy. The court summarily rejected the claim.¹³ We agree. The provider arrangement did not tie purchase of one product to purchase of another.

[**33] However, Association may also seek to allege a tie between the pharmacy benefit and its restrictions on the sources from which drugs may be purchased. As Association stated in its Amended Motion for Partial Summary Judgment, "The two products are an insurance benefit covering prescription drugs and the form in which that benefit is to be provided."

Interpreting Association's claim to rest on a tie between the pharmacy benefit and the drug purchase restrictions does not change the outcome. This "tying agreement," linking the pharmacy benefit set forth in the policy and the requirement that drugs be purchased from Provider or Pharmacy, fails for the fundamental reason that it does not implicate two different products.

HN10 To prevail on a tying claim, whether under section 1 of the Sherman Act, 15 U.S.C. § 1, or section 3 of the Clayton Act, 15 U.S.C. § 14, a plaintiff must first identify a tie between separate products. Hirsh v. Martindale-

¹² Association's argument that Provider's non-exempt involvement with Pharmacy barred it from receiving the protection of the exemption for its other activities is frivolous. Were that the case, every insurer with a provider arrangement (as in *Royal Drug*) or consultative relationship with third parties (as in *Pireno*) would forfeit all of its exemption from the antitrust laws. The business of noninsurance would overwhelm the business of insurance. There is no support for this position in law or logic.

¹³ The court first granted partial summary judgment under the McCarran-Ferguson Act for Provider on the tying claim only "for those violations which are based on a contract between Provider and its insureds." It left out any claim based on the contract between Provider and Pharmacy. It then amended its opinion, apparently to include the full tying claim in its disposition. See *supra* note 15. Yet in its final opinion the court went to the merits to decide that the provider agreement was not a tying agreement. As we find no support for a tying claim predicated on the provider agreement, we need not decide whether the court intended to dispose of it under the McCarran-Ferguson Act.

Hubell, Inc., 674 F.2d 1343, 1346-47 (9th Cir.), cert. denied, 459 U.S. 973, 103 S. Ct. 305, 74 L. Ed. 2d 285 (1982); Hamro v. Shell Oil Co., 674 F.2d 784, 787 (9th Cir. 1982); Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1352 (9th Cir. 1982). Separateness is determined in part by whether the products are normally sold or used as a unit and whether their joint sale effects savings beyond those of combined marketing. Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48 (9th Cir. 1971), cert. denied, 405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972) (describing the "function of the aggregate" test). The critical factor is the extent to which a producer's offerings are in response to independently structured consumer demand. Products that function together and are sold in combination may still be "separate" if consumers would prefer to buy them individually at the price necessary to market them separately. HN11¹⁴ Tying denotes illegal coercion: "Rules governing tying arrangements are designed to strike, not at the mere coupling of physically separable objects, but rather at the use of a dominant desired product to compel the purchase of a second, distinct commodity." *Id. at 47* (citing Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614, 73 S. Ct. 872, 883, 97 L. Ed. 1277 (1953)). Whether a producer's combined products should be considered as separate can be decided only by looking [**35] at consumer behavior. It is the relationship of the producer's selling decision to market demand, not the physical characteristics of the products alone, that determines the existence of legally separable products.¹⁴

[**36] [*1290] There was no separation between the pharmacy benefit and the restrictions on the sources from which drugs can be purchased on these principles. Insureds, the consumers, certainly did not consider these as two separate products. In deciding whether to buy the pharmacy benefit, they made just one decision, comparing the expected cost of the benefit plus copayments for drug purchases against the expected cost of drugs bought at the independent pharmacies. The risk insureds sought to transfer was the risk of high pharmacy bills. The product these consumers sought was a means by which they could satisfy their drug needs on favorable terms. Their purchase of drugs in the required manner was the consummation of the pharmacy benefit, not an unwanted and unnecessary product tied to the desired product.

To treat the pharmacy benefit as separate from the drug purchase provisions makes no more sense than treating a contract granting an option with respect to an item as a product distinct from that consisting of the terms on which the option is to be exercised. The entire option is one product.

This conclusion is not at odds with the Supreme Court's functional division of [**37] Provider's role into risk distribution and cost reduction. Provider performed both functions with one product. It differs not from an offer to perform garden maintenance. To maintain a garden requires many tasks of a different nature. The offer, however, is of a single product.

Nor does the split payment for the benefit, requiring an initial premium and then a copayment with each purchase, indicate two products. Copayment's purpose, whatever it might be, does not split the drug purchase terms of the pharmacy benefit from the pharmacy benefit itself. It functions no differently than would a provision in the offer to perform garden maintenance that required the owner of the garden to supply the fertilizer.

No doubt some insureds would have preferred to receive cash from Provider and then to buy their drugs from Association's members had their prices been comparable to those available under the pharmacy benefit. This

¹⁴ That the product determination hinges on market demand is perhaps clearest in the trademark cases. If consumers seek only the general services of the franchisees, a franchisor cannot tie its trademark to purchase of component goods used in operating franchises. In this "business format" system, consumers "have no reason to associate with the trademark." Baskin-Robbins, 664 F.2d at 1353 (discussing *Chicken Delight*). Because franchisees can satisfy consumer demand by using "commonplace" items and applying the franchisor's general methods, coerced purchase of supplies from the franchisor forces consumers to pay for component products they don't really want. The coerced purchase of supplies thus can only have an anticompetitive motive. *Id.* In a "distributor" franchise, on the other hand, consumers are drawn to the franchise because its trademark indicates the availability of the franchisor's quality component products. "The franchised outlets serve merely as conduits through which the trademarked goods of the franchisor flow to the ultimate consumer." *Id.* To prevent the franchisor from forcing franchises to use only company products would prevent consumers from effecting their market choices. The legality of the franchise arrangement thus turns on the court's perception of its place in consumer demand. See generally Hamro v. Shell Oil Co., 674 F.2d 784, 787-88 (9th Cir. 1982).

contingent preference does not demonstrate the existence of two products. It merely shows that Provider's pharmacy benefit product would have been less appealing had Association members' prices been lower.

In conclusion, we find no support for a second tying [**38] claim. As we stated in *Hirsh*, [HN12](#)[[↑]] "rules governing tying arrangements are designed to strike solely at practices employed to impede competition on the merits." [674 F.2d at 1348](#). Provider did not impede, but rather stimulated, competition within the pharmaceutical market. We therefore proceed to Association's remaining charge.

VII.

THE ALLEGED BOYCOTT TO EXCLUDE ASSOCIATION'S MEMBERS FROM PROVIDER'S BUSINESS

The most favorable interpretation of Association's boycott complaint yields charges of a refusal to deal, an attempt to monopolize, and an exclusive purchasing agreement. The district court, in its amended opinion, dismissed part of this cause of action -- the part that rested on Provider's contract with its insureds -- under the McCarran-Ferguson Act. We have already affirmed the exemption for Provider's health insurance policies. The court later granted summary judgment against Association on the merits of the residual claims [*1291] (based on Provider's contract with Pharmacy).¹⁵ We address these next.

[**39] We find no evidence, even interpreting the record most favorably toward Association, that requires that we reverse the district court's grant of summary judgment to Provider on the merits of the boycott claim. Association treated the health insurance contract as the end product of a wide group of conspirators that included Provider, Pharmacy, affiliated physicians, public body signatories, employer signatories, and labor unions. It alleged that these conspirators, by establishing the pharmacy benefit while refusing to deal with Association's members, sought to drive independent pharmacies from the market.

Association has done little, however, to support its charges. Some evidence of concerted activity directed at the alleged victims of the boycott must be offered for the case to survive summary judgment. The failure to meet this requirement enables us to dispose of Association's claims of a conspiracy between Provider and Pharmacy, on the one hand, and various physicians, public and private signatories of the health plan, and labor unions, on the other. Association has not pursued its charges against any of the latter group. [HN13](#)[[↑]] Although conspiracy sufficient to survive summary [**40] judgment may be inferred from circumstantial evidence, the plaintiff must come forward with "significant probative evidence" that supports its conclusion. [Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.](#), 637 F.2d 1376, 1386 n. 9 (9th Cir.), cert. denied, 454 U.S. 831, 102 S. Ct. 128, 70 L. Ed. 2d 109 (1981); [Blair Foods, Inc. v. Ranchers Cotton Oil](#), 610 F.2d 665, 672 (9th Cir. 1980).

The possibility of a conspiracy between Provider and Pharmacy is no better supported. Whether Pharmacy be viewed as the sole distributor of Provider's products, administering a package of benefits created by the health care provider, or as a supplier of products under contract to Provider, the arrangement constitutes a lawful scheme of vertical distribution. In the aftermath of [Continental T.V., Inc. v. GTE Sylvania, Inc.](#), 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977), [HN14](#)[[↑]] we have established narrow grounds for imputing per se illegality to such restrictions: they must "always or almost always tend to restrict competition and decrease output [and not] 'increase economic efficiency and render markets more, rather than less, competitive.'"¹⁶ [Krehl v. Baskin-Robbins Ice Cream Co.](#), 664 F.2d 1348, 1356 (9th Cir. 1982) (quoting [Broadcast Music, Inc. v. CBS](#), 441 U.S. 1, 19-20, 99 S. Ct. 1551, 1562, 60 L. Ed. 2d 1 (1980)); see, e.g., [A.H. Cox & Co. v. Star Machinery Co.](#), 653 F.2d 1302, 1305 & nn. 3 & 5 (9th Cir. 1981); [Ron Tonkin](#), 637 F.2d at 1381-82, 1385-88. There is no indication that the arrangement

¹⁵ The district court first granted partial summary judgment against Association on the second (boycott) cause of action. It also granted summary judgment on the third (tying) cause of action, but only for violations based on the insurance contract, not those resting on the agreement between Provider and Pharmacy. It amended its opinion to issue full judgment on the third cause of action and only partial summary judgment on the second. Nevertheless, in its final opinion the court decided on the merits those portions of both the second and third causes of action that rested on the agreement between Provider and Pharmacy. Our decision here does not turn on the scope of the McCarran-Ferguson exemption actually granted in the district court's earlier opinion.

between Provider and Pharmacy would "always" have -- or has ever had -- the proscribed effect. Therefore, it does not constitute a per se violation of the Sherman Act.

Association fares no better under rule of reason analysis. [HN15](#) Its burden below was to uncover either anticompetitive intent or specific anticompetitive effects. [A. H. Cox, 653 F.2d at 1306](#). It demonstrated neither. Provider's purpose in structuring the provision of drugs for its policyholders was to meet the terms of its policy at the least cost. Association has not shown that Provider or Pharmacy sought to injure competition in the pharmaceutical market. Provider even considered having Association's members join it; but they showed no interest in handling Provider's business at its prices.

[*1292] There is also no evidence of injury to competition. Association complains [**42] of its members' business losses, but [HN16](#) economic injury to competitors is not a per se violation of the antitrust laws. It is injury to the market, not to individual firms, that is significant. See [A.H. Cox, 653 F.2d at 1307](#); [Ron Tonkin, 637 F.2d at 1388](#); [Kaplan v. Burroughs Corp., 611 F.2d 286, 291 \(9th Cir. 1979\)](#), cert. denied, 447 U.S. 924, 100 S. Ct. 3016, 65 L. Ed. 2d 1116 (1980). A plaintiff must show that the defendant intended to or did reduce the ability of others to compete before it has shown an actionable restraint of trade. See [Knutson v. Daily Review, Inc., 548 F.2d 795, 803 \(9th Cir. 1976\)](#), cert. denied, 433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094 (1977). In an openly competitive market the inefficient fail; in a non-competitive system the efficient are precluded from competing. We cannot say that Association's members have demonstrated that they are the efficient barred from competing rather than the inefficient who have failed. To hold otherwise would require that the Provider-Pharmacy arrangement be treated as illegal per se. This we cannot do. Provider's arrangement with Pharmacy was simply an exercise of its freedom to contract with [**43] whomever it chose in order to sustain itself in the marketplace. [HN17](#) The general freedom of a single business to select its partners has been an established part of [antitrust law](#) since [United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992 \(1919\)](#).¹⁶

[**44] Neither of the other two charges that emerges from a liberal reading of Association's boycott complaint has any validity. There is insufficient evidence of either intent or predatory conduct to support an attempted monopolization claim. See [Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1219 \(9th Cir. 1977\)](#); see generally [William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1027-39 \(9th Cir. 1981\)](#), cert. denied 459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61, 103 S. Ct. 58 (1982). As Association has not proven this charge, we need not decide whether an attempted monopolization claim resting solely on Provider's direct provision of drugs would qualify for McCarran-Ferguson exemption. Finally, as already indicated, we reject Association's argument that Provider's agreement to supply discount drugs to subscribers who would patronize its pharmacy was an illegal purchasing agreement. See [supra at pp. 1287-1288](#). There is no merit to any of the boycott claims.

VIII.

ASSOCIATION'S PROCEDURAL MOTIONS

Association seeks to sustain the flickering life of this lawsuit by attacking the district court's denial of its motions to amend and to supplement [**45] its complaint. The trial court did not abuse its discretion by denying these motions.

Motions to amend, we recognize, are commonly granted. [HN18](#) Although within the trial court's discretion, leave to amend "shall be freely given when justice so requires." [Fed.R.Civ.P. 15\(a\)](#); see [Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 \(1962\)](#); [McCartin v. Norton, 674 F.2d 1317, 1320 \(9th Cir. 1982\)](#);

¹⁶ This freedom extends to the manufacturer who for any lawful reason terminates one distributor or supplier and puts another in its place, even if the terminated businessman is put out of business. See [Chandler Supply Co. v. GAF Corp., 650 F.2d 983, 989 \(9th Cir. 1980\)](#); [Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 619-20 \(9th Cir.\)](#), cert. denied, [447 U.S. 906, 100 S. Ct. 2988, 64 L. Ed. 2d 855 \(1980\)](#); [Bushie v. Stenocord Corp., 460 F.2d 116, 119 \(9th Cir. 1972\)](#); [Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76 \(9th Cir. 1969\)](#), cert. denied, [396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 \(1970\)](#). It easily applies to the case at hand, where Provider did not drop an old associate but merely decided not to initiate contracts with companies that would not deal with it on acceptable terms.

701 F.2d 1276, *1292L 1983 U.S. App. LEXIS 29952, **45

United States v. Webb, 655 F.2d 977, 979 (9th Cir.1981); Howey v. United States, 481 F.2d 1187, 1190 (9th Cir.1973). **HN19**[] We are required to review the exercise of the trial court's discretion to deny a motion to amend strictly. Thus, where the record does not clearly dictate the district court's denial, we have been unwilling to affirm absent written [*1293] findings, Webb, 655 F.2d at 980, and have reversed findings that were merely conclusory, Howey, 481 F.2d at 1190-91.

At the same time, **HN20**[] futile amendments should not be permitted. Foman, 371 U.S. at 182, 83 S. Ct. at 230; Smith v. Commanding Officer, Air Force Accounting, 555 F.2d 234, 235 (9th Cir.1977). In this case, it is clear that Association's motion should be denied for this reason. [**46] The district court rejected the motion because it was untimely, and for "other reasons." The most important "other reason" was futility. Asked the purpose of amendment, Association's attorney could only answer vaguely that it would "bring damages up to the current" and "clarify the point" that Pharmacy was a for profit institution. Association has not used Pharmacy's profit status to support any of its claims. And it does not have compensable damages unless it proves its case. It is clear that the district court believed that amendment on these lines could not affect the outcome of this lawsuit. We agree. We find no reason to overturn its decision.

The judgment of the district court is affirmed.

AFFIRMED.

End of Document

DEAK-PERERA HAWAII, INC. v. DOT

United States District Court for the District of Hawaii

March 7, 1983

CIVIL NO. 82-0334

Reporter

1983 U.S. Dist. LEXIS 18754 *

DEAK-PERERA HAWAII, INC., a Hawaii corporation, Plaintiff, vs. DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII, RYOKICHI HIGASHIONNA, in his official capacity as the Director of the Department of Transportation for the State of Hawaii, OWEN MIYAMOTO, in his official capacity as Chief of the Airport Division of the Department of Transportation of the State of Hawaii, Defendants, and CITICORP (U.S.A.), INC., Intervenor.

Core Terms

airport, immunity, state-action, contracts, sovereign, Sherman Act, anti trust law, instrumentality, political subdivision, supervised, wine, governmental function, Transportation, facilities, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN1[Exemptions & Immunities, Parker State Action Doctrine

To have state-action immunity, the agency must show that (1) it is an agent or instrumentality of the state acting as sovereign and as such is entitled to state-action immunity; or (2) as an independent political subdivision, it meets the criteria of the two-prong analysis: a clearly articulated and affirmatively expressed state policy with adequate review and supervision by the state.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN2[Exemptions & Immunities, Parker State Action Doctrine

When it is not clear that the state is acting as a sovereign, the crucial questions are whether there has been a "clearly articulated and affirmatively expressed" state policy, and if that policy is being "actively supervised" by the state.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

[HN3](#) [down] Exemptions & Immunities, Parker State Action Doctrine

A state, acting as sovereign, is immune from federal antitrust laws unless such laws are overridden by specific national laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Transportation Law > Air & Space Transportation > Airports > Establishment, Maintenance & Operation

Transportation Law > Air & Space Transportation > Airports > General Overview

Transportation Law > Air & Space Transportation > Airports > Governmental Liability

Transportation Law > Air & Space Transportation > Maintenance & Safety

[HN4](#) [down] Exemptions & Immunities, Parker State Action Doctrine

The operations of the state's airports are expressly recognized as "public and governmental functions, exercised for a public purpose, and matters of public necessity."

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Transportation Law > Air & Space Transportation > Airports > Governmental Liability

Transportation Law > Air & Space Transportation > Airports > General Overview

Transportation Law > Air & Space Transportation > Maintenance & Safety

[HN5](#) [down] Exemptions & Immunities, Parker State Action Doctrine

The function of the airport system in Hawaii is viewed as a fundamental government function. As such, actions taken to manage and develop the airport system must initially be viewed as acts of the state in its sovereign capacity for the public good.

Opinion

[*1] AMENDED DECISION

This matter came before the court on cross motion for summary judgment pursuant to [Rule 56 of the Federal Rules of Civil Procedure](#). The arguments were heard on September 1, 1982.

The motions sought to determine the legal issues of whether or not defendants, the State of Hawaii's Department of Transportation, its director Ryokichi Higashionna and Airport Chief Owen Miyamoto (collectively the DOT), were entitled to "state-action immunity" under [Parker v. Brown, 317 U.S. 341 \(1943\)](#), or were entitled to [Eleventh Amendment](#) immunity; or whether plaintiff, Deak-Perera Hawaii, Inc. ("Deak") was entitled to a permanent injunction and judgments as to violations of state and federal antitrust statutes.

An order was entered on September 2, 1982, granting defendants' motion on the basis of Parker v. Brown immunity and denying plaintiff's motion.¹ For the reasons herein given, it was unnecessary for the court to reach the Eleventh Amendment issue or the alleged violation of state and federal antitrust statutes.

[*2] FACTUAL BACKGROUND

Hawaii, as an island state, has always been especially dependent upon ships and, more recently, planes for inter-island and mainland communication and transportation.² Even before commercial aviation came to the islands, the Territorial legislature had appropriated funds for what has become today the state's commercial airport system for each and all of the Hawaiian Islands.³

The importance of the airport system is further emphasized by the expansion of tourism as a mainstay of the State economy. [n4] The nearly four million tourists coming to Hawaii each year from the continental United States, Canada, Japan, Australia, and literally all parts of the globe, depend almost entirely upon the availability of efficient and dependable airport facilities.⁵ The development, management, and financing of the airport system is governed by an enabling Act of the Hawaiian Legislature.⁶ In effect, the support of this airport system, [*3] under the Legislative mandate, must be met by the Airport Revenue Fund. This is made up of rents, concessions, Aircraft landing fees, and the aviation fuel tax. For the last few years, the concession fees have provided the lion's share of the Fund's revenues.⁷

The concession activities at Honolulu International Airport (HIA) encompass the full range of facilities one might find at a large airport. At HIA, the duty-free concession is the largest revenue producer.⁸ Other concessions include bars, restaurants, and snack bars; newsstands, fruit and packaged-food stands; barber shop, shoeshine stand, telegrams and flight insurance, and the parking lot.⁹ Also, the Bank of Hawaii maintains a branch at HIA.¹⁰

[*4] Most of these concessions are "exclusive", including the ground transportation for rent-a-car, airport shuttle bus, and airport taxi.¹¹ The lei stands are about the only "non-exclusive" concessions at HIA.¹²

¹ Order Granting and Denying Motions for Summary Judgment was amended on September 3, 1982, to accelerate dissolving the temporary restraining order when Deak abandoned the premises earlier than expected. The order was further amended by order filed December 1, 1982, after a hearing on plaintiff's motion to alter the previous orders concerning payment of rents due to State.

² Horvat, *Above the Pacific* (1966) at 63. Commercial aviation did not begin until 1929. See Hawaiian Aeronautics Commission, First Annual Report, 1947-48 (1948) at 10.

³ Act 176, Session Laws of Hawaii 1925. See n. 2, *supra*.

⁵ See generally Hawaii Business (Jan. 1982); Hawaii Business (Mar. 1982); and Hawaii Business (July 1982).

⁶ Haw. Rev. Stat. Ch. 261 (Supp. 1981). See nn. 32-35, 44, 45, and 48, *infra*.

⁷ In fiscal year 1981, the concession fees amounted to 76% of operating revenues. See DOT Annual Report (1982) at 30.

⁸ See Defendant State of Hawaii's Pre-Trial Brief, filed Aug. 20, 1982, at 7.

⁹ *Ibid.*

¹⁰ Bank of Hawaii, Airport Branch, also provides some limited foreign currency exchange. However, the amount may be considered as de minimus relative to the whole market at HIA.

¹¹ Each of the "exclusive" ground transportation contracts at HIA is involved in an antitrust suit: Civ. No. 79-0146, Pacific Auto Rental Corp. dba Dollar Rent-A-Car Systems v. State of Hawaii, et al., filed April 2, 1979; Civ. No. 79-0383, Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., et al., filed August 31, 1979; and Civ. No. 80-0060, Charley's Tour & Transportation, Inc. v. Interisland Resorts, Ltd., et al., filed February 2, 1980. The Pacific Auto case has been consolidated in M.D.L. No. 338, Airport Car Rental Antitrust Litigation and is assigned to District Judge William W. Schwarzer in the Northern District of California.

¹² See n. 8, *supra*.

For the past twenty years, Deak has operated foreign exchange concessions at HIA. For the last ten years, Deak has enjoyed exclusive contracts between itself and the Department of Transportation for the HIA foreign exchange concession.¹³ In the 1982 bids, Deak lost the bid to Citicorp (USA), Inc.,¹⁴ [*5] which bid almost two and one-half (2 1/2) times as much as Deak for the five-year exclusive concession.

The foreign exchange concession at HIA consists of five physical locations. Only one of these locations is sufficiently large enough for office space and a secure area, as well as a counter; all others are merely counter space.¹⁵ Deak has also maintained a sixth location at the Japan [*6] Airlines lounge servicing passengers under a private contractual agreement with that airline.¹⁶

DECISION

The gravamen of plaintiff's action is that defendants have violated federal **antitrust law** by the issuance of an exclusive lease for the foreign exchange concession at HIA.¹⁷ Defendants have responded that they are shielded from such a suit under the [Parker v. Brown, 317 U.S. 341 \(1943\)](#), state-action immunity doctrine. For the DOT **HN1**[¹⁸] to have state-action immunity in its grant of the exclusive concession here in question, it must either show that (1) it is an agent or instrumentality of the state acting as sovereign and as such is entitled to state-action immunity; or (2) as [*7] an independent political subdivision, it meets the criteria of the [California Retail Liquor Dealers' Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 \(1980\)](#) two-prong analysis (the Midcal Test), viz: a clearly articulated and affirmatively expressed state policy with adequate review and supervision by the state.

PART I: PARKER V. BROWN STATE-ACTION IMMUNITY

Here, as in all decisions on claims of state-action immunity, the perimeters of state-action immunity as defined in Parker v. Brown and refined in its progeny must be clearly understood.¹⁸ Actually, it is a misconception to say that the state-action doctrine was "defined" in Parker v. Brown, the [*8] doctrine has always existed in our federalist system, and Parker v. Brown merely restated and applied that doctrine to the antitrust laws:

¹³ Deak was the "sole bidder" in both 1972 and 1977 for five-year exclusive contracts. Three bids were received by June 17, 1982, for the exclusive five-year contract to commence July 1st. At the opening it appeared Citicorp (USA), Inc. was the high bidder at \$1.25 million for the five years. Deak was second high bidder at \$505,000 for the same period. Deak immediately filed the present action.

¹⁴ Citicorp (USA), Inc. is a Delaware corporation and a subsidiary of Citibank International. Citibank International originally attempted to intervene. Such was denied after a finding that Citicorp (USA), Inc. was the proper party in interest. Eventually, Citicorp (USA), Inc. did intervene in its own right and has submitted briefs and argued to this court on behalf of the state's motions.

¹⁵ The locations are designated as Space No. 346-118 comprising counter area of 121 square feet; Space No. 346-111A comprising counter area of 196 square feet; Space No. 344-237 comprising counter area of 25 square feet; Space No. 344-210 comprising counter space of 68 square feet (soon to be replaced by Space No. 342-262 comprising counter and office area of 690 square feet).

¹⁶ This was apparently a portable booth arrangement used only for the "package tour" groups arriving on Japan Airlines.

¹⁷ The antitrust claims are brought under both the Sherman Act, [15 U.S.C. §§ 1 & 2](#); and the Clayton Act, [15 U.S.C. § 16](#). Plaintiff also alleges violations of state antitrust laws and violations of state bidding procedures. The latter count, on bidding procedures, has been dismissed by a previous order (Order Granting Intervenor's Motions for Dismissal of Count V and for Protective Order, filed September 2, 1982). The other counts need not be reached unless plaintiff hurdles the defenses to the alleged Sherman Act violations.

¹⁸ [Community Communications Co., Inc. v. City of Boulder, Colorado, 455 U.S. 40, 102 S.Ct. 835 \(1982\)](#); [California Retail Liquor Dealers' Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 \(1980\)](#); [City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 \(1978\)](#); [Cantor v. Detroit Edison Co., 428 U.S. 579 \(1976\)](#); [Goldfarb v. Virginia State Bar, 421 U.S. 773 \(1975\)](#); reh. denied [423 U.S. 886 \(1975\)](#), and [New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co., 439 U.S. 96 \(1978\)](#) to cite but a few.

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.

317 U.S. at 351.

The United States Supreme Court has not decided a state-action case based on the state acting as sovereign since Parker.¹⁹ In the Parker decision, Mr. Chief Justice Stone approvingly cited *Lowenstein v. Evans*, 69 F. 908 (C.C.D.S.C. 1895),²⁰ which [*9] held that South Carolina's regulation of the liquor trade was the act of a state as sovereign. The fact that the law was administered by certain state agents did not create a monopoly for and in those individuals and thus preclude immunity from the federal antitrust laws.²¹

[*10] In Parker, the Court had to decide the further question of whether state-action immunity could be extended to give protection to "private" individuals -- the raisin growers. To that end, the Court examined the state's involvement in the regulation of raisin price setting. The Court determined that the state involvement was sufficient since the regulation was mandated by state law; the recommended prices were reviewed by the state commission; and the final decision rested with the state acting through the State Agriculture Proration Advisory Commission. 317 U.S. at 346-50.

In short, the Parker Court found that the raisin prorate program derived its authority from the legislative command of the state and was not designed to create a monopoly by force of individual agreement or combination. The Court concluded that:

We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

317 U.S. at 350-351.

The Court noted that while a state may be considered a "person" for purposes of suing under the antitrust laws, the State of California was not in [*11] that category of "persons" that the Sherman Act intended to restrain. 317 U.S. at 351, (citing *Georgia v. Evans*, 316 U.S. 159 (1942)).

Parker v. Brown, and most of its progeny, have never denied nor even suggested that Congress intended to subject states, as sovereigns, to federal antitrust laws. Rather, all have denied immunity to "private parties" or "political subdivisions" seeking to cloak their alleged monopolistic actions under the "gauzy cloak of state involvement".²² In each recent case before the Supreme Court, the question has been whether some entity other than the state may claim state-action immunity. None of those cases has held that a state acting in its sovereign capacity should be denied immunity from federal antitrust laws.

¹⁹ 317 U.S. 341 (1943). See also n. 18. All of these cases address the extension of state-action immunity to persons or corporations claiming immunity under state authority. None of the cases suggest that the state is acting as sovereign and that such action is being questioned.

²⁰ Chief Justice Stone cited Lowenstein to compare it with *Olsen v. Smith*, 195 U.S. 332 (1904). Olsen held that a state may regulate pilotage, even though such regulates commerce, until such time as federal laws should override or preempt the area. The comparison was that in Lowenstein the lower court had held that a state was neither a "person" nor a "corporation" within the meaning of the Act of Congress dealing with monopolies and trusts. Therefore, the South Carolina law regulating the liquor trade was a state monopoly in those individuals; rather, they were mere instrumentalities of the state acting as and for the state. As such, the monopoly was immune from antitrust prosecution as an action of the state as sovereign.

²¹ ²¹ Ibid.

²² See generally n. 18, supra. See specifically *Midcal*, 445 U.S. at 106.

All of those decisions are perfectly consistent with our federalist system and the purpose of the federal antitrust laws viz., to protect the public from unreasonable interference with competition in interstate and foreign commerce. Where private parties are attempting to monopolize an area of trade, the public has every right to expect protection; with governmental [*12] bodies, the people have a more direct recourse -- the vote.

While federal laws can override state laws which are inconsistent with national law,²³ the Sherman Act has not been interpreted to override all state laws which impinge on competition. In the latter situation, [HN2](#)[[↑]] when it is not clear the state is acting as a sovereign, the crucial questions are whether there has been a "clearly articulated and affirmatively expressed" state policy, and if that policy is being "actively supervised" by the state. [Midcal, 445 U.S. at 105](#) (quoting [City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 at 410](#)).²⁴ The Midcal test was neither new nor unexpected when applied to "private individuals" seeking state-action immunity,²⁵ but the application of the Midcal test to "public officials, agencies and treasuries" has created substantial confusion and apprehension both in the courts and in public officials generally.²⁶

[*13] Nevertheless, even after Lafayette and Midcal, and even after [Community Communications Co., Inc. v. City of Boulder, Colorado, 455 U.S. 40, 102 S.Ct. 835 \(1982\)](#), it is still clear that [HN3](#)[[↑]] a state, acting as sovereign, is immune from federal antitrust laws unless such laws are overridden by specific national laws.²⁷ Therefore, this court must initially determine whether or not the DOT was acting as "the state" or as some independent "political subdivision". If DOT acted "as the state", then obviously it can be afforded state-action immunity; if it was acting independently and was merely seeking to protect itself under some "gauzy cloak of state involvement", then the court must continue on to the Midcal test.

The cases of [E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 \(1st Cir. 1966\)](#), and [New Mexico v. American Petrofina, Inc., 501 F.2d 363 \(9th Cir. 1974\)](#), underscore [*14] the need for this court to examine the threshold question of whether or not the challenged acts are done by the state in its sovereign capacity, before considering a secondary examination under Midcal.

Wiggins dealt with the authority of the Massachusetts Port Authority (MPA) to enter into exclusive contracts in the operation of Logan and Butler-Boston Airports. The court held that the MPA was an "instrumentality or agency" of the Commonwealth of Massachusetts and, as such, was acting in an official capacity for and as the state. [362 F.2d at 55-56](#). In essence, the court found the MPA was acting for the state in the exercise of a valid state governmental function and, therefore, was entitled to state-action immunity under Parker. [Id. at 55](#).

In Petrofina, the State of New Mexico brought suit for alleged antitrust violations by various asphalt suppliers. The defendants counterclaimed that the state and some of its political subdivisions had conspired in violation of the

²³ Cf. [Bates v. State Bar, 433 U.S. 350 \(1977\)](#) and [Toomer v. Witsell, 334 U.S. 385 \(1948\)](#). See also [Gibson v. Berryhill, 411 U.S. 564 \(1973\)](#).

²⁴ Actually one may argue that this test was applied in [Parker v. Brown, 317 U.S. 341 \(1943\)](#). In that case, the court sought to determine whether or not the state was the controlling force behind the raisin subsidy. In effect, the court was looking for adequate state authority to fix the price and sufficient state involvement in review of the price set by the private raisin growers. Chief Justice Stone did so find.

²⁵ See [Goldfarb, 421 U.S. 773 \(1975\)](#); [Cantor, 428 U.S. 579 \(1976\)](#); and [Bates v. State Bar, 433 U.S. 350 \(1977\)](#).

²⁶ Areeda, Antitrust Immunity for "State Action" After Lafayette, 95 Harv. L. Rev. 435, 438-439. See also [Lafayette, 435 U.S. at 440-441](#) and 441 n. 32 (dissenting opinion of Stevens, J.).

²⁷ See nn. 18 and 23, supra. An examination of these cases indicates none dealt with a state acting as sovereign. Rather, all concerned attempts by private individuals or independent political subdivisions seeking immunity for their actions under the "gauzy cloak of state involvement."

Sherman Act. After discussing the meaning of the word "person" in the Sherman Act,²⁸ and examining the purpose of the Sherman Act in relation to the acts of a state as sovereign, the court stated:

Since the [*15] suit here is directly against the state, there can be no such question [as to whether or not the conduct was committed by the state], and the Whitten [[George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30 \(1st Cir. 1970\)](#)]²⁹ analysis is inapplicable. [Footnote omitted.] The "legislative mandate" test is useful, indeed possibly necessary, when there is doubt if the defendant or the regulatory scheme is really an instrument of the state. But when there is no doubt that the defendant is the state, the "legislative mandate" analysis is unnecessary.

[*16] [501 F.2d at 370.](#)

More recent Ninth Circuit cases and the United States Supreme Court cases since 1974 have indicated that there now is even more than a "valid argument" against "automatically" giving counties and cities state-action immunity.³⁰ Such political subdivisions may be subjected to the Midcal analysis. However, nothing since Petrofina has eroded its central theme that when it is the state itself being sued or acting, then it is entitled to Parker immunity against the Sherman Act and the Midcal analysis is "unnecessary".³¹

[*17] The DOT is legally an instrumentality of the State of Hawaii. It is clearly to be distinguished from an independent "political subdivision" of a state, such as a city or county and their administrative instrumentalities. Obviously, the latter fall under the Lafayette-Midcal rubric and would be subject to Midcal's additional two-prong test. For the purpose of this case, it is manifest that the DOT has been delegated the responsibility for the construction, operation and maintenance of all the state-operated commercial airports in Hawaii.³² [HN4](#) The

²⁸ The appellate court distinguished the definition of "person" in [Georgia v. Evans, 316 U.S. 159 \(1942\)](#) as permitting a state to bring suit as a "person" under the Sherman Act with the definition in [Parker v. Brown, 317 U.S. 341 \(1943\)](#) as not permitting a state to be sued as a "person" under the same act.

²⁹ The Whitten test was a precursor to the Midcal analysis of whether or not there has been a "clearly articulated and affirmatively expressed" state policy and, if so, whether it was being "actively supervised" by the state. In the omitted footnote in Petrofina, the court opined that there could not be any valid argument that a county was a private party masquerading under the umbrella of state authority. [501 F.2d at 370, n. 15.](#)

³⁰ [Ronwin v. State Bar of Arizona, 686 F.2d 692 \(9th Cir. 1982\)](#) (amended opinion) citing [Lafayette, 435 U.S. at 408](#); and [City of Boulder, 455 U.S. 40, 102 S.Ct. at 842](#), state that the Court has rejected such automatic extension of Parker immunity to government entities "simply by reason of their status as such." See also, [Benson v. Arizona State Board of Dental Examiners, 673 F.2d 272](#) (9th Cir. March 29, 1982); [Miller v. Oregon Liquor Control Commission, 688 F.2d 1222](#) (9th Cir. July 7, 1982); and [Knudsen v. Nevada State Dairy Commission, 676 F.2d 374](#) (9th Cir. May 3, 1982).

Because of the rather unclear and incorrect analysis as to what sort of "government entities" might require Midcal analysis other than a "state commission, state board, and a state department" mentioned in Ronwin, this court has performed a Midcal analysis for this case, infra, Part II.

³¹ As has been suggested earlier, [Parker, 317 U.S. 341 \(1943\)](#) and all of its progeny, including [City of Boulder, 455 U.S. 40, 102 S.Ct. 835 \(1982\)](#), have dealt only with political subdivisions seeking to assume the immunity granted to a state as sovereign. None of the United States Supreme Court decisions hold or suggest that the states acting as sovereigns through their officers and agents are to be denied state-action immunity. The section on Midcal analysis as applied to the present case, infra, demonstrates why such a holding would be logically superfluous.

³² [Haw. Const. Art. V, § 6](#) provides for not more than twenty principal departments under the supervision of the governor. Haw. Rev. Stat. Ch. 26 creates seventeen executive departments; [Haw. Rev. Stat. § 26-19](#) provides for a department of transportation, headed by a director, which "shall establish, maintain, and operate transportation facilities of the State, including highways, airports, harbors. . . ."

operations of the state's airports are expressly recognized as "public and governmental functions, exercised for a public purpose, and matters of public necessity."³³ Under other sections of Hawaii Revised Statutes, the DOT is authorized to enter into contracts to provide for goods and services at the airports,³⁴ and is required to "generate sufficient revenues from its airport properties to meet all of the expenditures of the statewide system of airports."³⁵

§ 261-4 Airports, general. (a) Establishment, operation, maintenance. The department of transportation may on behalf of and in the name of the State, out of appropriations and other moneys available or made available for such purposes, plan, acquire, and establish, construct, enlarge, and improve in the manner herein provided, maintain, equip, operate, regulate, and protect, airports and air navigation facilities, including the construction, installation, equipment, maintenance, and operation at airports of buildings and other facilities for the servicing of aircraft or for the comfort, accommodation, and convenience of air travelers, and including protection against airport hazards. For such purposes the department may, by purchase, gift, devise, lease, condemnation in accordance with chapter 101, or otherwise, acquire property, real or personal, or any interest therein, including the property, rights, estates, and interests mentioned in section 262-11. The department may acquire rights and interests in airports owned or controlled by others, for the purpose of meeting a civilian need which is within the scope of its functions, even though it does not have the exclusive control and operation of such airports. No officer, board, or department of the State, or municipality, shall perform any function which is within the jurisdiction of the department without its approval, except for military purposes.

(b) Acquisition of real property. In the acquisition of real property and interests therein, the department of accounting and general services shall assist the department of transportation at its request, and assign thereto state officers and employees under its supervision for the making of surveys, abstracts, and otherwise as may be of assistance, for which services the department of transportation shall pay out of the appropriations available to it, unless the department of accounting and general services has a general fund appropriation for such services.

(c) Structures and improvements. All structures and improvements to land shall be initiated by the department of transportation and shall be constructed or made by or under the comptroller, in conformity with plans and specifications approved by the department of transportation, for which purpose the department of transportation shall make allotments of the funds under its control for expenditure by the comptroller and for services of the department of accounting and general services for which the department has no general fund appropriation.

(d) Use of state and municipal facilities and services. In carrying out this chapter, the department of transportation may use the facilities and services of other agencies of the State and of the municipalities of the State to the utmost extent possible, and the agencies and municipalities shall make available their facilities to the department of accounting and general services with respect to services and facilities in addition to those specified by subsections (b) and (c). [L 1947, c 32, pt of § 1; RL 1955, § 15-9; am L Sp 1959 2d, c 1, §§ 12, 26]

³³ Haw. Rev. Stat § 261-11:

§ 261-11 Public purpose of activities. The acquisition of any lands or interests therein pursuant to this chapter, the planning, acquisition, establishment, construction, improvement, maintenance, construction, improvement, maintenance, equipment, and operation of airports and air navigation facilities; and the exercise of any other powers granted by this chapter to the department of transportation are declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity. All lands and other property and privileges acquired and used by or on behalf of the State in the manner and for the purposes enumerated in this chapter shall and are declared to be acquired and used for public and governmental purposes and as a matter of public necessity. [L 1947, c 32, pt of § 1; RL 1955, § 15-17; am L Sp 1959 2d, c 1, § 26]

³⁴ Haw. Rev. Stat. § 261-7:

§ 261-7 Operation and use privileges. (a) Under department operation. In operating an airport or air navigation facility owned or controlled by the department of transportation, or in which it has a right or interest, the department may enter into contracts, leases, licenses, and other arrangements with any person:

- (1) Granting the privilege of using or improving the airport or air navigation facility or any portion or facility thereof or space therein for commercial purposes;
- (2) Conferring the privilege of supplying goods, or facilities at the airport or air navigation facility;

[*18] **HN5** The function of the airport system in Hawaii must be viewed as a fundamental government function.

(3) Making available services, facilities, goods, commodities, or other things to be furnished by the department or its agents at the airport or air navigation facility; or

(4) Granting the use and occupancy on a temporary basis by license or otherwise any portion of the land under its jurisdiction which for the time being may not be required by the department so that it may put the area to economic use and thereby derive revenue therefrom.

All the arrangements shall contain a clause that the land may be repossessed by the department when needed for aeronautics purposes upon giving the tenant temporarily occupying the same not less than thirty days' notice in writing of intention to repossess.

Except as otherwise provided in this section, in each case mentioned in paragraphs (1), (2), (3) and (4), the department may establish the terms and conditions of the contract, lease, license, or other arrangement, and may fix the charges, rentals, or fees for the privileges, services, or things granted, conferred, or made available, for the purpose of meeting the expenditures of the statewide system of airports set forth in [section 261-5\(a\)](#), which includes expenditures for capital improvement projects approved by the legislature. Such charges shall be reasonable and uniform for the same class of privilege, service, or thing.

The department shall enter into separate contracts with no more than two persons ("contractors") for the sale and delivery of in-bond merchandise at Honolulu International Airport, in the manner provided by law. Each such contract shall confer the right to operate and maintain commercial facilities within the airport for the sale of in-bond merchandise and the right to deliver to the airport in-bond merchandise for sale to departing foreign-bound passengers.

The department shall grant such contracts pursuant to the laws of this State and may take into consideration:

(1) The payments to be made on in-bond merchandise sold at Honolulu International Airport and on in-bond merchandise displayed or sold elsewhere in the State and delivered to the airport;

(2) The ability of the applicant to comply with all federal and state rules and regulations concerning the sale and delivery of in-bond merchandise; and

(3) The reputation, experience, and financial capacity of the applicant.

The department shall actively supervise the operation of the contractors to insure its effectiveness. The department shall develop and implement such guidelines as it may find necessary and proper to actively supervise the operations of such contractors, and shall include guidelines relating to the department's review of the reasonableness of contractors' price schedules, quality of merchandise, merchandise assortment, operations, and service to customers.

Apart from the contracts described above, during the period ending June 30, 1982, the department shall confer no right upon any person to offer to sell, sell, or deliver in-bond merchandise at Honolulu International Airport.

(b) Under other operation. The department may, by contract, lease, or other arrangement, upon a consideration fixed by it, grant to any qualified person the privilege of operating, as agent of the State or otherwise, any airport owned or controlled by the department; provided that no such person shall be granted any authority to operate the airport other than as a public airport or to enter into any contracts, leases, or other arrangements in connection with the operation of the airport which the department might not have undertaken under subsection (a) of this section.

(c) Miscellaneous fees and charges. The department may fix and regulate, from time to time, reasonable landing fees for aircraft and other reasonable charges for the use and enjoyment of the airports and the services and facilities furnished by the department in connection therewith, including the establishment of a statewide landing fee which may vary among different classes of users such as foreign carriers, air taxi operators and such other classes as may be determined by the director of transportation, for the purpose of meeting the expenditures of the statewide system of airports set forth in [section 261-5\(a\)](#), which includes expenditures for capital improvement projects approved by the legislature.

(d) Liens. To enforce the payment of any charges for repairs or improvements to, or storage or care of any personal property made or furnished by the department or its agent in connection with the operation of an airport or air navigation facility owned or operated by the department, the department shall have liens on the property, which shall be enforceable by it as provided by sections 507-18 to 507-22.

(e) Buildings and land areas for general aviation activities; developmental rates. The department may from time to time establish developmental rates for buildings and land areas used exclusively for general aviation activities at rates not less than fifty per cent of the fair market rentals of the buildings and land areas and may restrict the extent of buildings and land areas to

³⁶ Much as schools, police services, and fire protection, the airport system is vital to the State of Hawaii from both functional and economic points of view.³⁷ As such, actions taken to manage and develop the airport system must initially be viewed as acts of the state in its sovereign capacity for the public good. Under these circumstances, a court must be most cautious about attempting to impose a hindrance or unnecessary burden upon the public officials in the execution of this public duty.³⁸

The DOT, therefore, acts as the state in matters concerning the management of HIA. The DOT, as an instrumentality of the state, has full power to enter into contracts for concessions at HIA, even though monopolistic in nature, to fulfill its mandate to generate sufficient funds to support the statewide airport system. In all of this, the DOT is authorized and required to act and to act in the name of the State of Hawaii. This court can only conclude, therefore, that when the DOT acts, it is the same, in full [*19] part and parcel, as if the State of Hawaii were acting. Therefore, the actions of the DOT, whether they concern contracts or management of Hawaii's airport system, are entitled to state-action immunity as the acts of the State of Hawaii as sovereign.

PART II: THE MIDCAL ANALYSIS

Were it not for what Judge Ferguson, in dissent, in *Ronwin v. State Bar of Arizona*, 686 F.2d 692, (9th Cir. 1982), characterized as the application of "erroneous standards"³⁹ by the majority in determining whether the state agency there in question was exempt from antitrust laws, this court would not feel compelled to apply the Midcal analysis to this case. However, while this court agrees with Judge Ferguson that "[t]he majority incorrectly applies a test of compulsion by asking whether the action of the Committee [on Examinations and Admissions] was required by the state supreme court" (emphasis in original), thereby applying a Midcal analysis to "public" as well as "private" conduct, such an analysis has been made. Having made the analysis, this court finds that even if it were assumed that the DOT is merely a "political subdivision" of the state, there is ample authority from and supervision [*20] by the state to satisfy the Midcal test.

be utilized. [L 1947, c 32, pt of § 1; am L 1949, c 374 § 1; am L 1953, JR 14, § 1; RL 1955, § 15-12; am L Sp 1959 2d, c § 1, 26; am L 1962, c 24, §§ 4, 5; HRS § 261-7; am L 1968, c 20, §§ 3, 4; am L 1972, c 14, § 1; am L 1976, c 235, § 2; am L 1981, c 243, § 2]

³⁵ *Haw. Rev. Stat. § 261-5:*

§ 261-5 Disposition of airport revenue fund. (a) All moneys received by the department of transportation from rents, fees and other charges pursuant to this chapter as well as all aviation fuel taxes paid pursuant to section 243-4(a)(2) shall be paid into the airport revenue fund created by section 248-8. All such moneys paid into the airport revenue fund shall be expended by the department for the statewide system of airports, including the construction of airports and air navigation facilities approved by the legislature, including acquisition of real property and interests therein; and for operation and maintenance of airports and air navigation facilities; and for the payment of indebtedness heretofore or hereafter incurred by the department, or its predecessor, the Hawaii aeronautics commission, for any of the purposes of this chapter. The department shall generate sufficient revenues from its airport properties to meet all of the expenditures of the statewide system of airports and to comply with section 39-59; provided that as long as sufficient revenues are generated to meet such expenditures, the director of transportation may, in his discretion, grant a rebate of the aviation fuel taxes paid into the airport revenue fund during a fiscal year pursuant to sections 243-4(a)(2) and 248-8 to any person who has paid airport use charges or landing fees during such fiscal year. Such rebate may be granted during the next succeeding fiscal year but shall not exceed one-half cent per gallon per person, and shall be computed on the total number of gallons for which the tax was paid by such person, for such fiscal year.

(b) All expenditures by the department shall be made on vouchers duly approved by the director of transportation or such other director. [L 1947, c 32, pt of § 1; RL 1955, § 15-10; am L Sp 1959 2d, c 1, § 26; am L 1962, c 24, §§ 2, 3; HRS § 261-5; am L 1968, c 20, § 2; am L 1969, c 10, § 6 and c 99, § 1]

³⁶ See n. 33, *supra*.

³⁷ See nn. 1-5, *supra*.

³⁸ See n. 26, *supra*.

³⁹ *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1982).

The Midcal case dealt with the necessity of filing fair trade contracts or price schedules with the State of California. [California Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 99 \(1980\)](#). Wholesalers had to post a resale price schedule and no state-licensed wine merchant could sell wine to a retailer at other than the posted effective price. Midcal Aluminum, Inc., a southern California distributor of wine, challenged the wine pricing system as a restraint on trade in violation of the Sherman Act.

The Midcal Court initially noted, in its review of the state court's decision, that "[t]he State [had] no direct control over wine prices, and it [did] not review the reasonableness of the prices set by the wine dealers." [Midcal, 445 U.S. at 100](#).⁴⁰ The Court then continued on to decide whether or not Parker immunity should apply absent direct control of an activity which appeared to violate the policies of the Sherman Act. [Id. at 103-104](#).

[*21] Reviewing its recent cases,⁴¹ the Midcal Court outlined the analysis which must be followed where it is not evident at the threshold that the state is exercising direct control as a sovereign over the activity. The analysis was first stated in [Lafayette, 435 U.S. 389 \(1978\)](#), and consists of a two-prong test:

First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised by the state itself. [City of Lafayette v. Louisiana Power & Light, 435 U.S. 389, 410 \(1978\)](#) (opinion of Brennan, J.). [Footnote omitted.]

[445 U.S. at 105](#).

Examining the legislative enactment to determine if it satisfied [*22] the first prong, the Court held that it did forthrightly state a clear purpose to mandate resale price maintenance. [Midcal, 445 U.S. at 105](#). However, the Court found that the program failed to satisfy the second prong -- the state failed to regulate prices or monitor market conditions or engage in any "pointed re-examination" of the program. [Id. at 105-106](#). The Court then stated that Parker teaches "'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." [31 U.S. at 351](#)." [Id. at 106](#). The question in Midcal concerned the state's participation in and control of the legislatively authorized activity violating the Sherman Act.

In this case, the state authorization for the DOT's action on the concession contracts at HIA can be found in the Hawaii Revised Statutes under Title 15 - Transportation and Utilities, Chapter 261 Aeronautics. [Section 261-4\(a\)](#) directs the DOT to

maintain, equip, operate, regulate, and protect, airports and air navigation facilities, including . . . maintenance, and operation at airports of buildings and other facilities . . . for the comfort, accommodation, [*23] and convenience of air travelers. . . .⁴²

⁴⁰ Cf. [Lowenstein v. Evans, 69 F. 908 \(C.C.D.S.C. 1895\)](#). In Lowenstein, a state also sought to control the liquor trade. However, South Carolina exercised direct control and management over the pricing and sale of all liquors. Cf. [Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal. 3d 431, 579 P.2d 476 \(1978\)](#) in which the prices were established by the producers with the state exercising no control or pointed re-examination of those prices to insure that policies of the Sherman Act are not unnecessarily subordinated. [21 Cal. 3d at 445, 579 P.2d at 486](#). While the Court indicates that the threshold question is whether the action violates the [Sherman Act, Midcal, 445 U.S. at 102](#), the threshold question in that inquiry is the extent of direct control and supervision of the activity by the state, such as to provide Parker immunity. [445 U.S. at 103-104](#). It is only after a failure at this hurdle that the Court must continue on to examine the extent of the state's mandate and review of the activity. Obviously if the Court had found direct state action and control there is no need for further examination.

⁴¹ See n. 18, supra. This two-prong analysis was reaffirmed in the recent [Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 102 S.Ct. 835 \(1982\)](#). City of Boulder also reaffirmed the state's powers and immunity as a sovereign under the Constitution. [455 U.S. 40, 102 S.Ct. at 842](#). In advancing the Midcal analysis, the High Court merely declined to "automatically" extend the state sovereign's right to Parker immunity to "cities, counties, and other organized bodies." Ibid.

⁴² See n. 32, supra, for full text of [§ 261-4](#).

To these ends, [§ 261-7](#) permits the DOT to

enter into contracts, leases, licenses, and other arrangements with any person:

(2) Conferring the privilege of supplying goods, commodities, things, services, or facilities at the airport or air navigation facility. . . .⁴³

Further, per [§ 261-7](#), the DOT may establish the "terms and conditions of the contract".⁴⁴

This language is reiterated in [H.R.S. § 261-9](#) - Contracts, Law governing;⁴⁵ and [H.R.S. § 261-10](#) - Exclusive rights prohibited.⁴⁶ In the latter, while the state forbids exclusive contracts as to the "use of an airway, landing area, or air navigation facility," the section also specifically says "[t]his section shall not prevent the making of contracts, leases, and other arrangements pursuant to [section 261-7](#)".⁴⁷ This broad grant of authority to the DOT is limited only by directives to manage the airport system in the best interest of the public and to generate sufficient revenue to support the statewide airport system. There can be no [*24] reasonable doubt that the state has authorized the DOT to act as its agent in the managing and financing its airport system.

[*25] Additionally, the expressed goals of this legislation, as stated in [H.R.S. § 261-11](#), are that the airport system is to be "used for public and governmental purposes and as a matter of public necessity".⁴⁸ The exercise of these powers is considered to be "public and governmental functions."⁴⁹ This clearly satisfies the first prong of the Midcal test.

⁴³ See n. 34, supra, for full text of [§ 261-7](#).

⁴⁴ Ibid.

⁴⁵ [Haw. Rev. Stat. § 261-9](#):

[§ 261-9](#) Contracts, law governing. The department of transportation may enter into any contracts necessary to the execution of the powers granted it by this chapter. All contracts made by the department shall be made pursuant to the laws of the State governing the making of like contracts; provided, that where the planning, acquisition, construction, improvement, maintenance, or operation of any airport, or air navigation facility is financed wholly or partially with federal moneys, the department may let contracts in the manner prescribed by the federal authorities acting under the laws of the United States and any rules or regulations made thereunder. [L 1947, c 32, pt of [§ 1](#); RL 1955, § 15-15; am L Sp 1959 2d, c 1, [§ 26](#)]

⁴⁶ [Haw. Rev. Stat. § 261-10](#):

[§ 261-10](#) Exclusive rights prohibited. The department of transportation shall grant no exclusive right for the use of an airway, landing area, or air navigation facility under its jurisdiction. This section shall not prevent the making of contracts, leases, and other arrangements pursuant to [section 261-7](#). [L 1947, c 32, pt of [§ 1](#); RL 1955, § 15-16; am L Sp 1959, 2d, c 1, [§ 26](#)]

⁴⁷ Read in conjunction with the broad powers enunciated in [§ 261-7](#), it is clear that the legislature has considered and condones the use of exclusive contracts by DOT and its various concessioners. Indeed in one case the legislature experimented in 1981 (H.B. 1470, Act 243 of the 1981 Session Laws) with specifically requiring the DOT to provide at least two duty-free in-bond concessions at the airport and then finding that unacceptable, not only returned the statute to the status quo, but mandated a sole source duty-free in-bond concession at the airport. (Act 90, S.B. 2261-82 S.D.2 of the 1982 Session Laws.) This approval of exclusive contracts by the legislature emphasizes the already clear mandate by the state that DOT has the power and authority to enter such contracts with such parties as will best serve the public's interest and provide adequate funds for the airport system. See also nn.32, 33 & 35, supra.

⁴⁸ See n. 33, supra, for full text of [§ 261-11](#).

⁴⁹ Ibid. See also [Haw. Rev. Stat. § 261-12](#):

[*26] The second prong of the Midcal analysis compels this court to determine if the DOT, in its contracting and management of the airport system, is actively supervised and subjected to "pointed re-examination" of its policies by the state.⁵⁰

§ 261-12 Rules, standards. (a) Powers to adopt. The director of transportation may perform such acts, issue and amend such orders, adopt such reasonable general or special rules and procedures, and establish such minimum standards, consistent with this chapter, as the director deems necessary to carry out this chapter and to perform the duties assigned thereunder, all commensurate with and for the purpose of protecting and insuring the general public interest and safety, the safety of persons operating, using, or traveling in aircraft, and the safety of persons and property on land or water, and developing and promoting aeronautics in the State. No rule of the director shall apply to airports or air navigation facilities owned or operated by the United States.

In furtherance of the duties assigned under this chapter, the director may adopt rules relating to:

- (1) Safety measures, requirements and practices in or about the airport premises;
- (2) The licensing and regulation of persons engaged in commercial activities in or about the airport premises;
- (3) The regulation of equipment and motor vehicles operated in or about the airport operational area;
- (4) Airport security measures or requirements, and designation of sterile passenger holding areas and operational areas;
- (5) The regulation of motor vehicles and traffic;
- (6) Any other matter relating to the health, safety and welfare of the general public and persons operating, using, or traveling in aircraft.

(b) Definitions. For the purpose of this section, if not inconsistent with the context:

"Sterile passenger holding area" means any portion of a public airport designated by the director and identified by appropriate signs as an area into which access is conditioned upon the prior inspection of persons and property in accordance with the approved Federal Aviation Administration air carrier screening program.

"Operational area" means any portion of a public airport, from which access by the public is prohibited by fences or appropriate signs, and which is not leased or demised to anyone for exclusive use and includes runways, taxiways, all ramps, cargo ramps and apron areas, aircraft parking and storage areas, fuel storage areas, maintenance areas, and any other area of a public airport used or intended to be used for landing, takeoff or surface maneuvering of aircraft or used for embarkation or debarkation of passengers.

Notwithstanding the restriction on access by the public into operational areas, entry may be authorized for airport operational area related purposes with the prior permission of the director or his duly authorized representative.

(c) Conformity to federal legislation and rules. No rules, orders, or standards prescribed by the director shall be inconsistent with, or contrary to, any act of the Congress of the United States or any regulation promulgated or standard established pursuant thereto.

(d) How made. All rules having the force and effect of law, shall be adopted by the director pursuant to chapter 91.

(e) Distribution. The director shall provide for the publication and general distribution of all of its rules and procedures having general effect. [L 1947, c 32, pt of § 1; RL 1955, § 15-18; am L Sp 1959 2d, c 1, § 26; am L 1965, c 96, § 11; HRS § 261-12; am L 1980, c 155, § 1]

⁵⁰ Of course when one considers that the DOT is composed of officers and agents of the state, the question becomes facetious. But for the sake of argument and in the hopes of exposing exactly why a Midcal analysis is unnecessary in such cases as this one, the court will overlook this obvious discontinuity. Especially since at least one other judge, sitting by designation in this district, overlooked this relationship and failed to grant the DOT state-action immunity for a similar exclusive concession contract at HIA, this court wishes to spell out quite clearly this symbiosis. Cf. *Leia, Inc. v. Photo Management, Inc.*, Civ. No. 78-0263 (Opinion & Order filed February 4, 1980, by Judge Stanley Weigel). In short, the DOT is but an instrumentality created by the state to conduct certain specific state policies. The DOT exists only because of the state's grant of authority and only to perform the specific mandates outlined in its Organic Act. See nn. 51 & 53, infra, and accompanying text.

[*27] Since the DOT is a state agency,⁵¹ which must submit budgets and is funded by the state,⁵² and whose director holds his office at the whim of the governor,⁵³ it is abundantly clear that the actions of the DOT are subjected to "pointed re-examination" by the state. By statute as well, H.R.S. § 261-7, the DOT is mandated to "actively supervise the operation of the contractors to insure its effectiveness. The department shall develop and implement such guidelines as it may find necessary and proper to actively supervise the operations . . . [and review] the reasonableness of contractors' price schedules. . . ."⁵⁴

From the above, it is manifest that the DOT is, from every aspect, an instrumentality of the state. To ask if the state controls and reviews the DOT is to simply ask if the state exercises control over and governs its own actions.

The tautology is complete. The DOT, as an agent and instrumentality of the state, is controlled [*28] and reviewed constantly by the state. Since the DOT accounts directly to the state, and the state is merely acting through its agent, which performs and controls the action, this court can hardly imagine how the Midcal analysis could fail to be satisfied.⁵⁵ As indicated above, in such situations as the present case, the Midcal test is simply not necessary to be made. But if made, as here done, it will almost certainly be met.

CONCLUSION

This court finds that the DOT is an instrumentality of the State of Hawaii. As such, the DOT's acts in regard to certain exclusive contracts at HIA are the acts of the state. Further, the acts relate to a fundamental governmental function, that is, the building, maintaining, managing and financing of a necessary statewide airport system for an island state. In so operating, the acts of the DOT are entitled to *Parker v. Brown* immunity against any claims of alleged violations of the Sherman Act.

For reasons heretofore stated, this [*29] court has considered and applied a Midcal analysis. The application of this superfluous analysis confirms this court's earlier conclusion. When the state is acting through one of its instrumentalities, the Midcal analysis logically should be satisfied automatically. The Midcal two-prong test having been met, the DOT's actions are entitled to the same *Parker v. Brown* immunity to antitrust suits as the state.

This court finds it unnecessary to consider the remaining claims of the plaintiff's complaint.

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment is DENIED; and defendants' motion for summary judgment is GRANTED.⁵⁶

End of Document

⁵¹ The Department of Transportation was created by ***Haw. Rev. Stat. § 26-4(15)*** (1976); and is a unit within the office of the governor.

⁵² *Ibid.*

⁵³ *Haw. Const. Art. V, § 6.*

⁵⁴ See n. 34, supra, for full text of *§ 261-7*.

⁵⁵ Perhaps it is logically possible to postulate the ultimate "right hand in ignorance of the left hand's acts" sort of situation. But then the courts would be forced to decide which "hand" was the state.

⁵⁶ See Order Granting and Denying Motions for Summary Judgment, filed on September 2, 1982. See also n. 1, supra.



People v. Automotive Service Councils, Inc.

Court of Appeals of Michigan

December 8, 1982, Submitted ; March 8, 1983, Decided

Docket Nos. 59573, 62170

Reporter

123 Mich. App. 774 *; 333 N.W.2d 352 **; 1983 Mich. App. LEXIS 2820 ***; 1983-1 Trade Cas. (CCH) P65,313

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, Cross Appellee, v. AUTOMOTIVE SERVICE COUNCILS OF MICHIGAN, INC., et al, Defendants-Appellees, Cross Appellants

Disposition: [***1] Affirmed.

Core Terms

commodity, commerce, indictment, transportation, conspiracy, attorney general, district court, combinations, antitrust, plumbers, statutory language, price fixing, carry out, merchandise, articles

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 > Cartels & Horizontal Restraints > General Overview

HN1 [down arrow] Price Fixing & Restraints of Trade, Vertical Restraints

Mich. Comp. Laws § 750.558 (Mich. Stat. Ann. § 28.826) provides: A trust is a combination of capital, skill, or arts by two or more persons, firms, partnerships, corporations, or associations of persons, or of any two or more of them, for either, any or all of the following purposes: (1) to create or carry out restrictions in trade or commerce; (2) to limit or reduce the production, or increase or reduce the price of, merchandise or any commodity; (3) to prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or any commodity; (4) to fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use, or consumption in the state. (See Core Concept Two).

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > Authority to Act

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

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

HN2 Contracts, Sales of Goods

Mich. Comp. Laws § 750.558 (Mich. Stat. Ann. § 28.826) states in part: (5) it shall hereafter be unlawful for two or more persons, firms, partnerships, corporations, or associations of persons, or of any two or more of them to make or enter into or execute or carry out any contracts, obligations, or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or any commodity or any article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity, or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Business & Corporate Law > Cooperatives > Member Duties & Liabilities

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

Business & Corporate Law > Cooperatives > General Overview

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

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN3 Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products

Mich. Comp. Laws § 750.558 (Mich. Stat. Ann. § 28.826) states in part: Every such trust as is defined herein is declared to be unlawful, against public policy, and void: Provided, however, that nothing contained in the provisions of this section shall be construed to forbid producers of farm or dairy products from co-operating or organizing corporations or associations not primarily for profit, for the purpose of insuring and providing a reasonably certain and stable market for, and distribution of, such products upon terms fair and reasonable to the public and to themselves, and bargaining with distributors of such products singly or collectively in relation thereto, nor shall such co-operative undertaking, corporations, associations, or members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade.

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

Criminal Law & Procedure > Sentencing > Fines

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

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

HN4 Price Fixing & Restraints of Trade, Vertical Restraints

Mich. Comp. Laws § 750.558 (Mich. Stat. Ann. § 28.826) states in part: Any violation of the provisions of this section shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant, or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes or orders thereunder or in pursuance thereof, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than two years, or by a fine of not more than 1,000 dollars. Each day's violation of this provision shall constitute a separate offense.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

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

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

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

HN5 Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Mich. Comp. Laws § 750.558 (Mich. Stat. Ann. § 28.826) states in part: In any indictment for any offense named in this and the following section, 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 is created. In prosecutions under this and the following section, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belongs to it, or acts for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may be based; or that it is evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

HN6 Legislation, Interpretation

Criminal statutes cannot be extended to cases not included within the clear and obvious import of their language. And if there is doubt as to whether an act charged is embraced in the prohibition, that doubt is to be resolved in favor of a defendant.

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

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN7 Price Fixing & Restraints of Trade, Vertical Restraints

The trust or conspiracy sections of Michigan's current **antitrust law**, Mich. Comp. Laws § 750.558 (Mich. Stat. Ann. § 28.826), do not appear to apply to the sale of services, only goods and commodities. Services course become vastly more significant in modern times. The catch-all general language in the provision of the 1899 act may embrace services, but the other parts of that statute are expressly limited to goods as are the 1889 initial act and the 1905 machinery statute.

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

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN8 Price Fixing & Restraints of Trade, Vertical Restraints

Only those activities described in [§ 5](#) of Mich. Comp. Laws § 750.558 (Mich. Stat. Ann. § 28.826) are intended to be proscribed.

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

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN9 Price Fixing & Restraints of Trade, Vertical Restraints

In Michigan, the legislature prefacing para. 5 of Mich. Comp. Laws § 750.558 (Mich. Stat. Ann. § 28.826), in both its present and original versions, with an express declaration of the prospective illegality of the activity described in that paragraph and reiterates that declaration at the conclusion of the original version of para. 5. (This latter declaration is now found in the body of para. 5.) It is reasonable to presume some intentionality in the insertion of this additional language. The task of the courts in interpreting the statute is to discern the intent of the legislature at the time of passage of the statute. It is reasonable to conclude that the Michigan Legislature in 1899 is concerned with remedying the evils of only those activities in para. 5 of Mich. Comp. Laws § 750.558 (Mich. Stat. Ann. § 28.826).

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

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN10 [] Price Fixing & Restraints of Trade, Vertical Restraints

The prefatory language of para. 5 of Mich. Comp. Laws § 750.558 (Mich. Stat. Ann. § 28.826) provides strong support for a restrictive interpretation of the statute. Similarly, while the statement in para. 5 that "Every such trust as is defined herein is declared to be unlawful, against public policy, and void" may constitute a legislative declaration of the criminality of all combinations described in paras. 1 through 5, para. 5's prefatory language and the general structure of the statute indicate otherwise. It is equally reasonable to construe paras. 1 through 4 as statements of definition, general description, and purpose.

Counsel: *Frank J. Kelley*, Attorney General, *Louis J. Caruso*, Solicitor General, *Richard A. Solomon*, Special Assistant Attorney General, and *Edwin M. Bladen* and *Richard T. O'Neill*, Assistants Attorney General, for the people.

Barris, Sott, Denn & Driker (by *Eugene Driker* and *Daniel M. Share*) and *Kenneth M. Mogill*, for Automotive Service Councils of Michigan, Inc., and others.

Peter Dozorc, for Armitage Collision Service, Inc., and Frank T. Henry.

Stringari, Fritz, Kreger, Ahearn & Hunsinger, P.C. (by *Arthur M. Stringari* and *Roy R. Hunsinger*), for Bob Borst Lincoln-Mercury, Inc., Robert Borst, Jerome-Duncan, Inc., Richard Duncan, Hutchinson Lincoln-Mercury, Inc., George Jankovich, Ed Schmid Ford, Inc., Edward Schmid, Bob Thibodeau, Inc., Harold Turner, Inc., and Ray Whitfield Ford, Inc.

DeMarco & Sage, P.C. (by *John A. DeMarco*), for Douglas Robertson and Theodore Robertson.

Parenti, Treinen, Hohauser, Greenless & Bunting, P.C. (by *L. Nicholas Treinen*), for Skalnek Ford, Inc., Milosch Chrysler-Plymouth Dodge Trucks, and Joe Dunlap.

Provizer, Eisenberg, Lichtenstein & Pearlman, P.C. (by *Stephen B. Simon*) [***2] , for Steven Prusky, Melvin Edwards, and Avon Collision and Frame Center, Inc.

Ward F. McDonough, Jr., for Elwyn Dubke and Marlin Dubke.

William F. Huetteman, for Rochester Hills Chrysler-Plymouth, Inc.

Hutson, Sawyer, Schenden & Chapman (by *Michael W. Hutson*), for Birmingham Chrysler Plymouth and Richard A. Mealey and Shelby Collision.

Dykema, Gossett, Spencer, Goodnow & Trigg (by *Fred L. Woodworth* and *Craig L. John*), for Richard S. Schoenherr and Stark Hickey Ford, Inc.

Dickinson, Wright, Moon Van Dusen & Freeman (by *Kenneth J. McIntyre* and *Michael G. Vartanian*), for Tarik S. Daoud and Al Long Ford, Inc.

Clark, Klein & Beaumont (by *M. V. Kell* and *David H. Paruch*), for Mel Farr Ford, Inc.

Louis Demas, P.C. (by *Victor Farneti*), for Lambert's Collision, Inc.

Gerald Hale Ladue, for Berkley Collision, Inc., and Edward Kasparian.

Colombo & Colombo (by *Lawrence F. Raniszewski*), for Jim Fresard Pontiac, Inc., F. James Fresard, Rinke Pontiac GMC Co., Michael Rinke, Park Motor Sales Co. and Paul Kuhn.

Richard G. Partrich, for Larry Dusich and 15 Mound Collision, Inc.

Rusel J. Comer, for Ross Witte.

Judges: [***3] D. C. Riley, P.J., and D. F. Walsh and Wahls, JJ.

Opinion by: WALSH

Opinion

[*778] [**354] On February 7, 1980, a Wayne County citizens grand jury returned an indictment against 183 defendants, charging unlawful combination and conspiracy in unreasonable restraint of trade and commerce. MCL 750.558; MSA 28.826. The specific charge was combination and conspiracy to fix prices for services in the automobile collision repair business. The 183 defendants are the Automotive Service Councils of Michigan, Inc. (a trade association of automobile repair businesses), the officers of the association, and numerous automobile dealers, collision repair shops and individual officers, employees, and agents thereof.

In district court, defendants sought dismissal of the indictment, arguing: (1) inapplicability of MCL 750.558; MSA 28.826 to the activity alleged by the prosecution, (2) insufficiency of the evidence, and (3) prosecutorial misconduct. The district court, in a thoughtful and well-reasoned opinion, ruled that the Legislature did not intend that MCL 750.558; MSA 28.826 be applied to services, as opposed to articles and commodities. The court further found that the statute was "so poorly [***4] drafted, so confusing and ambiguous" that it could not support a criminal prosecution for the concerted fixing of prices for services. The indictment was, therefore, dismissed as to all defendants. In anticipation of the Attorney General's appeal of its ruling, the district court resolved defendants' remaining challenges to the indictment. Assuming *arguendo* the applicability of the statute to service activities, the court ruled that there had been sufficient evidence to indict all but 19 of the defendants, and the [*779] court found no prosecutorial misconduct which would justify dismissal of the indictment. The Attorney General's motion for reconsideration was denied.

The Attorney General's appeal to circuit court was limited to the district court's ruling that the prohibitions of MCL 750.558; MSA 28.826 do not reach service activities. There was no challenge to the district court's finding of insufficient evidence as to 19 of the defendants. The remaining defendants cross-appealed from the district court's findings of sufficient evidence and absence of prejudicial prosecutorial misconduct. The circuit court affirmed the

district court in all respects. By leave granted, [***5] the Attorney General now appeals from the circuit court's order and the remaining defendants cross-appeal.

The sole issue presented in the Attorney General's appeal is whether MCL 750.558; MSA 28.826 assigns criminal liability to the fixing of prices for services, as opposed, for example, to the fixing of prices of commodities. [HN1](#)[

The statute provides in its entirety:

"A trust is a combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce;

"2. To limit or reduce the production, or increase or reduce the price of, merchandise or any commodity;

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity;

*"4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of [*780] merchandise, produce or commerce intended for sale, barter, use or consumption in this state;*

[HN2](#)[] " [**355] 5. *It shall hereafter [***6] be unlawful* for two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them to make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity, or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. [HN3](#)[] Every [***7] such trust as is defined herein is declared to be unlawful, against public policy and void: Provided, however, That nothing contained in the provisions of this section shall be construed to forbid producers of farm or dairy products from co-operating or organizing corporations or associations not primarily for profit, for the purpose of insuring and providing a reasonably certain and stable market for, and distribution of, such products upon terms fair and reasonable to the public and to themselves, and bargaining with distributors of such products singly or collectively in relation thereto, nor shall such co-operative undertaking, corporations, associations or members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade.

[HN4](#)[] "Any violation of the provisions of this section shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its [*781] commission, or who shall as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or furnish any [***8] information to assist in carrying out such purposes or orders thereunder or in pursuance thereof, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than two years or by a fine of not more than one thousand dollars. Each day's violation of this provision shall constitute a separate offense.

[HN5](#)[] "In any indictment for any offense named in this and the following section, 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.

"In prosecutions under this and the following section, it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all

the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based; or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by [***9] proof of its general reputation as such." (Emphasis added.)¹

Analyzing the statutory language, the district court observed:

[**356] "It is obvious both by a review of the statute and by the acknowledgement of the prosecution that [paras.] 2, 3 and 4 do not encompass services. It is also clear that para. 5 specifically refers to articles, commodities, merchandise, [*782] etc., and would not include services. We are then led to the inquiry as to whether services are included under the 'trade or commerce' language of [para.] 1."

Even assuming that the phrase "trade or commerce" in para. 1 of [***10] the statute includes services, however, the court found that the statute does not set forth a general proscription against combinations "to carry out restrictions in trade or commerce". In support of its conclusion that the activity described in the indictment had not been declared criminal, the court offered the following analysis of the statutory language:

"the statute makes a division into 'definitional provisions' and 'conduct provisions'. The first portion of the statute [*i.e.*, paras. 1 through 4] seems clearly to provide a definition. It is of great significance that para. 5 commences with the words, 'It shall hereafter be unlawful.' A plain reading would seem to indicate that the placement of those words at the beginning of para. 5 would be a clear indication that what went before para. 5 was not intended to be unlawful."

The district court went on to discuss the principle of strict construction of criminal statutes, [People v Hall, 391 Mich 175, 189; 215 NW2d 166 \(1974\)](#), and the concomitant requirement of statutory clarity:

"It is a fundamental rule of construction of [HN6](#) criminal statutes that they cannot be extended to cases not included within the clear and [***11] obvious import of their language. And if there is doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of the defendant." [People v Ellis, 204 Mich 157, 161; 169 NW 930 \(1918\)](#).

In addition to its own difficulty in ascertaining [*783] the statute's intended scope of coverage, the court observed that the Attorney General, in a November 14, 1978, memorandum to Governor William Milliken analyzing Senate Bill 1284 (a proposed revision of Michigan's antitrust legislation which died in the House Judiciary Committee), had stated that "the present antitrust statute [1899 PA 255] * * * does not provide for coverage of services in the same manner as commodities, transportation and machinery". Also cited was the text of a speech delivered by the assistant attorney general in charge of the consumer protection division of the Department of the Attorney General, in which the "absence of clear coverage of services, rather than just commodities, transportation and machinery" had been noted and advanced in support of adoption of Senate Bill 1254, which "[for] the first time, [provided] a clear understanding * * * that services, as [***12] well as all kinds of commodities and property" were included within the definition of "trade and commerce". (In contrast to the current statute, Senate Bill 1254 clearly set forth a blanket proscription against all contracts, combinations, and conspiracies in restraint of trade or commerce).

The district court further noted the comments made by the chairman of the state bar's [antitrust law](#) section:

[HN7](#) "[The] trust or conspiracy sections [of Michigan's current [antitrust law](#)] do not appear to apply to the sale of services, only goods and commodities. Services have of course become vastly more significant in modern times. The catch-all general language in the provision of the 1899 act * * * may embrace services, but the other parts of that statute are expressly limited to goods as are the 1889 initial act and the 1905 machinery statute." Alterman, [Toward a New Michigan Antitrust Law](#), 55 Mich St Bar J 19, 22 (1976).

¹ The original version of the statute was 1899 PA 255, which provided for both criminal and civil actions against restraint of trade. The current civil counterpart of MCL 750.558; MSA 28.826 is [MCL 445.701 et seq.](#); MSA 28.31 et seq. The current criminal statute (MCL 750.558; MSA 28.826) is, for purposes of resolution of the instant controversy, identical to [§§ 1, 4, 5, and 6](#) of 1899 PA 255.

[*784] Finding that the statutory language did not cover the activity charged in the indictment and, alternatively, that the statute lacked the requisite clarity to support this criminal prosecution, the district court dismissed the indictment. We follow the [***13] lead of the circuit court and affirm the district court's order of dismissal.

[**357] No Michigan case has addressed the issue of whether the fixing of prices for services was intended to be covered by MCL 750.558; MSA 28.826. In [Hunt v Riverside Co-Operative Club, 140 Mich 538; 104 NW 40 \(1905\)](#), the Wayne County prosecutor sought injunctive relief, under 1899 PA 255, against two plumbers' associations -- the Master Plumbers' Exchange and the Riverside Co-Operative Club. The members of the association had agreed that the price of plumbers' supplies would be fixed by a committee and that member plumbers would buy all of their supplies from wholesale members, who agreed to sell only to qualified master plumbers and to charge nonmembers more than members. The master plumbers agreed not to sell their labor or materials at prices below those fixed by the club's schedule, and members of the exchange agreed that, in bidding for contract work, they would estimate materials and labor at specified levels. The Supreme Court affirmed the circuit court's determination that a violation of the statute had been established.

The Attorney General argues that the district court's order [***14] in the instant case is at odds with the Supreme Court's decision in *Hunt*. Careful scrutiny of the Supreme Court's opinion, however, reveals the Court's exclusive concern with the effects of the defendants' agreements on the price of plumbing supplies. The Court expressly declined to determine whether the statute prohibits contracts [*785] fixing installation charges. [Hunt v Riverside Co-Operative Club, supra, pp 546-547](#). Mere characterization of the plumbing industry as a "service industry" is not dispositive of the issue raised in the instant case.

Also cited by the Attorney General is [Barrows v Grand Rapids Real Estate Board, 51 Mich App 75; 214 NW2d 532 \(1974\)](#), *app dis* 392 Mich 752 (1974), a civil action for injunctive relief against restraint of trade and monopoly. [MCL 445.701](#); MSA 28.31, MCL 445.762; MSA 28.62. The *Barrows* case was discussed in Alterman, *supra*, 55 Mich St Bar J, p 22, fn 14.

" [Barrows v Grand Rapids Real Estate Board, 51 Mich App 75 \(1974\)](#), challenged an exclusion from a real estate multiple listing service under the catch-all language in the 1899 act and the general language of the conspiracy to monopolize section of the [***15] 1905 monopoly statute. The court found the restraint reasonable. It did not discuss whether services are embraced by the catch-all provision of the 1899 act, perhaps because services are included in the monopoly conspiracy section of the 1905 act."

In the above-mentioned speech, the assistant attorney general also mentioned the insufficient clarity of the *Barrows* decision as it related to the issue of the coverage of agreements to fix the price of services. In addition, we note that *Barrows* was a civil, not a criminal, proceeding.²

Cases which discuss Michigan's antimonopoly statute, MCL 445.762; MSA 28.62, are inapposite, since the language of that statute differs significantly from the language of MCL 750.558; MSA 28.826. For the same reason, cases discussing the [*786] federal [antitrust law](#), the Sherman Act, [15 USC 1 et seq.](#), are [***16] not helpful to resolution of the instant controversy. The narrow issue presented is construction of the language in the Michigan criminal statute.

The district court's determination that [HN8](#)[↑] only those activities described in § 5 of MCL 750.558; MSA 28.826 were intended to be proscribed finds support in the early Texas case of [Queen Ins Co v State, 86 Tex 250; 24 SW 397 \(1893\)](#). With a few significant additions, the language of the 1899 Michigan statute echoed the 1889 Texas act. The Texas court described the economic climate which had prompted many states to enact antitrust legislation and identified

² See also [Michigan Ass'n of Psychotherapy Clinics v Blue Cross and Blue Shield of Michigan \(After Remand\), 118 Mich App 505; 325 NW2d 471 \(1982\)](#).

"the causes of popular discontent, and the evils which the Legislatures of several states sought to remedy by direct statutory [**358] enactments upon the subject. They were combinations organized for the purpose of affecting the prices of articles of prime importance in commerce, or the rates of transportation and intercommunication. The evils resulting from these operations were doubtless paramount in the minds of our legislators when they passed the statute under consideration; and it was to repress these practices that the law was enacted. By 'the plain import of its [***17] language' it makes unlawful all combinations to raise or depress the price of all articles of commerce whatever, or to increase or diminish the rates of transportation of such articles." [86 Tex 266-267; 24 SW 402.](#)

The Texas court analyzed the language of the statute as follows:

"It seems to us, therefore, that the words in the first subdivision of [section 1](#) of the act 'to create or carry out restrictions in trade,' were intended only as a general expression of the purpose of the law, and that the acts defined in the subsequent members of the section were [*787] intended as a specific definition of what was meant in the first." [86 Tex 267; 24 SW 402.](#)

The court concluded that the Texas statute was not intended to reach agreements fixing rates of insurance and insurance agents' commissions.

HN9[] In Michigan, the Legislature prefaced para. 5 of MCL 750.558; MSA 28.826, in both its present and original versions, with an express declaration of the prospective illegality of the activity described in that paragraph and reiterated that declaration at the conclusion of the original version of para. 5. (This latter declaration is now found in the body of para. 5.) It is reasonable [***18] to presume some intentionality in the insertion of this additional language. The task of the courts in interpreting the statute is to discern the intent of the Legislature at the time of passage of the statute. [Detroit Edison Co v Dep't of Revenue, 320 Mich 506, 519; 31 NW2d 809 \(1948\)](#). It is reasonable to conclude that the Michigan Legislature in 1899 was concerned with remedying the evils of only those activities in para. 5 of MCL 750.558; MSA 28.826.

While the district court's construction of the statute is persuasive, we affirm on the narrower ground of the statute's unquestionable lack of the clarity required of criminal statutes. The language of MCL 750.558; MSA 28.826 does not clearly and obviously embrace the activities with which the defendants have been charged. While the Legislature's intention may have been to prohibit all agreements which unreasonably restrain trade or commerce, **HN10**[] the prefatory language of para. 5 provides strong support for a more restrictive interpretation of the statute. Similarly, while the statement in para. 5 that "Every such trust as is defined herein is declared to be unlawful, against public policy and void" may constitute a legislative [***19] declaration of [*788] the criminality of all combinations described in paras. 1 through 5, para. 5's prefatory language and the general structure of the statute indicate otherwise. It is equally reasonable to construe paras. 1 through 4 as statements of definition, general description, and purpose.

We are constrained to resolve the doubtful state of the statutory language in defendants' favor. [People v Ellis, supra, p 161](#). The Attorney General has himself recognized the statute's ambiguity and urged passage of new legislation to remedy its inadequacies. We agree with defendants that the Attorney General's pursuit of this criminal prosecution has been less than admirable and we affirm dismissal of the indictment. It is, therefore, unnecessary to address the issues raised on cross-appeal.

Affirmed.



Laker Airways, Ltd. v. Pan American World Airways

United States District Court for the District of Columbia

March 9, 1983

Civil Action Nos. 82-3362, 83-0416

Reporter

559 F. Supp. 1124 *; 1983 U.S. Dist. LEXIS 18680 **; 1983-1 Trade Cas. (CCH) P65,309

LAKER AIRWAYS LIMITED, Plaintiff, v. PAN AMERICAN WORLD AIRWAYS, et al., Defendants; LAKER AIRWAYS LIMITED, Plaintiff, v. SABENA, BELGIAN WORLD AIRLINES, et al., Defendants

Core Terms

courts, injunction, lawsuit, airlines, proceedings, anti trust law, antitrust, enjoin, cases, fares, air, tribunal, foreign court, conspiracy, merits, Sherman Act, circumstances, violations, permanent injunction, defendants', charter, route

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN1](#) [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

There is no difference between addressing an injunction to the parties and addressing it to the foreign court itself.

Governments > Courts > Court Records

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Common Law

Governments > Federal Government > Domestic Security

[HN2](#) [down arrow] **Courts, Court Records**

It is the law in the United States that, except in unusual situations such as those involving well-defined national security matters or particular trade secrets, the public is entitled to access to what is happening in the courts, for the courts' business is the public's business.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN3](#) [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

559 F. Supp. 1124, *11241983 U.S. Dist. LEXIS 18680, **18680

The preliminary injunction in large part decides the merits. Nevertheless, the parties may, if they wish, have their claims considered again on the basis of additional evidence.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[**HN4**](#) Injunctions, Preliminary & Temporary Injunctions

Except in unusual, very narrow circumstances, there is no basis -- at least not in a free country -- for precluding a citizen by an injunction-type order from suing in the courts of another nation.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[**HN5**](#) Injunctions, Preliminary & Temporary Injunctions

If a court has the authority to prevent a national from suing elsewhere, it may exercise this power only in the most extraordinary circumstances.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Sherman Act > General Overview

[**HN6**](#) Sherman Act, Jurisdiction

No British tribunal could or would proceed to enforce the Sherman Act. [15 U.S.C. § 15](#) lays venue only in any district court of the United States. The problems that would be involved in trying to prove American [antitrust law](#) for purposes of application by a foreign court are reason enough for a foreign court to decline to hear such a case.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN7**](#) Antitrust & Trade Law, Sherman Act

Under British law it is not unlawful for a corporation to monopolize commerce by offering exceptional terms resulting in losses so as to drive competitors out of business, with the expectation that the losses will be recouped later once the competitor has been eliminated. These decisions further hold that the crux of an unlawful conspiracy is an intent to injure the plaintiff, and that an agreement or combination which has as its purpose the protection of the interests of the defendants, whatever they may be, is not unlawful.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

[**HN8**](#) Venue, Forum Non Conveniens

The fact that another country's law may be less favorable to a plaintiff than is American law is not reason alone to refuse to dismiss a lawsuit on forum non conveniens grounds. But when the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in the law may be given substantial weight.

Counsel: **[**1]** Robert M. Beckman, Beckman & Farmer, Washington, District of Columbia, Carl W. Schwarz, Metzger, Shadyac & Schwarz, Washington, District of Columbia, For plaintiff.

Pan American World Airways, Fred D. Turnage, Clearly, Gottlieb, Steen & Hamilton, Washington, District of Columbia.

British Caledonian Airways, Leonard N. Bebchick, Washington, District of Columbia, Douglas E. Rosenthal, Sutherland, Asbill & Brennan, Washington, District of Columbia.

McDonnell Douglas Corporation, McDonnell Douglas Finance Corporation, James J. Murphy, Bryan, Cave, McPheeeters & McRoberts, Washington, District of Columbia.

Trans World Airlines, George T. Manning, Chadbourne, Parke, Whiteside & Wolff, Washington, District of Columbia.

Lufthansa German Airlines, Swissair, Swiss Air Transport Company Limited, Lloyd Cutler, Wilmer, Cutler & Pickering, Washington, District of Columbia, Laurence A. Short, Short, Klein & Karas, Washington, District of Columbia.

British Airways Board, Sidney S. Rosdeitcher, Paul, Weiss, Rifkind, Wharton & Garrison, Washington, District of Columbia, William C. Clarke, Barrett, Smith, Schapiro, Simon & Armstrong, New York, New York.

Sabena, Belgian World Airways, Peter J. **[**2]** Nickles, Covington & Burling, Washington, District of Columbia.

KLM Royal Dutch Airlines, Thomas J. Whalen, Condon & Forsyth, Washington, District of Columbia.

International Air Transport Association, Bert Rein, P.C., Kirkland & Ellis, Washington, District of Columbia, For defendants.

Judges: Greene

Opinion by: GREENE

Opinion

[*1126] This is an antitrust action brought by Laker Airways against a number of American and foreign airlines. Presently before the Court is plaintiff's motion for a preliminary injunction. Because of the apparently unprecedented circumstances which gave rise to this application,¹ it is appropriate to recite the background of the lawsuit in some detail.

I

On November 24, 1982, Laker Airways Limited (Laker)² brought an action in this Court under the Sherman Act ([15 U.S.C. §§ 1](#) and [2](#)) and the Clayton Act ([15 U.S.C. § 15](#)) against Pan American World Airways, Inc. (Pan American), Trans World Airlines Inc. (TWA), McDonnell Douglas Corporation (McDonnell **[**3]** Douglas), McDonnell Douglas Finance Corporation (McDonnell Finance), British Airways Board (British Airways), Deutsche Lufthansa Aktiengesellschaft (Lufthansa), Swiss Air Transport Company Limited (Swissair), and British Caledonian Airways Limited (British Caledonian). On February 15, 1983, a separate action, containing essentially the same allegations

¹ See slip op. at pp. 11-15 *infra*.

² Laker Airways Limited is a subsidiary of Laker Airways (International) Limited, which in turn is controlled by Sir Freddie Laker.

as those recited in the November 1982 complaint,³ was brought by Laker against Sabena Belgian World Airlines (Sabena) and KLM Royal Dutch Airlines (KLM).

The complaints allege the following.

Since **[**4]** 1946 the fares for scheduled air transportation have been set by the International Air Transport Association (IATA), an association of the world's major airlines,⁴ at levels higher than would prevail in a competitive market. Laker began charter flight operations between Great Britain and the United States in 1970, and, starting in June 1971, it also began to seek permission to operate low-cost "Skytrain" transatlantic service. Resistance from the IATA airlines delayed implementation of the scheduled service until September 1977, but eventually Laker was able to provide every week over forty scheduled flights⁵ at low fares, in addition to extensive charter service between the United States and Great Britain. Prior to the advent of Laker's Skytrain service from London to New York, which cost \$115, the IATA-fixed economy fare on the same route was almost three times as much, or \$313.

[5]** The complaints further allege that, in response to Laker's low-fare service, the IATA airlines agreed on a predatory scheme to destroy both Laker's transatlantic charters and its Skytrain service.⁶ In execution of that scheme, some of the IATA airlines offered their services on the New York-London route at below cost, expecting to drive Laker out of business, and expecting further that, once Laker was gone, they could and would raise their fares again to their previous high levels or above. In short, the complaint alleges a classic antitrust conspiracy.

[*1127] Plaintiff further claims that although the conspiracy did not bear fruit at first,⁷ by 1981 Laker was so weakened by defendants' predatory activities and by a substantial **[**6]** drop in the dollar value of the pound sterling that it could not afford to reduce its fares further so as to compete with the fares adopted by defendants on some of Laker's routes. In October 1981, Pan American, TWA, and British Airways, seeking to end Laker's low-fare competition once and for all, decided to offer their own attractive, high-cost services at Laker's low prices on all of Laker's routes.⁸ Subsequently, in the winter of 1981-82, the IATA met in Switzerland and in Florida to agree on a program to set new and higher fares for the spring and summer of 1982, but to fix the fares of IATA members at Laker's level as long as Laker was in business.⁹

[7]** According to the complaint, the defendants also interfered with Laker's financing. By Christmas 1981, Laker had reached an agreement with its lenders for the financial support made necessary by its weakened condition. The IATA members thereupon successfully pressured Laker's lenders to deny Laker that financing, and on February 5, 1982, succumbing to this pressure, Laker was forced into liquidation.

It was in response to these alleged activities that Laker filed the instant actions in this Court.

II

³ In view of the fact that the cases appear to present similar or related issues of fact and law, and in the interest of judicial economy, the Court will consolidate the two actions unless one or more of the parties shows sufficient cause within five days of the date of this Opinion why such consolidation should not be effected.

⁴ IATA includes Pan American, TWA, British Airways, Lufthansa, Swissair, British Caledonian, KLM, and Sabena.

⁵ This service employed the widebodied jets typically used by the major airlines for transatlantic flights.

⁶ It is alleged that the airlines based in continental Europe participated in this scheme because many of their passengers travelled to the United States via London in order to benefit from Laker's low fares, bypassing the European airlines' direct service to the United States.

⁷ Until 1981 Laker was showing a profit.

⁸ By then, Laker offered service from three cities in the United Kingdom to four cities in the United States.

⁹ The meetings are referred to only in the complaint in No. 83-0416, the action against KLM and Sabena, but in that pleading plaintiff alleges that all of the IATA defendants participated in the meetings.

The first lawsuit proceeded in its normal course from November 24, 1982 to January 21, 1983. On that date, with no challenge to jurisdiction having been raised in this Court by any of the defendants, British Airways filed a declaratory judgment action against Laker filed in the Queen's Bench Division of the High Court of Justice in England¹⁰ seeking a declaration of non-liability to Laker and a permanent injunction preventing Laker from continuing with its suit against British Airways in the United States. At the time of the filing of its complaint, British Airways also applied for and was immediately granted an injunction against interference with the conduct of the British court [**8] proceedings.¹¹ Within hours, British Caledonian, Lufthansa, and Swissair filed similar writs against Laker in the British court, and they likewise applied for, and were granted the identical injunction against Laker's seeking a counterinjunction.

[**9] Mr. Justice Parker of the Queen's Bench Division set a hearing for March 21, 1983, at which it is to be determined whether Laker should be permanently enjoined from proceeding with its lawsuit in this Court against both British airlines on the basis that Great Britain is the more appropriate forum.¹²

[**10] However, subsequently, by an order dated March 2, 1983, the British court all but [*1128] decided this question at least with respect to British Airways and British Caledonian. That order, issued without a hearing and without any notice to plaintiff or to this Court, enjoins Laker from "taking any further steps in Civil Action 82-3362 [in this Court]" against the two British defendants.¹³ The March 2 order, if valid, would preclude plaintiff from filing applications or motions in this Court, oppositions to motions filed by the defendants, and any other pleadings or papers.¹⁴

¹⁰ The previous November 29, five days after Laker's first complaint was filed here, Midland PLC (Midland) had filed a declaratory judgment action in Britain against Laker, having been informed that Laker was considering joining Midland as a defendant in the U.S. action. This action is presently proceeding to trial. Midland hopes to prove facts that show that it could not have been involved in any conspiracy against Laker "under American Law, Anti-trust or otherwise, or English law." Transcript of judgment, February 4, 1983. The British court has described Laker's assertions of Midland's complicity as "inherently unlikely." Transcript at 14.

¹¹ Plaintiff had two hours notice of this application. The injunction restrains Laker, its liquidators, and their agents from attempting to obtain a counterinjunction that would prevent British Airways from proceeding with the British action. The factual basis for the injunction is not clear. No one had apparently even thought of obtaining a counterinjunction, if only because presumably no one knew or suspected that British Airways, not having challenged the jurisdiction of this Court in this Court, would do so elsewhere.

¹² After the issuance of the first British injunction on January 21, 1983, the remaining four defendants in C.A. No. 82-3362 -- TWA, Pan American Airways, McDonnell Douglas Corp., and McDonnell Douglas Finance Corp. -- were enjoined by a temporary restraining order issued by this Court from participating in the English lawsuit. Subsequently, KLM and Sabena were similarly made subject to a TRO. Five days ago, on March 4, 1983, a hearing was held on plaintiff's motions for a preliminary injunction and for partial summary judgment with respect to the issue of *forum non conveniens*. Inasmuch as not all of the parties agreed to an extension of the TRO until such time as the Court might be able to make a decision on the preliminary injunction in due course, that decision was issued on March 7, 1983. This Opinion details the reasons for the issuance of the injunction.

The Court will decide the motion for partial summary judgment at a later date, and it may further supplement this Opinion at that time. The Court does not envision that its decision on the summary judgment motion will be long delayed, contrary to the prediction made in affidavits submitted to the British court on January 25, 1983. It is worth noting that while the airlines complained in the British court about an expected delay here, in their opposition to plaintiff's motion for partial summary judgment filed in this Court they urged a delay in the ruling on that motion.

¹³ The order contradicts statements made to Mr. Justice Parker by English counsel for Lufthansa, back in January, that the British injunction "does not and has never been intended to stop the flow of proceedings in the United States."

¹⁴ The British court appears to have rationalized its action on the ground that its injunctions operate only on the plaintiff, not this Court. See Transcript of proceedings, February 4, 1983, pp. 5-6. At least in this country, as the Supreme Court held over a century ago, [HN1](#) there is no difference between addressing an injunction to the parties and addressing it to the foreign court itself. [*Peck v. Jenness*, 48 U.S. \(7 How.\) 612, 624-625, 12 L. Ed. 841 \(1849\)](#). See also, [*Compagnie des Bauxites de Guinée v. Insurance Company of North America*, 651 F.2d 877, 887 \(3d Cir. 1981\)](#). Mr. Justice Parker has also stated (Transcript of

[**11] The British court has indicated that it will decide at a later date the appropriateness of a permanent injunction at Lufthansa's and Swissair's urging, and that it will also hold trials on the merits of the claims that the airlines are not liable to Laker. In passing on these claims, the court apparently intends to decide issues of American antitrust law as well as of British law.¹⁵

The papers filed in the British court, which have been forwarded to this Court by various parties¹⁶ [**13] indicate¹⁷ two bases for [*1129] the extraordinary action of the British tribunal: (1) Laker is incorporated in Britain and for that reason it may and in these circumstances should be restrained from suing in the [*12] United States courts, and (2) because of the way the American legal system is structured, it is unlikely that the defendants can receive justice here.

III

The Court must decide whether to issue a preliminary injunction against the four American defendants and Sabena and KLM.¹⁸ The Court will consider first the question whether it is likely that plaintiff will prevail on the merits of its

proceedings, January 27, 1983, p. 3) that the type of injunction he issued "does not represent an interference by one court with the proceedings of another." With utmost respect, this Court must differ. It can hardly be said that an order which, for example, directs a party not to file further papers in this Court, as did the order of the British court of March 2, is anything other than a direct interference with the proceedings in this Court. The orders secured by the defendant airlines on January 21, 1983, have a like effect.

¹⁵ Mr. Justice Parker said with regard to the *Midland* case (see note 10 *supra*) that "the declaration [is], on its face, in very wide terms and appears to involve an English court deciding on American law, and in particular on American Anti-Trust law." Transcript of judgment, February 4, 1983, p. 11.

¹⁶ By order of the British court, all the papers filed there, including the transcripts of the hearings and the court's decisions, are to be kept confidential, and this Court was advised of this confidentiality order by those who at various times forwarded the papers to it. This Court did not seek or request these documents which came to it on an entirely unsolicited and haphazard basis. In any event, HN2 [↑] it is the law in the United States that, except in unusual situations such as those involving well-defined national security matters or particular trade secrets, the public is entitled to access to what is happening in the courts, for the courts' business is the public's business. See *Richmond Newspapers v. Commonwealth*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980).

For that reason and in fairness to the British court, this Court wants to make it clear that, if additional materials regarding these proceedings may be forwarded to this Court, it will not regard itself as bound by confidentiality requirements to the extent that the British documents bear on the proceedings here. Such requirements would be at odds with the public's right to know what is occurring in United States courts, especially in an extraordinary case such as this.

It is obviously difficult for all concerned -- including the British Court and this Court -- to conduct proceedings such as these where the information imparted to one tribunal does not always precisely correspond to that which is made known to the other. If, therefore, reference needs to be made here to the proceedings in Great Britain, this Court would prefer that it be done on the basis of a precise record available to all, just as this Court believes that Mr. Justice Parker should be furnished with, and be allowed to use in every way, a transcript of all that transpires in this Court that has any relationship to the proceedings in the United Kingdom. Certainly, the suggestion by the British court (Transcript of proceedings, January 27, 1983, p. 2) that an affidavit that was used there should not have been disclosed to this Court, if followed by both courts with respect to all proceedings and documents, could only aggravate an already difficult situation, fraught as it is with possible misunderstandings.

This Court has given instructions that copies of all transcripts of proceedings here, all orders and decisions, and all documents filed with the Court which bear on the proceedings in Great Britain shall be transmitted to Mr. Justice Parker. Of course the British court may make any use that it wishes of these papers, including their publication as part of an official record.

¹⁷ Since the British court, in accordance with custom in the United Kingdom, did not issue a written opinion, its reasoning must partly be discerned from its colloquies with counsel and the transcripts of its judgments, delivered orally.

¹⁸ The four airlines before the British court are not affected by the present injunction proceedings.

permanent injunction request,¹⁹ and thereafter (in Part VI) it addresses the relative balance of injuries and the public interest.²⁰

[**14] First. If the British court is proceeding on the assumption that, because Laker is a British corporation, it may not, under American law, sue in the courts of the United States²¹ to vindicate rights under the American antitrust laws,²² it would be mistaken. See *Pfizer Inc. v. India*, 434 U.S. 308, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978). As the Supreme Court there said:

The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations. Treble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.

434 U.S. at 314.

[**15] Second. **HN4**[] Except in unusual, very narrow circumstances, there is no basis -- at least not in a free country -- for precluding a citizen by an injunction-type order from suing in the courts of another nation. A number of courts have repeated in dicta the proposition that a court "has the power to enjoin a party over whom it has personal [*1130] jurisdiction from pursuing litigation before a foreign tribunal." See, e.g., *Western Electric Co. v. Milgo Electronic Corp.*, 450 F. Supp. 835, 837 (S.D. Fla. 1978). The power is rarely exercised, however, for "restraining a party from pursuing an action in a court of foreign jurisdiction involves delicate questions of comity and therefore 'requires that such action be taken only with care and great restraint.' *Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969)." *Compagnie des Bauxites de Guinée v. Insurance Company of North America*, *supra*, 651 F.2d at 887 n.10 (3rd Cir. 1981). Indeed, when one examines the reported instances in which this power has actually been used, one finds that the fact situations are quite different from those involved in the instant cases.

In *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946, 955-56 (D. Minn. 1981), the court issued an injunction directed at proceedings in Germany and Canada (1) only after taking pains to emphasize that its order merely prevented the foreign courts from awarding a form of relief -- an injunction -- that is not an issue on the merits in the lawsuit before this Court,²³ and (2) by noting that the dispute between the parties was based on a contract between them that could be construed to forbid the foreign plaintiff from seeking injunctive relief against the United States plaintiff. Needless to say, here no similar contractual relationship exists between the parties, and the injunction proposed to be issued by the British court would abort all aspects of Laker's lawsuit.

In another case cited by defendants, *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir. 1953), the Court of Appeals stated that [**17] it was of the opinion that the District Court could enjoin prosecution

¹⁹ As in many cases, **HN3**[] the preliminary injunction in large part decides the merits. Nevertheless, the parties may, if they wish, have their claims considered again on the basis of additional evidence.

²⁰ *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Assn. v. Federal Power Commission*, 104 U.S. App. D.C. 106, 259 F.2d 921 (D.C. Cir. 1958).

²¹ See, e.g., the memorandum of KLM in opposition to the motion for preliminary injunction which contends (at p. 11) that "there is grave doubt" that the American antitrust laws can be given extraterritorial effect so as to encompass "the injury to Laker, a U.K. company."

²² Until its insolvency, Laker was, of course, daily engaging in business in the United States, and so were and are all of the defendants in this action. Defendants' business activities, including any alleged antitrust violations, had an intended effect upon American commerce, and hence defendants are subject to United States **antitrust law**. See, e.g., *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980).

²³ The Court's order allowed the foreign suits to proceed by their normal course in all other respects.

559 F. Supp. 1124, *1130 LEXIS 1983 U.S. Dist. LEXIS 18680, **17

of an action in British Guinea if that action had been filed purely out of vexatiousness, but that if the plaintiff had a legitimate reason to be in the British Guinea court on account of British Guinea law, the injunction should not issue.

In *Velsicol Chemical Corp. v. Hooker Chemical Corp.*, 230 F. Supp. 998 (N.D. Ill. 1964), the court stated that it would be inclined to issue an injunction solely to ensure the finality of its judgment, that is, to prevent a losing plaintiff from initiating proceedings abroad against the same defendant on the same cause of action. Similarly, in *Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971), a Florida court enjoined a Florida resident from proceeding with a previously filed lawsuit in the Bahamas involving a contract concerning Bahamian land against Florida residents. Like in *Velsicol Chemical*, the injunction constituted an effort to make conclusive the court's judgment.²⁴ This is wholly different from the instant cases, which (1) implicate a key statute of the United States; (2) involve alleged conduct that in part occurred and had significant effects in the United [**18] States; and (3) do not concern the enforcement of an existing British judgment.²⁵

[**19] [*1131] Finally, in *Cole v. Cunningham*, 133 U.S. 107, 33 L. Ed. 538, 10 S. Ct. 269 (1890), a Massachusetts court enjoined a creditor of a Massachusetts insolvent from proceeding with an attachment action in New York. The creditor's action was an intentional circumvention of the Massachusetts laws regarding insolvency, not that much different from defendants' deliberate avoidance of American substantive and procedural law by their resort to the British courts. The holding is thus supportive of plaintiff's position rather than defendants'.²⁶

[**20] In short, the precedents cited by defendants differ factually in significant respects from the cases now before this Court. For that reason, and because of the breadth of the interference with United States law, ongoing court proceedings, and United States public policy, the injunction proposed to be issued by the British court is truly unprecedented by American standards.²⁷

²⁴ Moreover, the injunction was upheld because the lawsuit involved "the validity of a contract signed in Florida by Florida residents," *441 F.2d at 498*, and which was based on fraud.

²⁵ There is obviously a large difference between enforcement of a judgment and interference with an ongoing action so severe that a judgment could never be obtained. American courts occasionally stay proceedings before them that are duplicative of proceedings pending elsewhere, but this occurs when the foreign proceeding was filed first, see *Darr v. Burford*, 339 U.S. 200, 204, 94 L. Ed. 761, 70 S. Ct. 587 (1950), and when "the expected foreign judgment would be entitled to enforcement in the forum." Ehrenzweig, Conflict of Laws § 36, at 129. Clearly Laker filed his lawsuit first in this Court, and it is entirely inappropriate to suggest that a court of the United States should stay or otherwise abandon a proceeding brought under the Sherman Act to wait to see how another nation's courts would handle the same allegations. Ehrenzweig states that the British courts generally do not stay their proceedings *pendente lite*, because of their "preference for their own courts." *Id.*, § 36, at 127. In this case, the British court is being asked not simply to disregard the first-filed suit, but to ensure that its later-filed proceedings are the *only* proceedings between the parties.

²⁶ Defendants also cite *Dames & Moore v. Regan*, 453 U.S. 654, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981), the case upholding the actions of President Carter in extinguishing claims against Iran pending in United States courts and referring them to an international tribunal. These actions were taken as part of an executive agreement negotiated with Iran to free Americans who had been taken hostage there. At issue was the power of the Executive Department, not that of a court, to decide where American nationals might bring suit. The President's actions were taken, moreover, after the declaration of a national emergency implicating the foreign policy of the United States. As the Supreme Court noted, its holding was a narrow one; it did not "attempt to lay down . . . general 'guidelines covering other situations not involved here.'" *453 U.S. at 661*. It held that "where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims." *453 U.S. at 688*. The holding has no bearing on the question of when a court, acting on its own, should exercise its injunctive powers to direct a national where to sue, or, more accurately, where not to sue.

²⁷ To be sure, a British court is governed by British law, and the defendants cite a recent British case in which injunctive procedures were used. See *Smith, Kline & French Laboratories Ltd. v. Bloch*, 1980 S. No. 6514 (C.A. May 13, 1982). It may be noted that *Bloch* enjoined American proceedings having to do with actions that took place in Britain, not between Britain and the United States or in the United States. Moreover, the action was clearly based on a contract. When plaintiff's American counsel

[**21] Third. In addition to the circumstance that the American precedents would not support issuance of an injunction on the facts presented to Mr. Justice Parker, there is the perhaps even more significant fact that there are so few instances where any court, either in the United States or the United Kingdom, has asserted the power to enjoin its citizens from suing in the courts of another nation. The minimum lesson one can draw from this paucity of precedent is that, [HN5↑](#) if a court has the authority to prevent a national from suing elsewhere, it may exercise this power only in the most extraordinary circumstances.²⁸

Yet there is nothing extraordinary about the suits brought in this Court by Laker. They are the garden-variety type of antitrust suit, involving what is claimed to be a combination [**22] of American corporations and foreign corporations doing substantial business in the United States which allegedly committed anticompetitive acts. In this age of multinational corporations, ever closer trade relations among the nations, instant communications, and air carriers [[*1132](#)] closely binding the continents together, it is not at all unusual that activities of the kind here alleged should be claimed to have occurred in some instances. In short, there is nothing either unusual or vexatious²⁹ about the lawsuits brought in this Court.³⁰

[**23] Thus, if these lawsuits may be singled out for the extraordinary remedy of an injunction requiring a national to cease prosecuting this action, then a great many other lawsuits on both sides of the Atlantic, in the field of [antitrust law](#) as in many other fields, would qualify for similar treatment.³¹ To put it another way, any decision which accepted the proposition that the court of the plaintiff's nationality may interfere with and effectively halt proceedings abroad in circumstances such as those involved here would set a far-reaching and dangerous precedent.

American companies operate, directly or through subsidiaries, in many countries all over the world, sometimes on a massive scale.³² Under the rationale which underlies the lawsuit in Great Britain, and which has at least provisionally been [**24] accepted by the British tribunal,³³ American courts could legitimately interject themselves, by means of injunctions, between those American corporations and the foreign courts, and the courts of nations other than the United States and the United Kingdom could, and no doubt would, do likewise. The

discovered that his client had previously assigned his rights under the contract, a second complaint sounding in antitrust was filed in the hope that an antitrust claim would survive the assignment. In contrast, in these cases Laker alleges antitrust violations of a primary and significant form, and the actions would therefore not be governed by *Bloch* with its peculiar facts. For these reasons, among others, it appears that with respect to the instant cases there may be no significant difference between British and American law, and it is not necessary therefore at this juncture to contemplate the outcome in the event of an ultimate irreconcilable conflict between the two legal systems with respect to these cases.

²⁸ Mr. Justice Parker has expressed his own view that an injunction by what might be called the "nationality" court against litigation elsewhere would be a "rare case." Transcript of proceedings, January 27, 1983, p. 4.

²⁹ This is also demonstrated by the fact that the Justice Department independently empanelled a grand jury to consider the questions that are raised in these lawsuits. See note 49 *infra*.

³⁰ For that reason, there is somewhat of an Alice-in-Wonderland flavor to the arguments made by defendants both in the British court and in this Court. In both places, some of the defendants proceed as if clearly and without question the British court has jurisdiction -- notwithstanding its own statement that interference with a suit pending elsewhere would be a rare, or exceptional case -- and as if this Court, somehow, were an interloper for continuing to proceed with an action that is regularly pending before it, without any challenge to its jurisdiction having been made and without anything out of the ordinary having occurred until some of the defendants suddenly secured an order from a foreign court. See also note 41 *infra*.

³¹ It would be naive to expect that, were this kind of precedent to be set by the British court in these cases, other parties and other courts both in Great Britain and the United States would not follow suit.

³² Of course, companies chartered by other nations (e.g., Japan, Germany, France) do business on a similar scale in the United States and elsewhere.

³³ The court has indicated its view that the Laker controversy may "be one of the rare cases where a court in this country would restrain a defendant [Laker]." Transcript of proceedings, January 27, 1983, p. 20.

consequences to international trade and to amicable relations between nations that would result from this kind of interference are difficult to overestimate.³⁴

[**25] Fourth. As concerns defendants' contention that the American courts are unable to do justice, the theory appears essentially to be that the discovery process established by American law is too expensive.³⁵ [**26] Debates have been going on for some time in the American legal profession as to whether pretrial discovery is, on balance, beneficial because it removes the element of surprise from litigation and contributes to fairer trials and fairer settlements [*1133] by revealing evidence that might otherwise not be available, or whether it is detrimental because of its cost. Whatever may be the answer to that question,³⁶ it is hardly the proper province of a foreign court to prohibit the conduct of litigation here because it does not agree with the way in which the United States Congress and the American courts, including the Supreme Court, have dealt with this particular procedural problem.

Again, if that were a proper standard in the British courts, it would also be appropriate for the American courts and the courts of other nations to take like factors into account in determining whether they should interfere with litigation abroad. There are few nations which measure up to the elaborate safeguards guaranteeing fairness that one finds in the United States Constitution and laws. Under the rationale upon which the British proceedings involving Laker and the other airlines are thus predicated, injunctions [**27] against foreign proceedings involving American citizens or corporations could become commonplace in the courts of this country whenever a United States court regarded the foreign country's procedures as inadequate.

What is perhaps even more surprising than the denigration of American law by British courts³⁷ [**28] is that very large and reputable American law firms which routinely proceed under, and whose clients daily benefit from, the American discovery rules, would send their English solicitors into a foreign court to seek to enjoin proceedings in the United States on the ground that American courts cannot, under American legal procedure, be expected to do justice.³⁸ The argument based on the expense of litigation in this country is especially strange when it is advanced on behalf of many of the largest airlines in the world represented by these vast and, no doubt, expensive law firms against a plaintiff which is insolvent.

³⁴ Another practical factor militating against use of the "nationality" rule proposed by the defendants comes readily to mind. What about multinational corporations? If such a corporation brought suit in the courts of nation X, and if its affiliates or subsidiaries were incorporated in counties A, B, and C, the courts of which nation would have control over the lawsuit? Under the customary rule, the courts of nation X decide on their own jurisdiction, both in the broadest and in the more narrower *forum non conveniens* sense. Under the rule advocated by defendants, presumably any of the three, four, or more nations in which the corporation may be regarded as a national would have the authority to halt the lawsuit in nation X in its tracks. The impracticability of the rule and its propensity for mischief are apparent.

³⁵ Also referred to in various papers are the differences between the American and British rules respecting attorney's fees, the availability of jury trial, and the American treatment of antitrust defendants as jointly and severally liable.

³⁶ A proposed amendment to **Fed. R. Civ. P. 26(b)(1)** would allow a court, on its own initiative or pursuant to motion, to limit discovery if "the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, the parties' available resources, and the values at stake in the litigation." See also *Dolgow v. Anderson*, 53 F.R.D. 661, 664 (E.D.N.Y. 1971) (Weinstein, J.) ("court has duty, of special significance in lengthy and complex cases . . . , to supervise and limit discovery to protect parties and witnesses from annoyance and excessive expense").

³⁷ Lord Denning, Master of the Rolls, stated in *Bloch, supra*, that, "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." Mr. Justice Parker, after noting that a particular exhibit "savour[s] of either fiction or journalism rather than legal exposition," added that the exhibit "was apparently prepared by Laker's American attorneys." Transcript of proceedings, February 4, 1983, p. 6.

³⁸ The English solicitors were armed with lengthy affidavits from the American lawyers detailing the claimed inadequacies and injustices of the American system of laws.

Fifth. While two of the defendants are British, four of the other corporations are American and four are carriers chartered in continental Europe. It is difficult to visualize on what basis a British court could legitimately take jurisdiction -- let alone displace the jurisdiction of a United States tribunal -- where the complaint alleges violations of American law by American corporations and by foreign corporations which provide air service between the United States and Rotterdam, Brussels, Frankfurt, and other cities of continental Europe.³⁹ The arguments of the European defendants distill down to the proposition that continental Europe is closer to Britain than to the United States.⁴⁰ This is hardly a distinction that may be thought to make a difference in an era of multinational corporations and instant communications, especially when it is the parties' business to [*1134] provide frequent commercial air service [*29] between Europe and America.

Sixth. This Court does not know what evidence of antitrust violations will be adduced at trial. As noted, the complaint alleges a conspiracy involving both the American and the foreign carriers to violate the American antitrust laws with respect to their operations between Europe and the United States. Nevertheless, it would not be surprising if the effective elimination from the lawsuit of several of the defendants could cripple plaintiff's lawsuit. Furthermore, if that elimination through the action of the [*30] British court were to succeed, a precedent would be set that would be likely to undermine the effectiveness of the antitrust laws whenever multinational or foreign corporations are part of the anticompetitive scheme: a court somewhere in the world could surely always be found to issue orders similar to those sought from the British court in these cases to abort an ongoing antitrust action in this country.

IV

The defendants argue with considerable emphasis that the British court has an interest in deciding whether a British plaintiff may prosecute a lawsuit in a foreign court.⁴¹ [*31] Assuming that such an interest exists -- as discussed *supra*, at least in the United States and in Great Britain any power based on such an interest is exercised only in very narrow circumstances -- it cannot displace the Court's authority and duty⁴² to entertain and decide the instant lawsuits.⁴³

These actions were brought under a positive command of a crucial American statute that represents a very strong public policy. Indeed, the Sherman Act has frequently been called the charter of economic freedom and its role has been compared to that which the *Bill of Rights* plays with respect to personal freedoms. See *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972). The duty of this Court to entertain the present actions is buttressed by the constitutional mandate which guarantees to all those residing or doing business in the United States, such as Laker, due process and the equal protection of the laws. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 72 L. Ed. 2d 786, 796, [*32] 102 S. Ct. 2382 (1982); quoting *Yick Wo v. Hopkins*, 118

³⁹ Britain is not involved in this service.

⁴⁰ Additionally, defendants KLM and Sabena argue that the Court may not enter any injunction against them because they are owned by foreign governments. There is, of course, a significant difference between a sovereign's public and its commercial activities. In any event, this issue has not been developed either factually or legally, by adequate briefing or otherwise, and it is more appropriate for subsequent consideration.

⁴¹ That is not to say that all defendants make the identical arguments, approach the subject of the current motions with the same decree of sophistication, or claim for the British court the same decree of supremacy. Some of them (e.g., Lufthansa) recognize the existence of several significant operative factors; others (e.g., Sabena) content themselves with ignoring the interests of plaintiffs under American law and the legitimate authority of the American courts, evidently in the belief that these interests and that authority can thereby be made to vanish.

⁴² See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L. Ed. 257 (1821).

⁴³ This case contrasts with *Cole v. Cunningham*, 133 U.S. 107, 134, 33 L. Ed. 538, 10 S. Ct. 269 (1890), in which there was "[nothing] in the law or policy of [the state of the first-filed, enjoined action] opposed to the law or policy" of the state of the second-filed case.

U.S. 356, 369, 30 L. Ed. 220, 6 S. Ct. 1064 (1886). See also, Russian Volunteer Fleet v. United States, 282 U.S. 481, 489, 75 L. Ed. 473, 51 S. Ct. 229 (1930).⁴⁴

In the end, then, what is involved in this unfortunate controversy is the question whether greater weight ought to be accorded in cases of conflicting claims of jurisdiction to the nationality of the plaintiff or to the substantive law and the substantive public policies of the nation in whose courts the plaintiff brings the action. That question, moreover, must here be decided in the context of a factual situation [**33] where all the defendants were and still are substantially engaged in doing business in the United States; where certain of the acts allegedly committed in furtherance of the illegal conspiracy [*1135] occurred in the United States;⁴⁵ where only in the United States can all the defendants surely be reached;⁴⁶ and where, if the British court enjoins the plaintiff with respect even to some of the defendants, it may be impossible to prove the conspiracy against any of them.

But these are matters to be explored more fully at other stages -- perhaps on the motion for partial summary judgment on the *forum non conveniens* issue. The immediate question is whether this Court shall have the opportunity to decide whether it is an appropriate forum or whether a British court will assume [**34] that function. See Transcript of proceedings, January 27, 1983, where counsel for defendants stated (at pp. 16-17) that "the point of *forum non conveniens* . . . [is an issue which] we want . . . decided by the English court and not by the American court." This Court is aware of no precedent, and none has been cited by any party, holding that a *forum non conveniens* claim is to be decided by the tribunal to which a defendant wishes to have an action transferred rather than by the court in which the action is pending.

V

The conflict here is far from being a dry, abstractly legal dispute between jurisdictions or courts -- that is the least of it. Plaintiff has represented that in 1981 one in seven passengers flying between the United States and the United Kingdom was using low-fare Laker;⁴⁷ today, by contrast, travellers using scheduled airlines must pay the fare set by the IATA. According to the complaint, this result was brought about because several of the most powerful airlines of the western world banded together to commit violations of the American antitrust laws, engaging in activities which had the effect of driving Laker out of business and of injuring American consumers, [*35] among others, by making it impossible for them to continue to benefit from low airfares over the North Atlantic route.

If the allegations of the complaint are true, but if United States courts are nevertheless prevented by the actions of a foreign tribunal from deciding these cases under American law,⁴⁸ [**36] transatlantic airfares are likely to be kept artificially inflated by the alleged cartel on a permanent basis.⁴⁹ Such a development would every year cost many thousands of American travellers hundreds of dollars each, and it would significantly injure American tourism and other businesses which depend upon or make substantial use of commercial air transport between the United States and Europe.

⁴⁴ See also, the treaty entered into between the United States and Great Britain during the tenure of President Madison which provides that "generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce but always subject to the laws and statutes of the two countries respectively." 8 Stat. 228 (1815).

⁴⁵ E.g., the IATA meeting in Florida.

⁴⁶ Although the defendants represent that all of them are either subject to process in Great Britain or would submit to British jurisdiction, this has not yet been demonstrated.

⁴⁷ Transcript of hearing, March 4, 1983. At the same hearing, plaintiff asserted that President Carter had hailed Laker's service as a breakthrough for the American consumer. Laker had 17,000 agents in this country selling tickets to American travellers.

⁴⁸ It cannot seriously be questioned that British conspiracy laws, to the degree that they may be applicable at all, provide little, if any, protection from anticompetitive activities. See slip op. at pp. 28-30 *infra*.

⁴⁹ The allegations of wrongdoing by the defendant airlines are so significant that the Department of Justice has commenced a grand jury investigation of their activities vis-a-vis Laker. See Aviation Daily at 311 (February 29, 1983), a citation submitted to the Court in the papers filed here.

Now that lawsuits are pending which are designed to determine whether the charges of law violations have merit, the defendant airlines have taken steps which, whatever the intention, would have the effect of aborting these actions so that they could never be decided.⁵⁰ Clearly, this [*1136] Court has an obligation to see to it that the cases before it are disposed of in accordance with law, and it intends to discharge that obligation.

[**37] It is to be hoped that the court in Great Britain will ultimately decide that it has no basis for interjecting itself into ongoing foreign lawsuits,⁵¹ [**38] or that those who sought or have indicated their intention to seek an injunction in the British court will, upon reflection, proceed by way of normal litigation procedures here.⁵² In any event, for the reasons stated, should these injunction cases be required to go forward, it is likely that plaintiff will prevail on the merits of its request for a permanent injunction. See note 20 *supra*.

VI

What remains to be considered is the balance of injuries and the public interest.

It is clear that, if this Court does not issue an injunction to preclude the defendants from joining British Airways, British Caledonian, Swissair and Lufthansa in their actions in the British court, at least some of them, or more likely all of them, will do just that. KLM and Sabena have acknowledged their desire to join the British suits; the American defendants disavow any present intention to sue in the British courts but state that they may wish to "participate" in the proceedings there. Given the advantages to antitrust defendants of having the merits of antitrust claims adjudicated in the United Kingdom rather than in the United States (see *infra*), there is a strong likelihood [**39] that all defendants would move in the British courts as soon as they would be legally free to do so.

Defendants argue that even if this forecast is accurate, plaintiff would still not be injured because the British court may decide that Britain is not the only proper forum for Laker's claims and may decline to issue a permanent injunction restraining the proceedings here. If the British court does proceed to the merits of the allegations, they continue, it may be expected to grant just relief, either under the United States antitrust laws or the British conspiracy laws.⁵³ These predictions can only be characterized as a mirage.

It is quite clear that [HN6](#)[] no British tribunal could or would proceed to enforce the Sherman Act. [15 U.S.C. § 15](#) lays venue only "in any district court of the United States." Cf. [General Investment Co. v. Lake Shore & Michigan Southern Ry. Co., 260 U.S. 261, 287, 1**401 67 L. Ed. 244, 43 S. Ct. 106 \(1922\)](#) (state court may not hear claim brought under antitrust laws; right to sue to be "exercised only in a 'court of the United States'"). The problems that

⁵⁰ In addition to their efforts in the United Kingdom, the defendants, represented as they are by large and prestigious law firms, have sought to disqualify Laker's own counsel. The effect of that effort, if fully successful, would be to leave Laker unrepresented. The disqualification motion, which raises serious and substantial claims, is pending and will be considered by the Court in due course. Defendants have also refused to participate in any meaningful discovery, and they have requested that the Court excuse them from discovery until the disqualification motion is decided. That request is being denied this date by a separate order. And, as has been noted elsewhere, the defendants are seeking in various ways to defer the decisions of this Court while they are proceeding at a rapid pace before the court in Great Britain.

⁵¹ It would be a far different and less serious matter had the airlines limited their prayer for relief in the British court to a declaration of British antitrust law. Then the issue would become purely one of the res judicata effect to be accorded the judgment first obtained. See Restatement (Second) of the Law of Judgments § 98.

Similarly, were the lawsuits in this Court to result in a judgment in plaintiff's favor after trial, this Court would have no business interfering with the British courts' application of British law regarding treble damage awards. See slip op. at p. 30 *infra*.

⁵² Obviously, if there are jurisdictional or other defects in Laker's lawsuit with respect to any, or all, defendants, this Court is obligated by law, and it will, enforce the defendants' rights in that and in all other respects. Beyond that, appellate courts and appellate remedies are fully available to any dissatisfied party.

⁵³ Some defendants focus on the American antitrust laws, others assert that the British laws provide comparable relief.

would be involved in trying to prove American **antitrust law** for purposes of application by a foreign court are reason enough for a foreign court to decline to hear such a case.⁵⁴

Moreover, given the hostility of the British courts to the American antitrust laws, see *infra*, it would be wholly unrealistic to assume that a British court would enforce [*1137] the Sherman Act even if it had legal power to do so.

Confining Laker to British law is equally inadequate. The House of Lords has ruled twice, once in 1891 and again in 1982, that **HN7** under British law it is not unlawful for a corporation to monopolize commerce by offering exceptional terms resulting in losses so as to drive competitors out of business, with the expectation [**41] that the losses will be recouped later once the competitor has been eliminated. These decisions further hold that the crux of an unlawful conspiracy is an intent to injure the plaintiff, and that an agreement or combination which has as its purpose the protection of the interests of the defendants, whatever they may be, is not unlawful. See *Lonrho Ltd. v. Shell Petroleum Co. Ltd.*, [1982] A.C. 173, 189 (1981); *Mogul Steamship Co., Ltd. v. McGregor, Gow & Co.*, [1982] A.C. 25, 35-6, 40 (1891). In these critical respects, British law is thus totally different from American law,⁵⁵ and it is plain that to relegate Laker to British law as applied by the British courts would only be to ensure that those courts would issue the declaration of non-liability that the airlines which are already before the Queen's Bench are presently seeking.⁵⁶

[**42] Such a result is quite consistent with the way in which British law, both parliamentary and judge-made, regards antitrust principles in general. The Protection of Trading Interests Act of 1980 directs British courts not to enforce treble damage awards against British firms, and this same act's "clawback" provision allows non-United States firms doing business in the United Kingdom to sue there to recover two-thirds of treble damage awards levied against them in the United States. British courts have long bemoaned what they regard as the wrongful extraterritorial reach of the American antitrust laws. See, e.g., *British Nylon Spinners Ltd v. Imperial Chemical Industries Ltd.*, [1953] 1 Ch. 19 (Court of Appeal, 1952).

In short, the situation is not that British law might be slightly less favorable to plaintiff than American law,⁵⁷ and that therefore Laker cannot be deemed to be truly injured if it is left to its remedies in the British courts. See note 59 *infra*. Rather, it may be expected that, if this Court should fail to issue an injunction and thus allow those defendants which are still before this Court to join with their alleged coconspirators before the Queen's [**43] Bench Division, the British court may very well (1) enjoin Laker from pursuing its remedies against any of the defendants in this Court,⁵⁸ [**44] and (2) enter a judgment on the merits that the defendants here (plaintiffs there) are not liable to

⁵⁴ American law would have to be proved by the roundabout method of testimony by expert witnesses.

⁵⁵ See, e.g., *United States v. American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1368 (D.D.C. 1981), citing 3 Areeda & Turner, **Antitrust law**, para. 771b, at p. 151 (1978).

⁵⁶ Counsel for the defendants make much of a statement made in the *Midland* case by Mr. Justice Parker that "if the alleged conspiracy did exist and Midland was a party to it there would clearly be a cause of action in conspiracy here where Laker could recover full compensatory damages." Transcript of Judgment, February 4, 1983, p. 13. The British court makes no reference to any cases. The phrasing, moreover, would seem to state a tautology: if Midland is found to have engaged in the sort of conspiracy that British law will penalize, then British law will penalize it. The statement does nothing to allay the indication that British law, unlike American law, would not penalize the sort of conspiracy alleged by Laker.

⁵⁷ Laker might well be entitled to an injunction to protect its American antitrust rights even in that situation, on the basis that it simply cannot be deprived of those rights by the kind of procedural maneuver resorted to by defendants.

⁵⁸ It is obviously not certain that the British court will do so, particularly with respect to the American parties. However, given the fact that, once the British court issues an injunction of the type sought before it, it may very well be too late for Laker ever to find its way back to the American judicial system, less than absolute certainty concerning the British court's intentions suffices to support a finding of irreparable injury.

Laker for the acts averred in the complaints.⁵⁹ The Court [*1138] finds that, for these reasons, plaintiff would be irreparably injured if the Court does not issue an injunction.

The defendants argue that they will suffer irreparable injury if an injunction is granted. Sabena states that if "forced to defend itself against Laker's claims in the United States, it will be exposed to the risk of enormous potential liability, the possible use of 'escalating settlement' tactics by the plaintiffs, substantial litigation expense, and a significant disruption of its affairs." Memorandum at 15. It observes that [**45] "all of these undesirable consequences can be avoided if the British courts determine that Laker may not lawfully pursue its claims against Sabena in the United States. None of them can be recouped if Sabena is prevented from obtaining such a ruling." KLM makes a similar argument.

A court of the United States can have little sympathy with such a position. If Sabena and KLM are concerned about the prospect of United States antitrust liability they should not do business here.⁶⁰ On the other hand, if they feel strongly that they are immune from the antitrust laws for some reason, or that this Court should decline to exercise its subject matter jurisdiction in this case, they may legitimately be expected to follow the established American procedures and file appropriate motions to that effect. Their proper remedy is not to assume the existence of a "right" to go into the courts of a third country so as to circumvent American substantive and procedural law.⁶¹

[**46] The irreparable injury claimed by the American defendants consists of their being prevented "from protecting their rights by participating, or even providing evidence, in the ongoing English proceedings whose outcome may well reflect on the American defendant's own potential liability, if any, under English law." This injury is purely speculative at this point. Moreover, as noted *infra* (note 63), the Court will entertain a proposal by the American defendants to modify the order.

For the foregoing reasons, the Court finds that the injury to Laker from a denial of the injunction far outweighs the injury to defendants resulting from its issuance. Considerations of the public interest also favor the plaintiff. Laker alleges that numerous American consumers were injured by the defendants' predatory acts that led to its demise and with it the alternative of low-cost, no frills transatlantic air service. The public interest clearly favors a full airing of these claims in the manner envisioned by the Sherman Act.

VII

The Court exceedingly regrets that it must issue an injunction in this case. However, it is worth emphasizing that this Court had no part in precipitating the current [**47] dispute. The lawsuit pending before it was proceeding in its normal course,⁶² when the British court, without appropriate regard to principles of comity, proceeded to interfere with that action. At that juncture, this Court's options were severely limited. It could either issue its own injunction [*1139] to prevent at least the remaining defendants -- those from the United States and some of those from the European continent -- from seeking shelter from United States law in a British court, or it could acquiesce

⁵⁹ [HN8](#) [↑] The fact that another country's law may be less favorable to a plaintiff than is American law is not reason alone to refuse to dismiss a lawsuit on *forum non conveniens* grounds. [*Piper Aircraft v. Reyno*, 454 U.S. 235, 70 L. Ed. 2d 419, 102 S. Ct. 252 \(1981\)](#). But when "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in the law may be given substantial weight." [454 U.S. at 254](#). See also, [*Industrial Investment Development Corp. v. Mitsui Co.*, 671 F.2d 876, 890-91 \(5th Cir. 1982\)](#), vacated on other grounds, [460 U.S. 1007, 103 S. Ct. 1244, 75 L. Ed. 2d 475 \(1983\)](#).

⁶⁰ If this consequence be viewed as an undue burden on U.S. commerce, the remedy, if a remedy is needed, lies with the Congress.

⁶¹ Absent congressional action, surely a foreign corporation cannot expect that it may do business here but be entitled at the same time to retreat to the sanctuary of a foreign legal system as soon as its conduct of business in the United States involves what are claimed to be violations of United States laws. Only diplomatic personnel have that privilege.

⁶² Defendants have argued that no weight should be given to the fact that Laker won the "race to the courthouse." There was no such race. The Laker suit had been pending for three months before defendants brought any action in the United Kingdom.

in silence in the effort to have a foreign tribunal decide on this Court's jurisdiction and to see the plaintiff's Sherman Act rights dissipated. With regret, the Court has no choice but to follow the former course.

For the reasons stated, a preliminary **[**48]** injunction ⁶³ **[**49]** was issued ⁶⁴ restraining the defendants from taking any action in a foreign forum that would impair or interfere with the jurisdiction of this Court in these cases or the freedom of plaintiff to prosecute these actions. ⁶⁵

[50]**

End of Document

⁶³ Several defendants have complained about the breadth of plaintiff's injunction request. In response, plaintiff cogently argues that it is difficult to draft language which would relieve defendants' complaints yet would not provide them with the opportunity, on one basis or another, to proceed in the British court aggressively rather than defensively, as have several other airlines. See, for example, the request of the American defendants to "participate" in the British action without specifying what that participation would entail. If the parties are able to agree on language, or if any party will submit language which will accomplish the objective of permitting the defendants to offer defenses in Great Britain without at the same time leaving them free to secure orders which would interfere with the litigation pending in the United States, the Court will consider modifying the terms of the preliminary injunction.

⁶⁴ See [Seattle Totems v. National Hockey League, 652 F.2d 852, 855 n.5 \(9th Cir. 1981\); 28 U.S.C. § 1651](#) (All Writs Act).

⁶⁵ It is necessary to deal separately with the British court's order to preclude plaintiff from filing motions or pleadings in this Court with respect to its pending action against British Airways. Even if it be assumed *arguendo*, and contrary to what has been stated above, that a court in the United Kingdom has the power to enjoin a British subject from initiating and pursuing a legal action of this kind in the United States, such a court cannot, on any theory, be assumed to possess either the power to issue an order precluding a party to an action in this Court from routine participation in that action, or the capacity to enforce such an order against parties admittedly subject to this Court's *in personam* jurisdiction.

Since Laker is not unwilling, but merely unable, to act, it may ultimately become appropriate to appoint a receiver or trustee to protect its interests and possibly those of American creditors pending final resolution of this controversy. Cf. [Rule 17\(c\), Fed. R. Civ. P.](#); 3A *Moores Federal Practice* para. 17.26; [In re Air Crash Disaster Near Saigon, Etc., 476 F. Supp. 521 \(D.D.C. 1979\); Field v. American West African Line, Inc., 154 F.2d 652 \(2d Cir. 1946\)](#). In the interim, to preserve the status quo, the Court expects plaintiff's counsel, as officers of this Court, with professional responsibilities, to continue to represent Laker's interests in the action pending here, notwithstanding the March 2 order against Laker, and to take such measures, including the filing of motions and oppositions, as may be necessary or appropriate to protect these interests.



Lease Lights, Inc. v. Public Service Co.

United States Court of Appeals for the Tenth Circuit

March 9, 1983

Nos. 81-1462, 81-1781, 81-1712

Reporter

701 F.2d 794 *; 1983 U.S. App. LEXIS 29831 **; 1983-1 Trade Cas. (CCH) P65,262

Lease Lights, Inc., Jack R. Seay, d/b/a Seay Electric Co., Knight Lights Co., Inc., and Protective Lighting, Inc., Plaintiffs-Appellants, Cross-Appellees v. Public Service Co. of Oklahoma, Defendant-Appellee, Cross-Appellant

Prior History: [**1] Appeal from the U.S. District Court, Northern District of Oklahoma.

Disposition: Reversed and remanded.

Core Terms

interstate commerce, lighting, appellants', outdoor, Sherman Act, install, customers, poles, challenged activity, substantial effect, adversely affect, directed verdict, relevant market, district court, interstate, regulated

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

The effect upon interstate commerce necessary to establish jurisdiction, must, as a matter of practical economics, have a not insubstantial effect on the interstate commerce involved.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN2 [down arrow] **Sherman Act, Claims**

The jurisdictional element of a Sherman Act violation is established by a showing of activities actually in interstate commerce or by other activities which, while wholly local in nature, substantially affect interstate commerce. The jurisdictional requirement of the Sherman Act is satisfied under either the in commerce or the effect on commerce theory. To establish jurisdiction, a plaintiff alleges the critical relationship in the pleadings and if these allegations are controverted, demonstrates by submission of evidence beyond the pleadings either that a defendant's activity is

itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

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

In a civil action under the Sherman Act, liability is established by proof of either an unlawful purpose or an anticompetitive effect. Even where there is an inability to prove that concerted activity has resulted in legally cognizable damages, jurisdiction is not impaired, though such a failure confines the available remedies to injunctive relief.

Antitrust & Trade Law > Sherman Act > General Overview

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

HN4  **Antitrust & Trade Law, Sherman Act**

The determination of whether an activity has a substantial effect on interstate commerce is not determined with mathematical nicety. Nor does a lack of intent to affect interstate commerce or the lack of impact on market price preclude a viable jurisdictional determination.

Antitrust & Trade Law > Sherman Act > General Overview

HN5  **Antitrust & Trade Law, Sherman Act**

An effect on interstate commerce can be substantial under the Sherman Act even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market price.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

HN6  **Sherman Act, Jurisdiction**

A federal court has jurisdiction under the Sherman Act if the plaintiff establishes either that the challenged activity occurs within the flow of interstate commerce or that the activity, although wholly local in nature, substantially affects interstate commerce. Additionally, the plaintiff is not required to show that the flow of interstate commerce is diminished; an unreasonable burden on commerce may exist even though the anticompetitive conduct may increase interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

HN7  **Antitrust & Trade Law, Sherman Act**

Once a plaintiff establishes a substantial effect on interstate commerce, he need not establish an adverse effect on interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

HN8 [] **Antitrust & Trade Law, Sherman Act**

A mere allegation that a defendant's general or overall business affects interstate commerce falls short of alleging the required critical relationship, for it leaves the court, impermissibly, to presume the nexus between the challenged activity and interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

HN9 [] **Antitrust & Trade Law, Sherman Act**

An elaborate analysis of interstate impact is not necessary at the jurisdictional stage, only an allegation showing a logical connection as a matter of practical economics between the unlawful conduct and interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN10 [] **Antitrust & Trade Law, Sherman Act**

A private action is beyond the protective umbrella of the antitrust laws.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Antitrust & Trade Law > Sherman Act > General Overview

HN11 [] **Regulated Practices, Price Fixing & Restraints of Trade**

Restraints of trade and monopolization inherently involve injury to the public and competition.

Counsel: Jack I. Gaither (Bruce Darrow Gaither, with him on brief), Tulsa, Oklahoma, for Plaintiffs-Appellants, Cross-Appellees.

Floyd L. Walker, of Pray, Walker, Jackman, Williamson & Marlar, Tulsa, Oklahoma, for Defendant-Appellee, Cross-Appellant.

Judges: Barrett, McKay and Logan, Circuit Judges.

Opinion by: BARRETT

Opinion

[*795] BARRETT, Cir. J.

Lease Lights, Inc., Knight Lights Company, Inc., Protective Lighting, Inc., and Jack R. Seay, d/b/a Seay Electric Company (appellants), appeal from an order granting Public Service Company of Oklahoma (PSO) a directed verdict.

Appellants are engaged in the business of installing, leasing, servicing, and maintaining commercial and industrial outdoor lighting in Oklahoma. PSO is an electric public utility company regulated by the Oklahoma [*796] Corporate Commission. Appellants initiated this action against PSO for alleged violation of Section 2 of the Sherman Act as well as Sections 4 and 16 of the Clayton Act (15 U.S.C.A. § 2 and § 15). Appellants sought a total of \$8,500,000 in actual damages to be trebled.

Within their complaint, [*2] appellants alleged that PSO had a virtual monopoly in the supply of electricity within its service area, that PSO had monopolized and was attempting to monopolize the outdoor lighting business for private, commercial, and industrial users within its service area, and that PSO's actions had occurred in and had an effect upon interstate commerce. Appellants specially alleged that PSO had monopolized the outdoor lighting business by: furnishing outdoor lighting business in the public utility business; refusing to afford appellants the same service it furnished to its other customers; utilizing its public utility status unlawfully to install, service and maintain outdoor lighting on private property; refusing to allow appellants to install their lights on its poles; and by refusing to connect and delaying the connection of electrical current to appellants' lights for unreasonable periods of time.

Within its original answer, PSO admitted that the acts complained of occurred in and had an effect upon interstate commerce. Thereafter, PSO filed an amended answer in which it specifically denied that the acts complained of occurred in and had an effect upon interstate commerce. PSO further [*3] alleged, *inter alia*, that: as a state regulated entity, conducting state regulated business, it is exempt from the federal antitrust statutes; its rates are established in compliance with the directives of the Oklahoma Corporate Commission; its rates for outdoor lighting have, since May 16, 1975, been profitable; its rates for outdoor lighting have never been below its costs; appellants were never refused any service to which they were entitled; if appellants were in fact improperly denied service, they had a clear and adequate remedy before the Oklahoma Corporate Commission which they failed to pursue; its refusal to allow appellants the right to install their lights on its poles was based on sound business decisions; and, any losses sustained by appellants are attributable to appellants' mismanagement of their respective businesses.

During the course of trial appellants established that their interstate purchases for poles, lights, brackets, wiring, controls, and other components amounted to \$110,000 to \$185,000 a year. Appellants also presented evidence reflecting that PSO's share of the commercial and industrial lighting business in the Tulsa metropolitan area had grown [*4] from 24.6% in 1969 to 63.2% in 1981 while appellants' market share decreased from 69.27% to 33.9% during the same period.

At the conclusion of appellants' case, and prior to presenting any evidence, PSO moved for a directed verdict. PSO alleged that its outdoor lighting business as a public utility was regulated by the State of Oklahoma and, accordingly, was immune to federal antitrust laws; further, that appellants had failed to establish that interstate commerce had been substantially and adversely affected.

Within its order granting PSO's motion for a directed verdict the district court found/concluded:

The Plaintiffs herein contend that the business activity in question is the supplying of outdoor lighting to certain types of customers within the service area served by Defendant. It is not the rental of lights, poles and fixtures, but the rental of illumination. There is no dispute that the Defendant's service area is wholly within the State of Oklahoma. The Court, therefore, must conclude that because the business in question, as defined by the Plaintiffs, is wholly local in nature, the Plaintiffs' burden is to produce evidence which, when viewed in the light most [*5] favorable to Plaintiffs, shows that the Defendant's activity has an effect on some other appreciable activity demonstrably in interstate commerce.

[*797] In *McLain, supra*, the Court stated that **HN1**[] the effect upon interstate commerce necessary to establish jurisdiction, must, "as a matter of practical economics . . . have a not insubstantial effect on the interstate commerce involved." 100 S. Ct. at 511.

Plaintiffs' evidence on this crucial point shows that some of their customers were involved in interstate commerce (a trucking company, for example), and that substantially all of the components used in the business (lights and poles) were manufactured outside of the State of Oklahoma. There is simply no evidence that the interstate business of Plaintiffs' customers was affected in anyway by any activity of the Defendant; nor is there any evidence that the commerce between the states in lights, poles, and fixtures was adversely affected by any activity of the Defendant. The Plaintiffs' evidence actually shows that this business was increasing steadily during the times in question herein.

The Court, upon its review of the Plaintiffs' evidence, can come to no conclusion [**6] other than that Plaintiffs have failed to produce any evidence showing that interstate commerce was adversely affected in any way by the Defendant's activities.

R., Vol. I at pp. 62-63.

The district court also found that appellants had presented sufficient evidence to establish the claimed relevant market; appellants' evidence to establish that PSO possessed monopoly power in any relevant market was sufficient, although perilously close to being a "mere scintilla"; appellants failed to show any causal connections between PSO's activities and the damages they were claiming; appellants failed to present evidence by which the impact of PSO's allegedly unlawful acts could be separated from lawful competition, appellants' own business decisions, actions taken by customers, and general increases in costs and labor over a period of years; appellants' evidence on damages, although extremely weak, was adequate for submission "to the jury, had the other requirements [jurisdiction] been met"; and that in view of the lack of evidence relative to the extent of the Oklahoma Corporate Commission's regulation of PSO's business, a ruling on PSO's assertion that its regulated status caused [**7] it to be immune from the application of the Sherman Act would be premature.

On appeal appellants contend, *inter alia*, the district court erred in: (1) concluding that the evidence would not support a jury finding of causation or fact of damage; (2) finding that there was an absence of evidence to show that the interstate commerce jurisdictional requirements were satisfied; and (3) directing a verdict in violation of their right to a jury trial.

I.

Appellants contend that the trial court erred in finding that there was an absence of evidence to show that the interstate commerce jurisdictional requirements were satisfied. Appellants argue that they established the interstate commerce jurisdictional requirements by showing that: the lights and lighting components installed in the market area were purchased in states outside of Oklahoma; a portion of PSO's business occurs in interstate commerce; and that some of their lighting customers were engaged in businesses that operate in interstate commerce. PSO does not dispute these contentions.

PSO argues that such a showing does not establish jurisdiction when, as here, it is undisputed that: the business of outdoor lighting is [**8] wholly local in nature; the number of lights in the relevant market claimed by appellants has increased each year; there was no evidence that the movement in interstate commerce of outdoor lighting components has been reduced or adversely affected; and that appellants' evidence shows that the relevant market growth rate for several of the lights supplied by appellants [*798] and PSO was twice as fast following PSO's alleged anticompetitive actions as it was in the six immediately preceding years. As such, PSO contends that the district court did not err in finding that appellants had failed to establish jurisdiction, having "failed to produce any evidence showing that interstate commerce was adversely affected in any way by the Defendant's activities". We disagree.

HN2[] The jurisdictional element of a Sherman Act violation may be established by a showing of activities "actually *in* interstate commerce" or by other activities which, "while wholly local in nature substantially affect

701 F.2d 794, *798L^A 1983 U.S. App. LEXIS 29831, **8

interstate commerce." [McLain v. Real Estate Board of New Orleans, 444 U.S. 232, 241, 62 L. Ed. 2d 441, 100 S. Ct. 502 \(1980\)](#). In *McLain* the Court stated:

It can no longer be doubted, **[**9]** however, that the jurisdictional requirement of the Sherman Act may be satisfied under either the "in commerce" or the "effect on commerce" theory. . . . To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce. *Gulf Oil Corp. v. Copp Paving Co.*, *supra*, at 202.

To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful. . . . A violation may still be found in such circumstances because [HN3](#)[↑] in a civil action under the Sherman Act, liability may be established **[**10]** by proof of *either* an unlawful purpose or an anticompetitive effect.

* * *

Nor is jurisdiction defeated in a case relying on anticompetitive effects by plaintiff's failure to quantify the adverse impact of defendant's conduct. . . . Even where there is an inability to prove that concerted activity has resulted in legally cognizable damages, jurisdiction need not be impaired, though such a failure may confine the available remedies to injunctive relief.

[444 U.S. at pp. 242-243.](#)

[HN4](#)[↑] The determination of whether an activity has a "substantial effect" on interstate commerce cannot be determined with mathematical nicety. In [Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 \(1975\)](#) the Court stated:

The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved.

[421 U.S. at p. 785.](#)

Nor does a lack of intent to affect interstate commerce or the lack of impact on market price preclude a **[**11]** viable jurisdictional determination. In [Hospital Building Company v. Rex Hospital Trustees, 425 U.S. 738, 48 L. Ed. 2d 338, 96 S. Ct. 1848 \(1976\)](#) the Court held:

Whether the wholesalers intended their restraint to affect interstate commerce was simply irrelevant to our holding. See also [United States v. McKesson & Robbins, 351 U.S. 305, 100 L. Ed. 1209, 76 S. Ct. 937 \(1956\)](#). In the same way, the fact that respondents in the instant case may not have had the purposeful goal of affecting interstate commerce does not **[*799]** lead us to exempt that conduct from coverage under the Sherman Act.

The Court of Appeals further justified its holding of "no substantial effect" by arguing that "no source of supply or insurance company or lending institution can be expected to go under if Mary Elizabeth doesn't expand, and no market price likely will be affected." 511 F.2d, at 684. While this may be true, it is not of great relevance to the issue of whether the "substantial effect" test is satisfied. [HN5](#)[↑] An effect can be "substantial" under the Sherman Act even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market price.

[**12]

425 U.S. at p. 745.

In Mishler v. St. Anthony's Hospital Systems, 694 F.2d 1225 (10th Cir. 1981) we stated:

HN6 [↑] A federal court has jurisdiction under the Sherman Act if the plaintiff establishes either that the challenged activity occurs within the flow of interstate commerce or that the activity, although wholly local in nature, substantially affects interstate commerce.

* * *

Additionally, even at trial Dr. Mishler is not required to show that the flow of interstate commerce is diminished; an unreasonable burden on commerce may exist even though the anticompetitive conduct may increase interstate commerce. Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 132 & n. 14 (3d Cir. 1978); P. Marcus, Antitrust Law and Practice 86 (1980).

694 F.2d at pp. 1227-1228.

Applying these standards to the facts herein, we hold that appellants did establish a jurisdictional predicate for PSO's alleged antitrust violations and that the trial court erred in granting PSO's motion for a directed verdict. It was uncontested that the service in question, i.e., the supplying of illumination in and about the Tulsa metropolitan area, albeit admittedly [**13] local in nature, had a substantial impact on interstate commerce by the repeated, ongoing interstate purchase of lights and lighting components by both appellants and PSO. Having HN7 [↑] established a substantial effect on interstate commerce, appellants need not, as determined by the trial court, establish an "adverse effect" on interstate commerce.

We reject PSO's contention that the district court's directed verdict for lack of jurisdiction was in accord with our Crane v. Intermountain Health Care, Inc., 637 F.2d 715 (10th Cir. 1980) (en banc). In Crane, a pathologist sued Intermountain Health Care, Inc., (Intermountain), alleging that Intermountain and others had acted in concert to restrain the practice of pathology at Cottonwood Hospital and to boycott his services in violation of the Sherman Act. Within Crane, as observed by PSO, we stated:

Even though the defendant's overall business may impact interstate commerce greatly, the challenged activity may in every practical economic sense be unrelated to interstate commerce. HN8 [↑] A mere allegation that the defendant's general or overall business affects interstate commerce falls short of alleging the required "critical" [**14] relationship," for it leaves the court -- impermissibly, under McLain, see 444 U.S. at 242, 100 S. Ct. at 509 -- to "presume" the nexus between the challenged activity and interstate commerce.

637 F.2d at p. 724.

Although not conceded by PSO, appellants' evidence in this case did more than merely allege that PSO's general or overall business affects interstate commerce. As set forth, *supra*, appellants presented unrebutted evidence that most of the lights and lighting components installed in the relevant market area were shipped into Oklahoma from other states. PSO did not challenge this evidence. It did not present evidence that the lights and lighting components it installed were not received in the course of interstate commerce. Under such circumstances, we need not "presume the nexus" between the challenged activity [*800] (PSO's outdoor lighting business) and interstate commerce (interstate shipment of lights and lighting components).

Contrary to PSO's contention, appellants' evidence was in keeping with *Crane*. We there held, *citing to McLain, supra*:

By stating that plaintiff "need not make the more particularized showing of an [**15] effect on interstate commerce caused by the conspiracy . . . or other aspects of respondents' activity that are alleged to be unlawful," the Court [McLain] was only confirming the principle set forth in *Hospital Building*, *Burke*, and *Goldfarb* that for jurisdictional purposes a plaintiff need not "make the . . . particularized showing." [444 U.S. at 242, 100 S. Ct. at 509](#). In other words, [HN9](#)[¹⁵] an elaborate analysis of interstate impact is not necessary at the jurisdictional stage, *only an allegation showing a logical connection as a matter of practical economics between the unlawful conduct and interstate commerce*.

[637 F.2d at p. 723](#). [Emphasis supplied].

We are not inclined to accept PSO's contention that the substantial reduction in appellants' share of the market was due to their own mismanagement, which, if accepted, would effectively relegate appellants' action to [HN10](#)[¹⁶] a private one, beyond the protective umbrella of the antitrust laws. In [Mishler v. St. Anthony's Hospital Systems, supra](#), we stated:

Additionally, we cannot say from the pleadings that this case involves a mere private wrong in which revenues were diverted from one set of doctors to [**16] another, and thus fails to demonstrate the requisite harm to the public. We assume that doctors do not all deliver identical services for identical fees. [HN11](#)[¹⁷] Restraints of trade and monopolization inherently involve injury to the public and competition. [Almeda Mall, Inc. v. Houston Lighting & Power Co.](#), [615 F.2d 343, 351](#) (5th Cir.), cert. denied, [449 U.S. 870, 101 S. Ct. 208, 66 L. Ed. 2d 90](#) (1980).

[694 F.2d at p. 1228](#).

II.

In view of our determination that the district court erred in finding lack of subject matter jurisdiction, we decline to address appellants' remaining allegations of error.

Reversed and Remanded.



Rural Electric Co. v. Cheyenne Light, Fuel & Power Co.

United States District Court for the District of Wyoming

March 11, 1983, Decided ; March 11, 1983, Filed

No. C82-0416-B

Reporter

602 F. Supp. 105 *; 1983 U.S. Dist. LEXIS 18645 **; 1985-1 Trade Cas. (CCH) P66,542

RURAL ELECTRIC COMPANY, of Pine Bluffs, Wyoming, A Wyoming Non-Profit Corporation, Plaintiff, v. CHEYENNE LIGHT, FUEL & POWER COMPANY, A Wyoming Corporation, THE CITY OF CHEYENNE, A Wyoming Municipality, THE CHEYENNE CITY COUNCIL, VIRGIL SLOUGH, RON ROGERS, WILLIAM ANDERSON, CAROL CLARK, JANE CRAWFORD, PETER SALAS, JAMES HIGDAY, WANDA McCUE and DON ERICKSON, Individually, Defendants

Core Terms

antitrust, franchise, anti trust law, municipal, Sherman Act, immune, electric service, public body, allegations, electric

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Governments > Legislation > Interpretation

HN1[] Exemptions & Immunities, Noerr-Pennington Doctrine

There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful.

Administrative Law > Agency Adjudication > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN2[] Administrative Law, Agency Adjudication

A specific purpose to secure anticompetitive governmental action and to burden rivals cannot itself make activities wrongful. Monopolists or collaborators are privileged to pursue their private and selfish objectives through

602 F. Supp. 105, *105L^A 1983 U.S. Dist. LEXIS 18645, **18645

legislation, adjudication, or executive and administrative machinery. Conduct thus immune from antitrust attack would not be immune when the governmental action is a "mere sham" or in bad faith. In the legislative context, however, such bad faith is virtually beyond proof and should be ignored, at least presumptively and perhaps conclusively. It will also be difficult to prove in dealings with the executive or administrative arms of government. Bad faith is more readily detected, though still elusive in the context of administrative adjudication.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN3 [↓] Exemptions & Immunities, Noerr-Pennington Doctrine

The employment of improper means in dealing with government is not privileged. The courts, however, hesitate to use antitrust law to define what is proper in the political arena, although this hesitation need not have the effect of immunizing from antitrust challenge conduct that is already "legally proscribed" apart from antitrust law. The criteria of impropriety varies according to the governmental body involved; there is, for example, very wide latitude for questionable activity in the legislative context. Moreover, there are significant doubts about the causal connection between the impropriety and the anticompetitive results of government action. Such doubts are great enough to warrant antitrust law's ignoring improprieties altogether in the legislative context. In other contexts, improprieties may be considered by the antitrust tribunal, subject to the cautions slated elsewhere about significance and causation.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > 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. Such conduct is not illegal either standing alone or as a part of a broader scheme itself violative of the Sherman Act.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Governments > Local Governments > Boundaries

Governments > Local Governments > Duties & Powers

HN5 [↓] Regulated Industries, Energy & Utilities

Wyo. Const. art. XIII, § 4 provides: No street passenger railway, telegraph or electric light line shall be constructed within the limits of any municipal organization without the consent of its local authorities. This provision gives cities extensive control over electric utilities within their boundaries.

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Governments > Local Governments > Boundaries

Governments > Local Governments > Duties & Powers

HN6 [down] **Electric Power Industry, State Regulation**

The State legislature in *Wyo. Stat. § 37-2-205(b)* (1977) provides that no public utility shall exercise a right or franchise without first obtaining from the Public Service Commission a certificate of convenience and necessity.

Antitrust & Trade Law > Sherman Act > Defenses

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Utility Companies > Liability

Governments > State & Territorial Governments > Claims By & Against

HN7 [down] **Sherman Act, Defenses**

Under the "state action" doctrine enunciated in Parker, the actions of the City of Cheyenne, the Cheyenne City Council, and the Public Service Commission are immune from liability under the antitrust laws if they were taken pursuant to state policy. This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit. An adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. To be exempt from antitrust scrutiny the municipal action must be in furtherance or implementation of clearly articulated and affirmatively expressed state policy. Broad powers are conferred upon municipal governments to grant franchises to utility companies, and franchises are special privileges conferred by the government on individuals, which do not belong to the citizens of the country generally of common right; no franchise can be held which is not derived from the law of the state.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN8**](#) Exemptions & Immunities, Noerr-Pennington Doctrine

No violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws. Neither does the Sherman Act 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 only exception to this general principle recognized by the Noerr court is when the action complained of is not legitimately directed at influencing official action, but is instead a mere "sham," frivolous in its nature, designed solely to have a detrimental effect upon the business of a competitor or potential competitor. Such allegations are virtually impossible to prove, and may, for practical purposes, be ignored. In attempting to categorize an activity as merely a "sham" lobbying, hiding behind the most frivolous of contentions, it must be remembered that in a political forum, almost no contention can be characterized categorically as frivolous. A contention cannot, by definition, be frivolous when it is actually adopted by a legislature, administrator, or court.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

[**HN9**](#) Exemptions & Immunities, Noerr-Pennington Doctrine

The United States Supreme Court (Court) has concluded that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors. The court also held that the exercise of the above rights could not be taken in such a manner as was designed to foreclose one's competitors from meaningful access to the same public bodies.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Governments > Legislation > Interpretation

[**HN10**](#) Exemptions & Immunities, Noerr-Pennington Doctrine

To be sure, the legislature may be mistaken or unaware of the consequences of its actions, or it may be responding to political pressures not truly reflecting "the public interest," but the antitrust court may not reappraise the legislature's assessment of the public welfare. This sound advice will be heeded by the court.

Judges: [\[**1\]](#) Clarence A. Brimmer, Chief United States District Judge.

Opinion by: BRIMMER

Opinion

[**\[*105\]** MEMORANDUM DECISION AND ORDER OF DISMISSAL](#)

The Plaintiff, Rural Electric Company, of Pine Bluffs, Wyoming, brought suit against the City of Cheyenne, Wyoming, its mayor and city councilmen, and the Cheyenne Light, Fuel & Power Company, a private utility, alleging that (1) Cheyenne Light, Fuel & Power breached a contract dividing the service area in an industrial [\[*106\]](#) park near Cheyenne, (2) that the mayor, councilmen and the City, by denying the Plaintiff a franchise for electric service, acted in violation of State law, (3) that the mayor, councilmen and City have illegally granted the Defendant utility a monopoly, (4) that Cheyenne Light, Fuel & Power violated federal antitrust laws by conspiring with the other Defendants to monopolize the electric service area, (5) that the municipal Defendants have engaged in an unlawful

conspiracy to monopolize an electric service area in violation of the antitrust laws, and (6) that the Defendant Higday has engaged also in an unlawful conspiracy to violate the antitrust laws. The municipal Defendants (the mayor, councilmen and the City) and the [**2] utility Defendants (Cheyenne Light, Fuel & Power and its manager, Higday) have each moved to dismiss Plaintiff's complaint for lack of jurisdiction and failure to state a claim under [Rule 12\(b\)\(6\), Federal Rules of Civil Procedure.](#)

The Plaintiff is a nonprofit Wyoming public utility company furnishing electric service to rural residents in southeastern Wyoming, northeastern Colorado and western Nebraska. The Defendant Cheyenne Light, Fuel & Power is a Wyoming intrastate public utility company serving the City of Cheyenne and specified rural areas adjacent thereto with electric and gas utility service. Jurisdiction is claimed under [28 U.S.C. § 1331](#), relating to federal questions, and § 1337 relating to Acts of Congress regulating commerce and protecting trade and commerce against restraints and monopolies.

The first cause of action for breach of contract is a pendent jurisdiction claim, as are the second and third causes of action, claiming that the municipal Defendants acted in violation of State statutes and the Wyoming Constitution. Whether or not this Court has jurisdiction of the remaining three causes of action, which allege that the Defendants engaged in an unlawful combination [**3] or conspiracy to restrain trade in violation of [15 U.S.C. §§ 1-30](#), is the issue presented by Defendants' motions.

The facts alleged by the Plaintiff's complaint, and which are assumed to be true for the purposes of these motions, are that Plaintiff and Cheyenne Light, Fuel & Power Company on December 7, 1953 by written contract, thereafter approved by the Public Service Commission, agreed that what is now Lot 24 of Rocky Mountain Industrial Park would be part of the Plaintiff's certificated service area. In December 1978 the Rocky Mountain Industrial Park was annexed to the City of Cheyenne. Prior to March 11, 1982 the Defendants had numerous meetings with Quanex Corporation, a large industrial company, concerning location of an industrial facility on Lot 24 and utility service to it, but at a meeting with Plaintiff's representatives on March 11, 1982 the Plaintiff refused to give up this portion of its certificated area. The Plaintiff then asked the municipal Defendants to grant it a franchise to serve Lot 24 but on April 16, 1982 the Cheyenne City Council refused to grant Plaintiff a franchise and by resolution asked the Wyoming Public Service Commission to grant Cheyenne Light, [**4] Fuel & Power the right to serve Quanex Corporation. The Plaintiff's subsequent efforts to secure a franchise from the City failed. On August 2, 1982 the Wyoming Public Service Commission held a public hearing, at which the Plaintiff, the City of Cheyenne and Cheyenne Light, Fuel & Power were present, on the application of Defendant Cheyenne Light, Fuel & Power to serve the disputed area, and on September 27, 1982 the Public Service Commission of Wyoming by order granted Cheyenne Light, Fuel & Power authority to serve the Quanex Corporation. Cheyenne Light, Fuel & Power is the only utility company serving the City of Cheyenne and has a monopoly on the electric and gas utility business therein.

Paragraphs 43(a) and 43(b) of the Plaintiff's Complaint allege that Cheyenne Light, Fuel & Power has appeared three times before the Cheyenne City Council and that its agents have contacted members of the City Council to keep the Plaintiff from obtaining a franchise for electric service within the City. Plaintiff also alleges [**107] that the municipal defendants as well as the Defendant Higday have engaged "in an unlawful combination and conspiracy" to restrain and monopolize interstate [**5] trade. In argument Plaintiff's counsel stated that he hoped to discover proof of such allegations in the course of discovery.

Mr. Justice Cardozo observed, in his dissent in [U.S. v. Constantine, 296 U.S. 287, 299, 80 L. Ed. 233, 56 S. Ct. 223 \(1935\)](#), "[HN1](#)" There is a wise and ancient doctrine that a Court will not inquire into the motives of a legislative body or assume them to be wrongful." Alexander M. Bickel in "The Least Dangerous Branch" cites this as the established view (p. 208). *Areeda & Turner on Antitrust*, Vol. II, p.36, summarize their conclusions respecting efforts of collaborators to use the machinery of government to maintain or strengthen market power as follows:

"(1) [HN2](#) A specific purpose to secure anticompetitive governmental action and to burden rivals cannot itself make activities wrongful. Monopolists or collaborators are privileged to pursue their private and selfish objectives through legislation, adjudication, or executive and administrative machinery.

(2) Conduct thus immune from antitrust attack would not be immune when the governmental action is a "mere sham" or in bad faith. In the legislative context, however, such bad faith is virtually beyond proof [**6] and should ignored, at least presumptively and perhaps conclusively. It will also be difficult to prove in dealings with the executive or administrative arms of government. Bad faith is more readily detected, though still elusive in the context of administrative adjudication.

(3) [HN3](#) The employment of improper means in dealing with government is not privileged. The courts, however, hesitate to use anti-trust law to define what is proper in the political arena, although this hesitation need not have the effect of immunizing from antitrust challenge conduct that is already "legally proscribed" apart from antitrust law. The criteria of impropriety varies according to the governmental body involved; there is, for example, very wide latitude for questionable activity in the legislative context. Moreover, there are significant doubts about the causal connection between the impropriety and the anticompetitive results of government action. Such doubts are great enough to warrant antitrust law's ignoring improprieties altogether in the legislative context. In other contexts, improprieties may be considered by the antitrust tribunal, subject to the cautions slated elsewhere about significance and [**7] causation."

In [United Mine Workers v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#) the Supreme Court held that,

[HN4](#) "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 a part of a broader scheme itself violative of the Sherman Act."

The Supreme Court held in [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#) that a state marketing program did not violate the Sherman Act because it derived its authority from the "legislative command of the state" and the Court found nothing in the Sherman Act or its history suggesting that its purpose was to restrain a state or its agents. [HN5](#) [Article XIII, Section 4 of the Wyoming Constitution](#) provides

"No street passenger railway, telegraph or electric light line shall be constructed within the limits of any municipal organization without the consent of its local authorities."

The Wyoming Supreme Court in [Tri-County Electrical Association Inc. v. City of Gillette, 584 P.2d 995](#) (Wyo., 1978), held that this provision gave cities extensive [**8] control over electric utilities within their boundaries. Here, the Plaintiff alleges (1) that the disputed area is within the city's boundaries, and (2) that the City Council wanted to keep the City of Cheyenne "under one power company" (Complaint, paragraph [*108] 15). [HN6](#) The State Legislature in § 37-2-205(b), W.S. 1977, provided further that no public utility shall exercise a right or franchise without first obtaining from the Public Service Commission a certificate of convenience and necessity.

We must conclude that the action of the City of Cheyenne as well as of the Public Service Commission of Wyoming, is immune from suit under the Sherman Act. [HN7](#) Under the "state action" doctrine enunciated in *Parker*, the actions of the City of Cheyenne, the Cheyenne City Council, and the Public Service Commission are immune from liability under the antitrust laws if they were taken pursuant to state policy. [Pueblo Aircraft Service, Inc. v. City of Pueblo, Colo., 679 F.2d 805 \(10th Cir. 1982\)](#); [Lafayette v. Louisiana Power and Light Company, 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 \(1978\)](#).

This does not mean, however, that a political subdivision necessarily must [**9] be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit. . . . An adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' [Lafayette, supra, p. 415](#).

To be exempt from antitrust scrutiny the municipal action must be "in furtherance or implementation of clearly articulated and affirmatively expressed state policy." [Community Communications Co. v. City of Boulder, 455 U.S. 40, 55, 70 L. Ed. 2d 810, 102 S. Ct. 835 \(1982\)](#).

In *Tri-County Electrical Association, Inc., supra, p. 1001*, the Wyoming Supreme Court recognized the broad powers conferred upon municipal governments to grant franchises to utility companies, and noted that "franchises are special privileges conferred by the government on individuals, which do not belong to the citizens of the country generally of common right; no franchise can be held which is not derived from the law of the state." It appears from [**10] an application of the state action doctrine to the laws of the State of Wyoming, as found in Article XIII of the Wyoming Supreme Court in Tri-County, that the City of Cheyenne is immune from antitrust liability in this matter, and the causes of action against it on this basis must be dismissed.

Even if the Plaintiff's allegations that various of the Defendants collaborated to influence the decision-making of public bodies are true, such activity would not amount to a violation of the antitrust laws. **HN8**[] "No violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 135, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*. Neither does the Sherman Act "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." *Noerr, supra, p. 136*.

The only exception to this general principle recognized by the *Noerr* court is when the action complained of is not legitimately directed at influencing official action, but is [**11] instead a mere "sham," frivolous in its nature, designed solely to have a detrimental effect upon the business of a competitor or potential competitor. *Noerr*, p. 144. Areeda and Turner point out, however, that such allegations are virtually impossible to prove, and may, for practical purposes, be ignored. *Areeda and Turner, supra*, paragraph 203. They also point out an obvious fact of significance in this action. In attempting to categorize an activity as merely a "sham" lobbying, hiding behind the most frivolous of contentions, it must be remembered that "in a political forum, almost no contention can be characterized categorically as frivolous [A] contention cannot, by definition, be frivolous when it is actually adopted by a legislature, administrator, or court." *Id.*, paragraph [*109] 203(c). See also *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076, 1079 (9th Cir. 1976)*.

The Supreme Court, in *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)* reiterated its earlier stances in *Noerr* and *Pennington*.

HN9[] We conclude [**12] that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors. *Id.*, p. 510-511.

In *California Motor Transport, supra*, the Supreme Court also held that the exercise of the above rights could not be taken in such a manner as was designed to foreclose one's competitors from meaningful access to the same public bodies. Plaintiff herein has raised no such issue, and cannot be heard to complain that it was unable to petition the same public officials as certain of the Defendants. To the contrary, the Plaintiff is merely dissatisfied with the actions taken by those public bodies.

HN10[] "To be sure, the legislature may be mistaken or unaware of the consequences of its actions, or it may be responding to political pressures not truly reflecting 'the public interest,' but the antitrust court may not reappraise the legislature's assessment of the public welfare." *Areeda and Turner* [**13] , *supra*, paragraph 202b. This sound advice, concurring as it does with the wisdom of Justice Cardozo, will be heeded by this Court. The allegedly violative activities of the Defendants in influencing the granting of a franchise to the Defendant Cheyenne Light, Fuel & Power were apparently successful attempts to persuade a public body to exercise its powers in a particular way. Such activities, even if selfishly motivated, do not violate the Sherman Act if endorsed ultimately by a public body. This Court will not endeavor to speculate upon the motivations of the City Council, the City of Cheyenne, or the Public Service Commission in acting as they did. Even if the conduct of various of the Defendants was unethical

602 F. Supp. 105, *109 (1983 U.S. Dist. LEXIS 18645, **13

in interacting as it is alleged they did in influencing the City Council, such activity is also immune from suit under the antitrust laws when conducted in the context of lobbying the City Council as a legislative body. [Metro Cable Co. v. CATV of Rockford, 516 F.2d 220 \(7th Cir. 1975\).](#)

It is clear that the fourth, fifth, and sixth claims of the Plaintiff's complaint fail to state a claim upon which relief can be granted by this Court. Pursuant to [Federal Rules of Civil Procedure 12\(b\)\(6\)](#), these claims are properly dismissed from this action. Since the only basis of jurisdiction in this Court rests upon these claims, the pendent state claims contained in the first, second, and third causes of action must also be dismissed for lack of subject matter jurisdiction.

Dated this 11th day of March, 1983.

End of Document



Bostick Oil Co. v. Michelin Tire Corp., Commercial Div.

United States Court of Appeals for the Fourth Circuit

December 9, 1982, Argued ; March 14, 1983, Decided

No. 81-1985

Reporter

702 F.2d 1207 *; 1983 U.S. App. LEXIS 29681 **; 1983-1 Trade Cas. (CCH) P65,271; 12 Fed. R. Evid. Serv. (Callaghan) 1652

Bostick Oil Company, Inc., Appellant, v. Michelin Tire Corporation, Commercial Division, Appellee

Subsequent History: [**1] As Amended.

Prior History: Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert W. Hemphill, Senior District Judge.

Disposition: Reversed and Remanded.

Core Terms

dealer, termination, tire, complaints, customers, district court, truck tire, dealership, sales, memorandum, exemption, discount, renewal, percent, pricing, unfair trade practice, Sherman Act, competitor, conspiracy, personnel, directed verdict, district manager, manufacturer, facilities, purchasers, practices, rebates, unfair, join, passenger

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] Judgment as Matter of Law, Directed Verdicts

In reviewing the grant of a motion for directed verdict under [Fed. R. Civ. P. 50\(a\)](#), the court views all evidence presented by the nonmoving party, in the light most favorable to it, drawing all reasonable inferences in the nonmoving party's favor, without weighing the credibility of witnesses.

Antitrust & Trade Law > Sherman Act > General Overview

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

702 F.2d 1207, *1207LÁ1983 U.S. App. LEXIS 29681, **1

The plaintiff must introduce sufficient evidence upon which a jury would be warranted in finding a contract, combination or conspiracy as a prerequisite to [15 U.S.C.S. § 1](#), liability. If such is found, it must be one which is unreasonably in restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

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

[**HN3**](#) Antitrust & Trade Law, Sherman Act

Antitrust civil conspiracy or combination has traditionally been inferred from a course of dealing or other circumstances in which the determinative facts are what the parties actually did rather than whether an express agreement existed. The courts, being sensitive to the realities of the marketplace, have extended the concept of concerted activity far beyond the classic case of actual agreement to engage in a common course of conduct.

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN4**](#) Antitrust & Trade Law, Sherman Act

Proof of termination following competitor complaints is sufficient to support an inference of concerted action. A termination even more unilateral in nature could constitute a [15 U.S.C.S. § 1](#) violation if it evinces sufficient anticompetitive character.

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

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

[**HN5**](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A finding of per se violation of [15 U.S.C.S. § 1](#), would result from a factual determination that the termination was in furtherance of competitors' desires to eliminate a price-cutting rival.

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

[**HN6**](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Where the facts support a finding that competing distributors provoked a manufacturer to eliminate one of their number as a marketplace competitor, there is no need to proceed to the more finely tuned "rule of reason" analysis that is proper when considering manufacturer-imposed vertical restrictions.

702 F.2d 1207, *1207LÁ1983 U.S. App. LEXIS 29681, **1

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 [blue icon] Price Fixing & Restraints of Trade, Vertical Restraints

Price maintenance schemes have been consistently condemned as per se illegal, and are not saved by claims of redeeming interbrand virtues when there is sufficient evidence of their initiation at the instigation of horizontally competing entities.

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

HN8 [blue icon] Regulated Practices, Trade Practices & Unfair Competition

See [S.C. Code § 39-5-20\(a\)](#).

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

HN9 [blue icon] Regulated Practices, Trade Practices & Unfair Competition

See [S.C. Code § 39-5-40](#).

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

HN10 [blue icon] Regulated Practices, Trade Practices & Unfair Competition

[S.C. Code § 39-5-40](#) requires the party claiming exemption to raise [§ 39-5-40\(d\)](#) affirmatively, such that the defense is untimely when first raised on motion for directed verdict.

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

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

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

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN11 [blue icon] Regulated Practices, Trade Practices & Unfair Competition

The South Carolina Unfair Trade Practices Act states only that the courts will be guided by the interpretations given to the Federal Trade Commission Act. [S.C. Code § 39-5-20\(b\)](#).

Counsel: Robert E. Staton (Michael H. Quinn, Quinn, Brown, Staton & Boyle on brief), for Appellant.

O. Doyle Martin (Natalma M. McKnew, Leatherwood, Walker, Todd & Mann; James M. Micali, Assistant General Counsel on brief), for Appellee.

Judges: Winter, Chief Judge, Phillips, Circuit Judge, and Butzner, Senior Circuit Judge.

Opinion by: WINTER

Opinion

[*1209] WINTER, Chief Judge:

Bostick Oil Company, Inc., (Bostick) brought this private antitrust suit under various federal and state statutes when the Michelin Tire Corporation, Commercial Division, (Michelin) terminated Bostick's contract as a distributor of Michelin truck tires. At the close of Bostick's evidence at trial, the district court granted Michelin's motion for a directed verdict on the causes of action then remaining:¹ attempt to monopolize under [§ 2](#) of the Sherman Act, [15 U.S.C. § 2](#); contract, combination or conspiracy in restraint of trade, in violation of [§ 1](#) of the Sherman Act; and, unfair or deceptive trade practices [*2] violating the South Carolina Unfair Trade Practices Act, [§ 39-5-20\(a\)](#), Code of Laws of South Carolina 1976. Bostick appeals only from the judgment entered against it on its state law claim and on its two theories of the [§ 1](#) Sherman Act violations,² asserting that sufficient evidence was introduced to warrant [*1210] submission of these issues to the jury. We agree, and therefore reverse and remand for a new trial. Because of our disposition of this appeal, we need address only briefly an evidentiary issue also raised by Bostick.

[**3] I.

HN1 [↑] In reviewing the grant of a motion for directed verdict under [Rule 50\(a\), Fed. R. Civ. P.](#), we view all evidence presented by Bostick, the nonmoving party, in the light most favorable to it, drawing all reasonable inferences in Bostick's favor, *Ard v. Seaboard Coast Line Railroad Company*, [487 F.2d 456, 457](#) (4 Cir. 1973), without weighing the credibility of witnesses. *Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne*, [386 F.2d 193, 197](#) (4 Cir. 1967).

Bostick was at one time a small, family-owned oil concern based in Estill, South Carolina, which began shifting its focus to tire sales in 1967. By 1974, Bostick was offering for sale a wide range of passenger car tires and some truck tires. In April 1974, Bostick contacted Michelin, seeking to become an authorized distributor. Michelin, the marketing division of the Michelin Tire Corporation, was then expanding distribution of its radial tires and related products through numerous distributorship arrangements.³ Responding to the inquiry, Michelin sent its district truck

¹ By consent of the parties, a claim for breach of contract and a counterclaim for abuse of process had been dismissed with prejudice prior to trial.

² Michelin maintains that only one theory of [§ 1](#) liability, regarding Bostick's termination as a result of pressure on Michelin from complaints by competing distributors, was presented in the pleadings and at trial, so that Bostick should now be foreclosed from arguing that the evidence also supports finding Michelin liable for a resale price maintenance arrangement. Although there may have been some imprecision below as to whether Bostick presented two separate theories or merely two types of evidence in support of a single theory, it is apparent from the district court's memorandum opinion that the resale price maintenance theory was argued by Bostick as a distinct basis for liability. Where the evidence "as developed provides a basis for recovery not covered strictly by the pleadings", the pleadings are treated as conforming to the evidence. *Keeffe Bros. v. Teamsters Local Union No. 592*, [562 F.2d 298, 306](#) and n. 11 (4 Cir. 1977); [Rule 15\(b\), Fed. R. Civ. P.](#) To dispel any doubt, Bostick formally moved to amend the pleadings at oral argument, as it is allowed to do. See generally 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1494. We therefore consider both [§ 1](#) theories.

tire sales manager to Estill to survey Bostick's operation and prepare a dealership application. The Michelin representative noted, among [**4] other items, the type of tire service available from Bostick. Bostick's application was approved, and it entered the first of four successive one-year standard form Dealer Sales Agreement (DSA) contracts with Michelin on May 29, 1974, authorizing it to sell both passenger and truck tires.

Beginning sometime in 1975 with the employment of an experienced truck tire saleswoman, Bostick shifted the vast majority of its Michelin business into truck tire sales. During its first calendar year as a Michelin dealer, Bostick sold approximately \$38,000 in truck tires and \$39,000 in passenger tires of that brand.⁴ For the calendar year 1976, Bostick's gross sales of truck and light truck tires had soared [**5] to slightly over \$1,100,000 as compared to \$936,827 in passenger tire sales, according to a memorandum written by Michelin's corporate sales manager for the Eastern United States. By the end of April 1978, its last fiscal year as a Michelin dealer, Bostick had sold approximately \$2,000,000 worth of Michelin truck tires during the preceding twelve months. The initial impetus for this shift to truck tire sales, according to company president Joe Bostick, came from Michelin's local sales representative during 1974 and 1975, as well as the enticing quantity discounts and commissions built into Michelin's pricing structure.

In expanding its business, [**6] Bostick employed the practice of "drop-shipping", i.e., transferring the tires to the purchaser by taking an order and having tires shipped directly, without providing any initial mounting or other service. Although one provision of the Dealer Sales Agreement required Bostick to maintain facilities sufficient to "enabl[e the] Dealer to sell and service Michelin Products in a first class manner", Bostick introduced the testimony of several major truck fleet-owning customers to explain that such purchasers usually maintained their own service facilities. Joe Bostick also testified that his company maintained a service arrangement with a mechanic in Estill, and had received virtually no complaints about a lack of service from customers during the period it was a Michelin dealer.

[*1211] Bostick's primary method of expanding sales was through its aggressive price cutting and rebating of commissions and quantity discounts to its customers. Until the summer of 1977, Michelin offered dealers truck tires at a basic price of 22 percent off of the manufacturer's suggested list price. From this "net billing price," Bostick or any dealer was able to subtract up to an additional [**7] 9 percent for a quantity purchase, another 2 percent discount for early payment to Michelin, and a further 2 percent discount if certain shipping arrangements were made.⁵ Thus, Bostick was able to give as much as a 6 percent discount to the purchaser off of the "net billing price" and still sell at a gross profit; in effect, Bostick could buy a tire listed by the manufacturer as worth \$100 for approximately \$68, offering it for as low as approximately \$73.30, while a dealer taking no advantage of discounts would have to sell the tire for \$83.30 for a comparable total return on each unit sold.⁶

[**8] Bostick's sales practices provoked complaints by various competing Michelin dealers to field and district level personnel of the tire company. One general manager of a Charleston, South Carolina, Michelin dealer during the

³ A more detailed chronicle of the French tire manufacturer's expansion into the American market can be found in [Donald B. Rice Tire Company v. Michelin Tire Corporation](#), 483 F. Supp. 750, 752-53 (D. Md. 1980), aff'd, 638 F.2d 15 (4 Cir.), cert. denied, 454 U.S. 864, 70 L. Ed. 2d 164, 102 S. Ct. 324 (1981).

⁴ These figures actually represent Bostick's purchases of Michelin tires through the end of 1974, but they are indicative of its sales. By its method of operation, Bostick bought from Michelin those tires for which it had orders, rather than carrying a large stock. Company president Joe Bostick estimated each figure in the \$40,000 range when testifying from memory.

⁵ There was also the potential for a 5 percent calendar year bonus if sales reached a certain volume. During the period until mid-1977, Bostick apparently never reached the requisite volume; its allegation that a quantity bonus was earned but unpaid was in part the subject of one of the claims not at issue in this appeal.

⁶ Of course, for a comparable percentage markup based on the cost of the tire (i.e., approximately 7.8 percent), the other dealer would have charged roughly \$84.00. In addition, the discount price available to Bostick may have been better still; the evidence was unclear whether the additional discounts were taken from the assumed \$78 net billing price, from the \$100 list price, or from the net price to Bostick after each prior discount was figured. The figures used here as examples reflect the most conservative manner of calculating the discount.

period 1974 to 1978 testified that he had complained to Michelin of Bostick's "coming into the Charleston area and selling truck tires at prices much below what we were selling them for." Three other South Carolina Michelin dealers testified to having complained to Michelin personnel about Bostick's low prices forcing them to decrease their profit margins to compete; one stated that he preferred buying from Bostick as a wholesale supplier because in small quantities it proved cheaper and more convenient than buying directly from Michelin. Several of these dealers on cross-examination gave some support to Michelin's contention that Bostick's lack of service facilities resulted in their having to provide service to Michelin tire owners who had bought the product elsewhere. But one of the dealers explained that the cost of the tire did not reflect the cost of future service, for which the customer was charged separately as provided, and that service had become for [**9] that dealer "a big key to our growth" representing approximately 50 percent of his total business volume.

Internal Michelin memoranda, and testimony of Michelin personnel at various levels, showed that numerous such complaints were passed along to middle and upper-level management, as well as being originated by Michelin field and sales representatives themselves. As early as August 1975, a field representative's monthly report to management quoted Bostick's discount pricing and noted that another dealer "will not meet this price." By the spring of 1976, complaints about Bostick had reached Jean Pierre Duleyrie, Michelin's vice-president in charge of sales, prompting him to send a corporate sales manager (the Michelin official immediately below Duleyrie) to talk directly with Joe Bostick in April 1976. Though the actual motivation behind the meeting and its contents were much in dispute at trial, the outcome was a renewal of Bostick's dealership for 1976-77 and possibly a promise by Bostick to expand service facilities. The complaints by competitors and Michelin sales personnel nonetheless persisted during the remainder of Bostick's distributorship.

Shortly before the May 29 [**10] renewal date of Bostick's dealership contract in 1977, Michelin's district manager approached Joe [**11] Bostick to explain the company's proposal to enroll Bostick in a "National Accounts" program. Various large-volume purchasers designated "national accounts" were billed and their accounts collected centrally through Michelin, while distributors such as Bostick continued to perform the actual selling and delivery of tires for which they were paid a commission. Participation in the program required disclosure of customer lists to Michelin, and loss of the ability in the first instance to quote a price for the tires. Continuation as a Michelin dealer was not made expressly conditional on joining the National Accounts program; by the stated terms, a dealer could continue to sell to some accounts as before and list others as National Accounts in any desired mix.

Michelin explained, through cross-examination, that the National Accounts pricing structure proved capable of giving a dealer an advantage over the regular distribution terms. A National Accounts customer was billed by Michelin at a 20 percent discount off the list price; the dealer who delivered the tire from his [**12] stock was credited by Michelin at 22 percent off suggested list price and was paid a 12 percent commission on each National Accounts tire sold.⁷ Thus the dealer could rebate a substantial part of the commission to the National Accounts customer and in effect reduce the price of the tire below that of a direct sale from the dealer. Bostick, as an aggressive seller, eventually gave from half to all of the commission back to its National Accounts customers in the form of rebates. Michelin officially did not disclose the price it charged the customer, although the suggested price list apparently was easily obtainable from customers.

Despite the eventual attractiveness [**13] of National Accounts sales to Bostick, Joe Bostick testified that he personally had felt "intimidated" into joining the National Accounts program during meetings near dealership renewal time in 1977.⁸ In support of this contention, Bostick introduced the recommendation in the April 1977

⁷ In actual practice, much of the financial relationship between dealer and Michelin was accomplished through accounting for tires "bought" and "sold" on each company's books. The record does not reflect clearly at what point cash actually flowed between the companies, but the practical effect on Bostick's credit with Michelin was as described here.

⁸ Michelin has argued before us that Joe Bostick's testimony was "incredible" given his business acumen. While that may well be the case, we think, as we explain more fully below, that the issue remains one of many for resolution by the jury. For the most part, moreover, Bostick's subjective feeling of intimidation is of little relevance, as there is sufficient objective evidence from which a jury could conclude that as a matter of fact dealership renewal was being held up until Bostick acquiesced in joining the National Accounts program.

monthly report of Michelin district manager Elroy Earl "Pete" Christensen, Jr. to "management" that Bostick not be renewed as a dealer. During April and May, Christensen, despite frequent contact, refused to answer Joe Bostick's inquiries as to whether or not the dealership would be renewed. On May 28, 1977, with Michelin representatives still seeking to enroll Bostick in the National Accounts program, the dealership legally expired. On June 7, 1977, Bostick made its first sale through the National Accounts program, and actual dealership renewal followed on June 14. Contemporaneously, Christensen noted in a semi-annual June 1977 planning report to management that encouragement from Michelin representatives to larger purchasers to participate in the National Accounts program "should help a great deal in the area where dealers are wholesaling and dropping off." A preceding portion of the same memorandum [**13] identified Bostick as "the most pressing problem" in the district and expressed optimism over Bostick's recent willingness to enter the National Accounts program.

Michelin's enthusiasm over Bostick's National Accounts participation soon waned. Christensen's July 1977 report expressed concern over Bostick's solicitation of existing customers for National Accounts treatment and noted that Bostick had begun giving rebates as high as 15 percent on purchases program. Internal [**14] memoranda were also directed to management complaining [**13] that Bostick was purchasing tires from a Canadian source and selling them through the National Accounts program; the Michelin corporate sales manager informed district manager Christensen that although "we can do nothing legally" about the practice "you will ask him kindly not to do so."

Complaints about Bostick's merchandising tactics continued to be reported to Michelin management throughout 1977-78. Finally, for reasons that are the central subject of this dispute, Michelin representatives notified Bostick in April 1978, that its truck tire dealership would not be renewed in May, although continuation of passenger and light truck tire distributorship was offered. Bostick refused the limited dealership offer and instead brought this suit on May 26, 1978.

II.

Bostick asserts claims under [§ 1](#) of the Sherman Act on essentially two distinct but related theories. The first is that Bostick was eventually terminated as a dealer because Michelin heeded the complaints of Bostick's competitors, who were threatened by Bostick's ability to undersell them. The alternative theory is that the National Accounts program [**15] was a resale price maintenance scheme, and to enforce it Michelin terminated Bostick, a dealer who continued effectively to lower the manufacturer-imposed minimum price for its customers. The interrelationship of the two is shown by perhaps a third view, that Michelin's pressing Bostick to join the National Accounts program was a less drastic attempt at satisfying the competing dealers' complaints which failed to curb Bostick's price cutting, ultimately requiring Bostick's termination. For all these claims, of course, [HN2](#) Bostick must introduce sufficient evidence upon which a jury would be warranted in finding a "contract, combination, . . . or conspiracy" as a prerequisite to [§ 1](#) liability. [15 U.S.C. § 1](#); compare [United States v. Parke, Davis & Co.](#), 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960), with [United States v. Colgate & Co.](#), 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919). If such is found, it must be one which is unreasonably "in restraint of trade." [Continental T.V., Inc. v. GTE Sylvania Incorporated](#), 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). The district court believed one or the other element was lacking in plaintiff's case for each theory [**16] and so granted Michelin a directed verdict. We discuss each theory and the necessary elements seriatim.

A.

Michelin argues strenuously that mere complaints do not a conspiracy make, and cites to us cases for this proposition. See, e.g., [H.L. Moore Drug Exchange v. Eli Lilly and Company](#), 662 F.2d 935 (2 Cir. 1981), cert. denied, 459 U.S. 880, 103 S. Ct. 176, 74 L. Ed. 2d 144 (1982); [Roesch, Inc. v. Star Cooler Corporation](#), 514 F. Supp. 890 (E.D. Mo. 1981), aff'd, 671 F.2d 1168 (8 Cir. 1982).⁹ Were this a proper case, we might well agree with

⁹ Roesch, however, holds in conflict with [Battle v. Lubrizol Corp.](#), 673 F.2d 984 (8 Cir. 1982), which was decided the same day. The Eighth Circuit granted rehearing en banc in both cases on May 21, 1982, and heard arguments in October 1982. Decision is currently pending.

this unstartling principle. In this case, however, the evidence elicited at trial showed more than just uninfluential competitors' complaints "standing alone", [H.L. Moore Drug, supra, 662 F.2d at 941.](#)

[**17] [HN3](#) Antitrust civil conspiracy or combination¹⁰ has traditionally been inferred "from a course of dealing or other circumstances" in which the determinative facts are "what the parties actually did" rather than whether an express agreement existed. [Parke, Davis, supra, 362 U.S. at 43-44; Eastern States Retail Lumber Dealers' Assoc. v. United States, 234 U.S. 600, 58 L. Ed. 1490, 34 S. Ct. 951 \(1914\); Albrecht v. The Herald Co., 390 U.S. 145, 149-50, 19 L. Ed. 2d 998, 88 S. Ct. 869 \(1968\).](#) As we noted in [Hester v. Martindale-Hubbell, \[*1214\] Inc., 659 F.2d 433, 436](#) (4 Cir. 1981), cert. denied, 455 U.S. 981, 102 S. Ct. 1489, 71 L. Ed. 2d 691 (1982), the courts, being "sensitive to the realities of the marketplace" . . . have extended the concept of concerted activity far beyond the classic case of actual agreement to engage in a common course of conduct." Contrary to what the district court believed, that Michelin did not expressly inform complaining dealers that it would terminate Bostick at their behest cannot be determinative.

[**18] In an analogous case we recently addressed the basis upon which the trier of fact could be permitted to find "the requisite degree of involvement of other parties" to infer a conspiracy under *United States v. Parke, Davis & Co.*" [Donald B. Rice Tire Company v. Michelin Tire Corporation, 638 F.2d 15, 16](#) (4 Cir.), cert. denied, 454 U.S. 864 (1981) (citation omitted). In *Rice*, we affirmed the district court's finding of a "combination" despite the absence of any formal manufacturer-dealers agreement, or even of evidence that rival dealers had ever been consulted by Michelin following their complaints against Rice, like Bostick a high-volume Michelin dealer eventually terminated. The evidence at that trial showed:

Jean Pierre Duleyrie, the Vice-President in charge of sales, and the individual primarily responsible for the nonrenewal decision conceded that complaints from Michelin sales personnel in other areas and from other tire dealers about plaintiff's geographically extensive and large-scale wholesaling activities contributed to the decision. While Michelin sales personnel do not qualify as economically distinct entities with whom defendant could conspire¹¹ or contract, [Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025 \(2d Cir. 1979\)](#), other Michelin tire dealers do qualify. Numerous other witnesses testified that other tire dealers complained to Michelin personnel about plaintiff's activities. In light of this testimony, as well as Duleyrie's concession that no other types of complaints from any sources about any other aspects of plaintiff's business were received prior to the nonrenewal decision, it is apparent that a combination existed for the purposes of [§ 1](#) between Michelin and some of its authorized dealers.

[Rice v. Michelin Tire, supra, 483 F. Supp. at 754.](#) The evidence adduced in the instant case, as we have summarized it, was quite similar.

As in *Rice*, the testimony of Mr. Duleyrie, Michelin's sales vice president during the relevant time period, shows personal knowledge of the complaints and discussions between Bostick and Michelin's district manager leading up to the renewal decision in 1976. Speaking generally, Duleyrie admitted hearing of complaints by other dealers about Bostick's underselling them "all the time," although he characterized such complaints as "everyday-type" to which¹² "our people are instructed not to pay attention." He also conceded, "I don't know of any instances where Bostick was asked to perform service and failed to do it."¹¹

Mr. Duleyrie's knowledge of the complaints, and his direction of subordinates to take various actions in response, can also be inferred from admitted knowledge of the situation and directives to local Michelin officials by the

¹⁰ There is no contention that a contract was entered into between Michelin and other dealers regarding Bostick in regard to this first theory.

¹¹ When questioned about Bostick's lack of service facilities as a basis for termination when other dealers without service facilities were assertedly allowed to continue, Mr. Duleyrie stated that "we took exactly the same type of action that was taken in the Bostick oil case" in terminating Rice as a dealer.

702 F.2d 1207, *1214-1983 U.S. App. LEXIS 29681, **20

regional corporate sales manager, who reported directly to and took orders from Mr. Duleyrie. Michelin's own theory of the termination -- that it was merely responding to the disillusionment of other dealers stemming from Bostick's lack of service facilities -- implicitly recognizes that the termination was something **[**21]** more than a unilaterally motivated action. Thus, even absent an express "concession" from Mr. Duleyrie, a reasonable jury could find a "causal nexus" between the complaints and the termination without speculating about the involvement of rival dealers. *Roesch v. Star Cooler, supra, 514 F. Supp. at *1215-1984*. Indeed, the Seventh Circuit in a highly lucid discussion of § 1 liability predicated upon termination of a dealer has held "that HN4¹ proof of termination following competitor complaints is sufficient to support an inference of concerted action." *Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1238* (7 Cir. 1982). And we have previously found that a termination even more unilateral in nature could constitute a § 1 violation if it evinces sufficient anticompetitive character. *Osborn v. Sinclair Refining Company, 286 F.2d 832, 837* (4 Cir. 1960), cert. denied, 366 U.S. 963, 6 L. Ed. 2d 1255, 81 S. Ct. 1924 (1961).¹²

[22]** It is ultimately, then, a factual issue for the jury to determine whether Bostick was terminated to placate rival dealers objecting to price-cutting, or instead for lack of service facilities as Michelin claims.¹³ The question next to be considered is whether termination for either purpose is a violation of § 1.

The answer is found in *Rice*,¹⁴ where we said:

We think it is important to distinguish between a conspiracy among dealers and their supplying manufacturer for the purpose of retail price maintenance that would benefit the dealers and one involving the same parties but redounding primarily to the benefit of the manufacturer as a result of increased interbrand competition. A restraint imposed by the former conspiracy would be horizontal in nature and *per se* illegal, while one imposed by the latter would be vertical and analyzed under the rule of reason.

638 F.2d at 16. On the authority of *Rice* **[**23]**, we conclude that HN5¹ a finding of *per se* violation of § 1 would result from a factual determination that the termination was in furtherance of competitors' desires to eliminate a

¹² Michelin contends that to rule for Bostick we must necessarily embrace an expansive reading of *Girardi v. Gates Rubber Company Sales Division, Inc., 325 F.2d 196* (9 Cir. 1963), and that *Girardi* has been sapped of precedential value by universal criticism. Neither is true. *Girardi* perhaps can be read quite broadly as in effect creating a presumption of combination or conspiracy whenever distributors' complaints are followed by a supplier's termination of the disfavored rival distributor. But we need not adopt such a presumption here to require submission of the case to the jury in the face of other evidence, beyond bald complaints, upon which a causal connection between the competitors' objections to price-cutting and the termination could be found. Also, those cases cited as rejecting *Girardi*, see, e.g., *Roesch v. Star Cooler, supra, 671 F.2d at 1172; E.J. Sweeney & Sons, Inc. v. Texaco, Inc., 478 F. Supp. 243, 256 (E.D. Pa. 1979)*, aff'd, 637 F.2d 105 (3 Cir. 1980), cert. denied, 451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981), in actuality only criticize the expansive view of that case, while preserving the narrower point that such other evidence as we find here will be enough to raise an issue of fact regarding § 1 concerted activity. And the Seventh Circuit has refused to follow the stringent proof requirements set out in *Sweeney*, see *Spray-Rite, supra, 684 F.2d at 1238-39*, while the authority of *Roesch* is in doubt pending the Eighth Circuit's resolution of its in banc hearing. See *supra* note 9; *Spray-Rite, supra, 684 F.2d at 1239 n.7*.

¹³ Or, for that matter, for a third reason as yet undisclosed by Michelin.

¹⁴ Bostick does not challenge on appeal the service clause in his Dealer Sales Agreement as itself an unreasonable restraint of trade, as did the plaintiff in *Rice*. The district court in *Rice* had found that defendant's evidence, *in rebuttal* to the plaintiff's evidence of a horizontal combination among rival dealers, showed that Rice had underspent on Michelin promotional activities, and, although maintaining "adequate" service facilities, had effectively shifted much of the tire service and repair work it could have been expected to perform on to other dealers. 483 F. Supp. at 757-59. These service and promotional deficiencies therefore were found to create a "free-rider" problem, see, e.g., *GTE Sylvania, supra, 433 U.S. at 55*, justifying enforcement of Michelin's contractual requirements, and hence the termination of Rice. But the reasonableness of the clause did not come into question until a *prima facie* case of a horizontal combination as the impetus to the termination had first been shown.

price-cutting rival. *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404, 411-13, (6 Cir. 1982); *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. General Motors Corp.*, 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966). While we are not unmindful that a *per se* label should not be mechanically applied, *Broadcast Music, Inc. [**1216] v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979); *National Electrical Contractors Assoc., Inc. v. National Constructors Assoc.*, 678 F.2d 492, 500 (4 Cir. 1982), [HN6](#)¹⁵ where the facts support a finding that competing distributors provoked a manufacturer to eliminate one of their number as a marketplace competitor, there is no need to proceed to the more finely tuned "rule of reason" analysis that is proper when considering manufacturer-imposed vertical restrictions like the tire service requirement in *Rice*.

[**24] Of course, it is possible that the jury will reject Bostick's proof and instead find that termination occurred for the reasons Michelin claims. Michelin has yet to put on its proof, and had, by cross-examination, only begun to draw out evidence to support its defense. In *Rice*, by way of illustration, Michelin eventually failed to convince the trier of fact of the applicability of two of the three explanations for viewing the termination as a vertically imposed manufacturers' restraint promoting competition against other tire brands.¹⁵ Only the "free rider" justification was proven, a justification yet to emerge as applicable here; although some rival dealers' dissatisfaction with Bostick apparently stemmed from the perception that Bostick's minimal service facilities allowed it a cost advantage, at least one dealer claimed a benefit from an expansion in the service portion of his business. Whether provision of Michelin service paid for itself or even produced a profit for other dealers will be a matter the parties will be free to explore at a new trial. We find only that the evidence so far submitted rendered the court's grant of a directed verdict erroneous.

[**25] B.

Analysis of the National Accounts program presents no problem in finding the concerted action element of a [§ 1](#) violation, as the program itself was a contractual agreement between Michelin and various of its dealers including Bostick.¹⁶ More difficult is the issue of whether the program operated as an unreasonable restraint of trade. The district court reasoned that the program fell short of a *per se* illegal resale price maintenance arrangement, see, e.g., *Parke, Davis, supra, 362 U.S. 29*, for two reasons: (1) the program was voluntary in that dealers could join or not, or only partially, and remain dealers, and (2) no minimum resale price was set by Michelin given that Bostick could effectively alter the final sales "price" by rebating to his customers. Were these two salient features of the National Accounts program uncontestedly true, we would agree with the district court that a central billing program by a manufacturer is not *per se* illegal under the Sherman Act.¹⁷ See *Ohio-Sealy Mattress Manufacturing [**1217]*

¹⁵ In *Rice*, the district court considered whether Michelin's actions fell within any of the three rationales discussed in *GTE Sylvania, supra, 433 U.S. at 55-56*, as justifying restrictions or policies enhancing competition among different product manufacturers ("interbrand") at the expense of lessened competition among dealers of the same brand ("intrabrand"). These rationales were (1) inducing aggressive retailers to become dealers to enhance the manufacturer's likelihood of successful entry into a new market, (2) stemming the "free rider" effect, see *supra* note 13, and (3) assuming direct manufacturer oversight of quality and safety to lessen product liability exposure. In affirming *Rice*, we noted carefully that such actual positive benefits must be shown before a restraint imposed by a manufacturer is accorded the deference of a "rule of reason" analysis. [638 F.2d at 16](#).

¹⁶ In addition, the program appears to be the kind of arrangement in which no single dealer can be sufficiently assured of not losing a competitive advantage in joining unless competing dealers also join. To this extent there is an additional element of "combination" involved, see *Albrecht, supra, 390 U.S. 145*, one which goes "beyond mere announcement of [the manufacturer's] policy and the simple refusal to deal" allowed under the doctrine announced in *Colgate, supra, 250 U.S. 300*. *Parke, Davis, supra, 362 U.S. at 44*.

¹⁷ Because of the posture of this case we are not called upon to determine whether the potential for resale price maintenance of a central pricing and billing system is justified as in effect creating a new "product", see, e.g., *B.M.I. v. C.B.S.*, *supra*, 441 U.S. 1, or as promoting interbrand competition through economies of scale in a manner that cannot be achieved through less restrictive alternatives, see e.g., *GTE Sylvania, supra, 433 U.S. 36*.

[Co. v. Sealy, Inc., 585 F.2d 821](#) (7 Cir. 1978), cert. denied, 440 U.S. 930, 59 L. Ed. 2d 486, 99 S. Ct. 1267 (1979); cf. B.M.I. v. [**26] C.B.S., *supra*, 441 U.S. 1. But the evidence so far presented permitted a contrary finding.

[**27] The voluntariness of the program in a formal sense was not a proper basis for the granting of a directed verdict when Bostick had introduced sufficient evidence of Michelin's efforts to pressure it into joining the program unwillingly. Such evidence can be found in the simultaneous refusal of Michelin to disclose its intention to renew or terminate the dealership while vigorously promoting the virtues of the National Accounts program; the delay in formalizing renewal past the usual May 29 anniversary until mid-June in 1977, *after* Bostick had made its first sale through the National Accounts program and had begun to express an interest in participating; and to some degree Joe Bostick's own account of feeling "intimidated" by Michelin representatives at pre-renewal meetings where the possibility of termination for failure to join the National Accounts program was assertedly conveyed to him.¹⁸ Moreover, although large-volume customers were ostensibly free to choose to join the program and dealers free to solicit national accounts for business, Michelin soon became critical of Bostick's active promotion of itself as a National Accounts dealer.

[**28] As to Michelin's lack of control over the ultimate sales price, the evidence is not at all clear that Michelin anticipated the availability of an "end run" around the central pricing and billing system directly to the customer through rebates by Bostick. Even if the potential for dealer rebating was perceived in advance, Michelin personnel showed considerable disenchantment with Bostick's continued price-cutting. That Bostick was eventually able to turn the program to its advantage once enrolled does not imply that its participation was not initially urged as a means of dampening its ability to discount. The record reveals frustration and attempts by Michelin during 1977-78 to exert indirect pressures on Bostick to curtail its sales practices. A jury could reasonably conclude that the nonrenewal in May 1978 was a last resort by Michelin to bring a maverick into line and make the National Accounts program as *enforced* an effective barrier to dealer price competition.

Accordingly we conclude that proof of an illegal resale price maintenance arrangement does not rest upon a showing that the National Accounts program in its structure on paper restricts market pricing if in practical [**29] effect the "coercive potential of summary termination" keeps discounting dealers in line. [Greene v. General Foods Corp., 517 F.2d 635, 658](#) (5 Cir. 1975), cert. denied, 424 U.S. 942, 47 L. Ed. 2d 348, 96 S. Ct. 1409 (1976).

HN7 Price maintenance schemes have been consistently condemned as *per se* illegal, [Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48, 50 U.S.L.W. 4687](#) (1982); [Albrecht, supra, 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998](#), [Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259](#) (1951); [United States v. Trenton Potteries, 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377](#) (1927), and are not saved by claims of redeeming interbrand virtues when there is sufficient evidence of their initiation at the instigation of horizontally competing entities. [United States v. Topco Associates, Inc., 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126](#) (1972). Michelin, of course, is not generally a dealers' collective or joint venture of competitors. But in establishing a National Accounts billing program involving review of dealers' customer lists, the setting of uniform prices to all participating [**30] customers, the potential for insulation of the dealer from the customer in pricing matters, and an opportunity for monitoring dealers' [*1218] sales tactics and policies in greater depth, it has taken on this role of a regulator of the horizontal competition among otherwise legally distinct dealerships selling tires they legally own.¹⁹ See [United States v. Sealy, Inc., 388 U.S. 350, 18 L. Ed. 2d 1238, 87 S. Ct. 1847](#) (1967). If the cancellation of Bostick is found to have been for the reasons claimed in this suit, a violation of § 1 of the Sherman Act was committed.

C.

From the foregoing the outlines of a third view of the evidence becomes clear without need for great elaboration. Even if the National Accounts program itself was insufficient to constitute a resale price maintenance arrangement, Michelin's insistence on Bostick's participation [**31] can be understood as a first attempt to carry out the wishes of

¹⁸ See *supra* note 8.

¹⁹ Indeed, the apparent justification for Michelin acting as billing clearinghouse for its dealers is that joint efforts in this area benefit dealers as a whole.

competing dealers. As Bostick's discounting continued, so did complaints. The ultimate cancellation of only Bostick's truck dealership was a more drastic second step in an essentially horizontal effort to remove downward pressure on Michelin truck tires. That Michelin offered to continue Bostick as a passenger and light truck tire distributor could be taken as signaling a desire to take steps strong enough to placate other dealers but not so drastic as to lose itself a highly effective dealer outright.²⁰ Viewing Michelin's entire course of dealing with Bostick as a consistent two-stage progression, a jury could find the termination in furtherance of a horizontal combination with anticompetitive effect.²¹

[**32] III.

Bostick also urges that the facts underlying its Sherman Act claims equally support a finding of liability under the South Carolina Unfair Trade Practices Act, § 39-5-10 et seq., Code of Laws of South Carolina 1976. Specifically, § 39-5-20(a) provides:

HN8 [↑] Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Bostick contends that a jury could have found that its nonrenewal was "contrary to equity and good conscience", deTreville v. Outboard Marine Corporation, 439 F.2d 1099, 1100 (4 Cir. 1971), or, alternatively, that in dealing with Bostick, Michelin went beyond a unilateral refusal to deal to seek compliance with an anticompetitive price maintenance arrangement.²² The district court dismissed this count on a variety of grounds which we consider in turn.

[**33] [*1219] Most quickly disposed of is the district court's passing suggestion that federal law preempted application of the South Carolina Unfair Trade Practices Act. This position is untenable, and Michelin makes little effort to defend it here. Nothing in the nearly century-old history of federal antitrust regulation is cited to us to suggest that Congress has manifested a clear intent to displace state regulation of unfair trade practices. See 1 P. Areeda & D. Turner, Antitrust Law para. 208 (1978). Cf. New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 413, 37 L. Ed. 2d 688, 93 S. Ct. 2507 (1973); Parker v. Brown, 317 U.S. 341, 351, 87 L. Ed. 315, 63 S. Ct. 307 (1943).

²⁰ Michelin suggested at oral argument that Bostick's various "Dr. Tire" retail outlets provided sufficient service facilities to satisfy the Dealer Sales Agreement. This may be established on remand; evidence currently in the record is at best minimal on this point, and certainly inconclusive.

²¹ Further supporting this conclusion is the Supreme Court's observation in GTE Sylvania, supra, 433 U.S. at 56, that many economists "have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products." Because the National Accounts program dampens intrabrand price competition, which is only then reinvigorated by rebating, it could follow that it was contrary to Michelin's interests standing alone to terminate an effective intrabrand competitor like Bostick. The jury could thus infer that Michelin was instead responding to the pressures from Bostick's competitors, who had more reason to oppose strong intrabrand competition than Michelin, especially if it doubted Michelin's service-related justification in this case.

²² Bostick advanced two other Unfair Trade Practices Act-based theories which are no longer tenable in this cases. One was that Michelin fraudulently induced Bostick to enter the National Accounts program, a claim identical to that dismissed with prejudice below by agreement of the parties. We think that Bostick is foreclosed from reopening its fraud claim under a different heading here on appeal. The other was that Michelin restricted the territory of its dealers or to whom the product could be transferred. Bostick, however, failed to offer any proof of this, aside from perhaps a strained view of the potential of the National Accounts program as a means of overseeing dealer-customer contact. These theories were properly dismissed.

To the extent the district court relied on the inverse proposition, that the state law exempts from its coverage all federally regulated conduct, the following language of [§ 39-5-40](#) governs:

[HN9](#) Nothing in this article shall apply to:

* * *

(d) Any challenged practices that are subject to, and comply with, statutes administered by the Federal Trade Commission and the rules, regulations and decisions interpreting such statutes.

For the purpose of this section, *the burden* [\[*34\]](#) *of proving exemption from the provisions of this article shall be upon the person claiming the exemption.*

(emphasis added). As Bostick points out, Michelin failed to raise this defense in its answer. The above language appears to [HN10](#) require the party claiming exemption to raise [§ 39-5-40\(d\)](#) affirmatively,²³ such that the defense is untimely when first raised on motion for directed verdict. [Rule 8\(c\), Fed. R. Civ. P.](#); [Hardy-Latham v. Wellons](#), 415 F.2d 674, 677 (4 Cir. 1968).

Even if considered properly [\[*35\]](#) raised as more akin to a defense of failure to state a claim upon which relief can be granted and hence timely, [Rule 12\(h\) \(2\), Fed. R. Civ. P.](#), this exemption is not available to Michelin on the ground of its action being "subject to, and comply[ing] with" F.T.C. rules, regulations and interpretations. No case has been pointed to of Federal Trade Commission approval of the type and manner of dealer termination alleged here. Instead, some terminations are found lawful, others not, on a case-by-case basis. Compare [Naifeh v. Ronson Art Metal Works, Inc.](#), 218 F.2d 202, 206 (10 Cir. 1954) (simple refusal to deal not illegal), with [Adolph Coors Company v. F.T.C.](#), 497 F.2d 1178, 1185-86 (10 Cir. 1974), cert. denied, 419 U.S. 1105, 42 L. Ed. 2d 801, 95 S. Ct. 775 (1975) (conduct going beyond a simple refusal to deal found illegal where distributorship terminated for anti-competitive purpose). [Section 39-5-40](#) instead runs to activity given a blanket exemption or endorsement by federal law.

In [State ex rel. McLeod v. Rhoades](#), 275 S.C. 104, 267 S.E.2d 539, 541 (1980), the South Carolina Supreme Court found certain allegedly unfair stock trading practices to be within [\[*36\]](#) the regulatory scheme of the Securities and Exchange Act of 1934 and therefore exempted from the Unfair Trade Practices Act.²⁴ By contrast, where the less comprehensive Federal Motor Vehicle Information and Cost Savings Act was asserted [\[*1220\]](#) to have exempted allegedly fraudulent automobile odometer setting practices from state law coverage, the court found that "the Federal Act clearly reveal[s] it was not intended to supersede or otherwise limit state law remedies". [State ex rel. McLeod v. Fritz Waidner Sports Cars, Inc.](#), 274 S.C. 332, 263 S.E.2d 384, 385 (1980).

[\[*37\]](#) Interpretation of the Act, though scant, indicates that the exemption relates only to fields extensively governed by federal law, where federal preemption might otherwise already apply. As discussed, we do not view the body of federal **antitrust law** as preemptive in this way, and therefore no exemption arises merely by virtue of Michelin's asserting that its conduct in a particular case might not be illegal under federal law. Michelin thus has failed to carry its burden of proving an exemption under [§ 39-5-40](#).

²³ Dealing with a pendent state law claim, we look to state law for guidance on whether the defense is affirmative in nature. [Freeman v. Chevron Oil Company](#), 517 F.2d 201, 204 (5 Cir. 1975). As Professor Day of the University of South Carolina School of Law has summarized the procedural status of [§ 39-5-40](#), "Proof of an exemption is clearly an affirmative defense." Day, The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea?, 33 S.C.L. Rev. 479, 501 n.147 (1982).

²⁴ Strictly speaking, *Rhoades* addressed only the exemption provided for in [§ 39-5-40\(a\)](#) regarding "actions or transactions permitted under laws administered by any regulatory body" of the state or the United States, and not 40(d) claimed by Michelin. As 40(d) apparently has not been interpreted by the South Carolina Supreme Court, the treatment of the broader exemption of 40(a) discussed in the text gives guidance on the scope of the entire section. It follows that if the cause of action against Michelin is not exempted under the broader view of actions "permitted" by other law, it also fails to meet the stricter demands of alleging acts subject to and complying with criteria set forth by the FTC, itself a regulatory body administering federal law.

Looking then to the merits of Bostick's state law claim, we conclude that the district court overly restricted the Act's coverage to only those practices which would be unlawful under § 5(a) (1) of the Federal Trade Commission Act, [15 U.S.C. § 45\(a\) \(1\)](#).²⁵ [HN11](#)[↑] The Act instead states only that "the courts will be *guided* by the interpretations given" to the federal FTC Act. [§ 39-5-20\(b\)](#) (emphasis added). This language neither revokes pre-existing South Carolina definitions of unfair or deceptive trade practices, nor binds the Act to the scope of federal law. Pertinent, then, is our statement of South Carolina law applicable to a claim of wrongful franchise termination: [\[**38\]](#)

Although some states may give full effect to broad unilateral powers of termination, South Carolina, whose law governs here, does not. It is settled law in that state that regardless of broad unilateral termination powers, the party who terminates a contract commits an actionable wrong if the manner of termination is contrary to equity and good conscience. That standard of conduct is far more stringent than one forbidding only actual fraud, and it may apply to an unconscionable reason for termination as well as to the causing of needless injury in the course of termination.

[deTreville v. Outboard Marine, supra, 439 F.2d at 1100](#) (citations and footnote omitted). The principle that proof sufficient to sustain a finding of fraud need not be prerequisite to establishing an unfair trade practice has been applied directly to the Act. [State ex rel. McCleod v. Brown, 278 S.C. 281, 294 S.E.2d 781, 783 \(S.C. 1982\)](#).

[\[**39\]](#) Accordingly, evidence sufficient to withstand a motion for directed verdict on the federal causes of action provides at least as sufficient a basis for also requiring jury determination of the state law claim. Moreover, there is no requirement in the Unfair Trade Practices Act of a contract, combination or conspiracy as there is under [§ 1](#) of the Sherman Act. It is therefore entirely possible that the jury could find Bostick to have been terminated in furtherance of unfair or anticompetitive purposes -- e.g., to harm its business because of its role as a growing wholesale competitor of Michelin's -- without rendering a verdict duplicative of the federal claims. It is, of course, proper that the jury be instructed not to award duplicative damages for violations of both the state and federal statutes based upon precisely the same conduct, and the defendant will be free to ask for an instruction to this effect. But dismissal of the Unfair Trade Practices Act claim as a matter of law was incorrect here.

IV.

Bostick contends that the district court committed reversible error in excluding [\[*1221\]](#) from evidence a memorandum written by Michelin's district manager on May 7, [\[**40\]](#) 1977, offered as plaintiff's Exhibit 42. The memorandum concerned plaintiff's sales activities and was prepared by defendant's district manager to set forth his comments and recommendations for the use of his corporate superior. The district court originally found admissible all but two paragraphs of the memorandum,²⁶ and ruled that the exhibit would be admitted if plaintiff agreed to delete those two paragraphs. However, when defendant continued to press its objection, the district court ruled the entire document inadmissible on a variety of grounds.

Even if admissible, we do not think that the ruling excluding this evidence would be reversible error because the statements it contains are largely cumulative of other evidence regarding the district manager's reports and recommendations to defendant's management. [\[**41\]](#) We would thus not consider the point were it not that we order a retrial at which it is not unlikely that the exhibit will be offered again.

²⁵ Indeed, read this way the Act truly would be redundant and, in some cases, possibly in conflict with federal law. Instead, "the statutory mandate to follow federal interpretations of the FTC Act indicates that state courts 'are now free to find methods, acts or practices not heretofore specifically declared unlawful by the FTC or the federal courts prohibited by the [UTPA]' Day, The South Carolina Unfair Trade Practices Act, *supra* note 23, 33 S.C.L. Rev. at 482, quoting [Murphy v. McNamara, 36 Conn. Supp. 183, 187 n.4, 416 A.2d 170, 174 n.4 \(1979\)](#) (interpreting identical language in Connecticut's Unfair Trade Practices Act).

²⁶ The two paragraphs ruled inadmissible allegedly related solely to the sale of passenger tires and were ruled irrelevant because the alleged antitrust violations all related to the sale of truck tires.

In our view the memorandum is admissible as an admission, under Rule 801(d) (2) (C) and (D), Fed. Rules of Evidence, whether or not unfavorable to defendant, provided that it is shown either (a) that the district manager was authorized to make a statement concerning the subject, or (b) that the memorandum was made by defendant's agent concerning a subject within the scope of his agency during the existence of the agency relationship. If either of those conditions is met, the district court, on retrial, should admit the memorandum as an exhibit. The statement's status as a nonhearsay admission does not turn, as the district court believed, on proof that a company superior actually relied on the memorandum. Of course, the admissibility of the memorandum is subject to the limitations of Fed. R. Evid. 402 and 403, that it be relevant and that its probative value not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, etc. Thus the district court may properly require the memorandum to be redacted either because [**42] portions are irrelevant or would result in the evils protected against by Rule 403, or both. In that event, however, the elimination of the improper material should be made by the district court without requiring the plaintiff's agreement and the balance should be admitted.

REVERSED AND REMANDED.

End of Document

L.A. Draper & Son, Inc. v. Wheelabrator-Frye, Inc.

United States District Court for the Northern District of Alabama, Southern Division

March 16, 1983

Civil Action No. 80-G-0958-S

Reporter

560 F. Supp. 1138 *; 1983 U.S. Dist. LEXIS 18489 **; 1983-1 Trade Cas. (CCH) P65,458

L. A. DRAPER AND SON, INC., Plaintiff, v. WHEELABRATOR-FRYE, INC., a corporation; HESSCO INDUSTRIAL SUPPLY, INC., a corporation; and FRED Z. HESTER, Defendants

Core Terms

unfair competition, suppliers, Sherman Act, distributor, antitrust claim, pendent, state claims, territorial, federal court, defendants', shot, directed verdict motion, resale price, antitrust, prices, cases, directed verdict, manufacturer, selling, state law claim, no evidence, Motions, substantial evidence, alternative relief, anticompetitive, conspiracy, abrasive, retailer, boycott, parties

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

HN1[] Communications, Sherman Act

The appropriate standard for determining the adequacy of a claim under § 1 of the Sherman Act for unfair competition cases is the following two-part standard: (1) a market effect that would be prohibited under the law of mergers, and (2) other conduct by the defendant that threatens Sherman Act values. To meet the first part of the test there must be a concentrated market and a powerful potential entrant attempting to buy out or merge with the most significant competitor in that market, so that the merger would have such a potential for lessening competition that it could be prevented by the Federal Trade Commission. If a defendant could achieve a desired result either by lawful merger or by engaging in unfair competition, the choice of the unfair competition route alone should not give rise to an antitrust violation. The second prong of the test is met if the defendants engage in anticompetitive conduct having an anticompetitive effect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

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

HN2 [down] **Vertical Restraints, Resale Price Maintenance**

Resale price maintenance is, in the absence of state fair trade legislation, a per se violation of the antitrust laws. But before this doctrine can come into play there must be resale price maintenance. The United States Supreme Court cases have involved situations in which the attempt to set retail prices was clear. Taken together, these cases suggest that a case of illegal resale price maintenance is made out when a price is announced and some course of action is undertaken or threatened contingent on the willingness or unwillingness of the retailer to adopt the price. The action need not necessarily fit under the rubric "coercion," but it must involve making a meaningful event depend on compliance or non-compliance with the "suggested" or stated price.

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

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

HN3 [down] **Tying Arrangements, Sherman Act Violations**

An illegal tying arrangement has four characteristics: (1) two separate products, the tying product and the tied product; (2) sufficient market power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in the tied market.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN4 [down] **Price Fixing & Restraints of Trade, Tying Arrangements**

To make out a case of tying violative of the antitrust laws the plaintiff must establish that the defendant distributor tied two products (a more and a less marketable one) and conditioned the sale of the more marketable one upon the purchase of the less desirable, "tied" companion.

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

HN5 [down] **Price Fixing & Restraints of Trade, Vertical Restraints**

Where a manufacturer is alleged to have imposed restrictions requiring his distributors to abide by territorial limitations, the agreement is a vertical one, governed by the rule of reason. A plaintiff must show that the defendant's conduct had an adverse effect on competition to prevail under the rule of reason.

560 F. Supp. 1138, *1138LÁ1983 U.S. Dist. LEXIS 18489, **18489

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Sherman Act > General Overview

HN6 Sherman Act, Claims

In the absence of a showing of anticompetitive effect, the decision of a manufacturer to switch from an independent distributor to an in-house distribution system does not establish a violation of [§ 1](#) of the Sherman Act.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN7 Judgment as Matter of Law, Directed Verdicts

The standard to determine whether there is sufficient evidence to submit a case to the jury following a motion for a directed verdict in a federal court trial is as follows: The district court should consider all evidence and not just evidence supporting the nonmover's case. The evidence must be considered in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable persons could not reach a different conclusion, the court should direct a verdict. On the other hand, if there is substantial evidence of such quality and weight that reasonable persons in the exercise of impartial judgment might reach different conclusions, the court should deny the motion for a directed verdict and submit the case to the jury. A mere scintilla of evidence is insufficient to present a question for the jury; there must be a conflict in substantial evidence to create a jury question.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > Trials > Separate Trials

HN8 Supplemental Jurisdiction, Pendent Claims

The decision whether to accept a pendent claim lies in the court's discretion. There are several reasons why a court would use its discretion to refuse a pendent claim. Examples: (1) The real substance of the case is the state claim. Even if the federal question is significant, when the main orientation of the case is state based, jurisdiction may well not be taken over the pendent state claim. (2) The federal claim asserted is frivolous. (3) There would be jury confusion caused by litigating the federal and state claims together. If the state claim would have to be severed under [Fed. R. Civ. P. 42](#), and separate trials held, then the efficiency-economy consideration is undercut and there is no practical reason for the federal court to take the state claim. (4) A federal court should dismiss the state-based insufficient claim if the federal claim collapses before trial. This was read as mandatory for many years, but in recent years the United States Supreme Court has indicated that this consideration likewise lies within the discretion of the district court.

Governments > Courts > Authority to Adjudicate

Governments > Courts > Judicial Comity

HNG[] Courts, Authority to Adjudicate

Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has substantial value in securing uniformity of decision and discouraging repeated litigation of the same question, but its obligation is not imperative. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he is clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes into play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law.

Counsel: [**1] Thad G. Long and Joseph B. Mays, Jr., Bradley, Arant, Rose & White, Birmingham, Alabama, for plaintiff.

L. Murray Alley and L. Vastine Stabler, Jr., and Lee E. Bains, Jr., Cabaniss, Johnston, Gardner, Dumas & O'Neal, Birmingham, Alabama, (for Wheelabrator-Frye, Inc., and Hessco Industrial Supply, Inc.)

Ralph D. Gaines and Sidney Hardy, Gaines, Cleckler, Robbins & Goodrich, P.C., Talladega, Alabama, (attorneys for Fred Z. Hester.)

Judges: Guin.

Opinion by: GUIN

Opinion

[*1139] MEMORANDUM OPINION

This is an action under the Sherman Act, [15 U.S.C. §§ 1 et seq.](#), with a pendent state claim for unfair competition.

At the close of the plaintiff's case on the thirteenth day of trial, the defendants, Wheelabrator-Frye, Inc., HESSCO Industrial Supply, Inc., and Fred Z. Hester, moved for a directed verdict. During the hearing on the motion for directed verdict, defendants made an oral motion to dismiss the [*1140] pendent state claim without prejudice, stipulating that the time period from the filing of the present action in federal court to the trial court's entry of final judgment would be excluded from the calculation of any period for the statute of limitations. At the conclusion [**2] of the hearing on these motions, the court dictated into the record its decision to grant defendants' motion for directed verdict as to the antitrust claim in Count One of the complaint and denying the motion as to the unfair competition claim in Count Two. The court also granted the oral motion to dismiss the pendent state claim without prejudice to its disposition in state court. Plaintiff has filed Motions for Various Types of Alternative Relief, which the court elects to treat as a motion for reconsideration. That motion is denied. This memorandum opinion sets forth the findings of fact and conclusions of law upon which the court's denial is based.

L.A. Draper & Son, Inc. ("LADSCO"), is a corporation incorporated under the laws of the State of Alabama, with its principal place of business in Anniston, Alabama. Since 1958 LADSCO has been in the business of selling foundry supplies, including abrasive shot, primarily in the states of Alabama, Georgia, Mississippi, Tennessee, North Carolina, South Carolina, Kentucky, and Florida. Wheelabrator-Frye ("W-F") is a corporation incorporated under the laws of the State of Delaware, with its principal place of business in Indiana. [**3] For many years, Wheelabrator-Frye was the principal supplier to LADSCO of abrasive shot. Abrasive shot are pellets with a variety of industrial uses including the cleaning of castings and applying a finish to metal. Fred Z. Hester, a resident of Anniston, Alabama, for approximately 22 years, was a managerial employee of LADSCO. For the last eight or ten years of his employment, Hester was Vice-President and Director of LADSCO. On August 23, 1979, Hester

resigned from employment with LADSCO and sometime thereafter joined with several other former LADSCO employees to form HESSCO Industrial Supply, Inc. ("HESSCO"), a foundry supply business located chiefly in Anniston, Alabama. Thus HESSCO and LADSCO became competitors.

The plaintiff complains that HESSCO is an unfair competitor and that the circumstances surrounding its formation and ultimate acquisition by Wheelabrator-Frye violate Section One of the Sherman Act, [15 U.S.C. § 1](#).

HN1[] The appropriate standard for determining the adequacy of a claim under the Sherman Act, Section One, for unfair competition cases is the following two-part standard: (1) a market effect that would be prohibited under the law of mergers, and (2) other [**4] conduct by the defendant that threatens Sherman Act values. [Associated Radio Service Co. v. Page Airways, Inc.](#) *624 F.2d 1342 (5th Cir. 1980)*, cert. denied 450 U.S. 1030, 68 L. Ed. 2d 226, 101 S. Ct. 1740 (1981); [Northwest Power Products, Inc. v. Omard Industries, Inc.](#), *576 F.2d 83 (5th Cir. 1978)*, cert. denied 439 U.S. 1116, 59 L. Ed. 2d 75, 99 S. Ct. 1021 (1979). To meet the first part of the test there must be a concentrated market and a powerful potential entrant attempting to buy out or merge with the most significant competitor in that market, so that the merger would have such a potential for lessening competition that it could be prevented by the Federal Trade Commission. [Associated Radio v. Page Airways](#), *624 F.2d at 1352*. "If a defendant could achieve a desired result either by lawful merger or by engaging in unfair competition, the choice of the unfair competition route alone should not give rise to an antitrust violation." [Northwest Power v. Omard Industries](#), *576 F.2d at 89*. The second prong of the test is met if the defendants engage in anticompetitive conduct having an anticompetitive effect. *Id. at 89-90*; [Associated Radio v. Page Airways](#), *[**5] 624 F.2d 1342 at 1353*. The decision of this court is definitively resolved on the second prong of the *Northwest Power* test; thus, this opinion will consider that aspect first.

The plaintiff alleged that the defendants engaged in four activities which threaten Sherman Act values: resale price maintenance, unlawful territorial restrictions, tying [***1141**] arrangement, and group boycott. The court finds that there is no substantive evidence to support any of these claims.

Resale Price Maintenance

The rule binding in this circuit governing cases of alleged resale price maintenance was stated in [Aladdin Oil Co. v. Texaco, Inc.](#), *603 F.2d 1107, 1117 (5th Cir. 1979)*, quoting [Butera v. Sun Oil Co.](#), *496 F.2d 434, 436-57 (1st Cir. 1974)*:

HN2[] Resale price maintenance is, in the absence of state fair trade legislation, a *per se* violation of the antitrust laws. [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.](#), *340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*; [Dr. Miles Medical Co. v. John D. Park & Sons Co.](#), *220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*. But before this doctrine can come into play there must be resale price maintenance. The [**6] Supreme Court cases have involved situations in which the attempt to set retail prices was clear. In [Simpson v. Union Oil Co.](#), *377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964)*, upon which [plaintiff] relies, Union Oil had signed an agreement with the retailer containing the latter's promise to resell at the price set by Union Oil. In *Kiefer-Stewart* a refusal to sell at a fixed price was met by a concerted refusal to deal. In [Albrecht v. Herald Co.](#), *390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)* and [United States v. Parke, Davis & Co.](#), *362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*, the retailer was confronted with minimum or maximum prices and harassed by his supplier and others if he stepped out of line. Taken together, these cases suggest that a case of illegal resale price maintenance is made out when a price is announced and some course of action is undertaken or threatened contingent on the willingness or unwillingness of the retailer to adopt the price. The action need not necessarily fit under the rubric "coercion", but it must involve making a meaningful event depend on compliance or non-compliance with the 'suggested' or stated price. The [**7] dealers in *Parke, Davis* and *Albrecht* were told that the harassment directed against them would end as soon as they acceded to the manufacturer's price desires. The cancellation of the lease in *Simpson* was a direct consequence of the refusal to charge the manufacturer's desired price. The other cases adhere to the same pattern. Cf. [Lehrman](#)

560 F. Supp. 1138, *1141-983 U.S. Dist. LEXIS 18489, **7

v. Gulf Oil Corp., 464 F.2d 26 (5th Cir.), cert. denied 409 U.S. 1077, 93 S. Ct. 687, 34 L. Ed. 2d 665 (1972); Bowen v. New York News, Inc., 366 F. Supp. 651 (S.D.N.Y. 1973).

Plaintiff alleged that Wheelabrator-Frye imposed a system of resale price maintenance on LADSCO. Since there has been no written contract between these two parties since 1969 or 1970, LADSCO relied on the old contract to make out its case on this claim. The plaintiff tried to show that the old contract with the defendant required it to "maintain . . . the prices and terms and observ[e] . . . all sales policies and regulations as established by Wheelabrator Corporation." The plaintiff did not establish that the aforementioned provision remained in force after the late 1960s when the alleged wrongdoing at the center of this dispute is said to [**8] have occurred; though there was evidence that the tenor of the agreement continued after its lapse. More importantly, however, there has been no evidence of the coercion, harassment, or intimidation on the part of the defendants required to make out a *prima facie* case of illegal price maintenance. What the evidence did show was that Wheelabrator thought that in instances where the plaintiff's salesman called upon the same customers as its own jobbers the two "ought to be selling at the same price." Wheelabrator's view about prices did not issue forth as an ultimatum; it was little more than a stated preference about the manner in which business should be conducted where both manufacturer and distributor are calling upon the same potential customer. There has been no showing that Wheelabrator, in any way or at any time, threatened the plaintiff with harm to its business if it did not comply with a certain price list. What the evidence does show is that LADSCO's success in selling Wheelabrator's products was due to its willingness to sometimes cut its profit margin [*1142] and reduce its prices. Even though Wheelabrator was aware of this, there is no evidence that it took any [**9] action, coercive or otherwise, to stop it.

Wheelabrator-Frye never conditioned dealing with LADSCO upon compliance with its suggested prices. No meaningful event turned upon LADSCO's compliance when its contract with Wheelabrator contained a pricing provision. There has been no contract in force since 1969 or 1970, and no evidence that the unwritten working arrangement between the parties contained a pricing provision. Wheelabrator-Frye has certainly not tried to enforce such a provision. This being the case, these facts will not maintain a resale price claim; the plaintiff's proof fails.

Tying Arrangement

In *Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1037 (5th Cir. 1981)*, the Fifth Circuit said that [HN3](#)[
↑] an illegal tying arrangement has four characteristics:

- (1) two separate products, the tying product and the tied product;
- (2) sufficient market power in the tying market to coerce purchase of the tied product;
- (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and
- (4) anticompetitive effects in the tied market.

The plaintiff alleged that defendants violated the Sherman Act by facilitating [**10] a tying arrangement of shot with equipment and parts. As a Wheelabrator-Frye distributor, plaintiff wanted to sell W-F parts and equipment in addition to the shot it was selling, but was not permitted to do so. It is undisputed that LADSCO had been remarkably successful in selling abrasives such as shot. They were Wheelabrator's largest distributor of that product. But LADSCO's business relationship to Wheelabrator was limited to abrasives; it did not encompass the sale of parts. There is testimony to the effect that Wheelabrator did not think that because LADSCO was successful selling shot it would be equally successful selling parts. Thus Wheelabrator made a bona fide business decision regarding the selection of a distributor for parts.

More to the point of the issue of tying, however, is the simple fact that the alleged facts do not constitute tying. [HN4](#)[
↑] To make out a case of tying violative of the antitrust laws the plaintiff must establish that the defendant distributor tied two products (a more and a less marketable one) and conditioned the sale of the more marketable one upon the purchase of the less desirable, "tied" companion. The facts of this case show, rather than [**11] the imposition of undesirable goods as a condition for purchasing more salable ones, the manufacturer limiting the distributor to certain products that he (the distributor) has shown himself expert at marketing.

Counsel for the plaintiff, while not conceding that the tying claim was a tenuous one, was heard to characterize the claim as kin to tying. The court finds, under these facts, that the claim is such a distant cousin it bears no family resemblance to the kind of tying that the **antitrust law** forbids. The plaintiff has failed to establish his case of tying.

Territorial Restriction

HN5 Where a manufacturer is alleged to have imposed restrictions requiring his distributors to abide by territorial limitations, the agreement is a vertical one, governed by the rule of reason. [Continental TV v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 \(1977\)](#). A plaintiff must show that the defendant's conduct had an adverse effect on competition to prevail under the rule of reason. [Daniels v. All Steel Equipment, 590 F.2d 111, 113 \(5th Cir. 1979\)](#).

The plaintiff has alleged that Wheelabrator-Frye is guilty of imposing an impermissible territorial restriction **[**12]** upon LADSCO. There is no evidence in the record to support this claim. W-F did not restrict LADSCO's sale of shot to any particular territory. In certain areas, such as the Carolinas, W-F competed with LADSCO in the retail market. It is the defendant manufacturer's insistence on distributing **[*1143]** its own product and competing with LADSCO that is the gravamen of the territorial restriction claim. W-F's presence in the market as a distributor of its own goods, troubling though it may be to a distributor such as LADSCO, does not constitute an impermissible territorial restriction violative of Sherman Act values. Indeed, to the extent that LADSCO's real concern is to have W-F withdraw from the market and allow it to be the exclusive distributor of W-F's goods, it is the plaintiff, not the defendant, who would curb competition and risk offending Sherman Act values.

The court in [Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1005 \(5th Cir. 1981\)](#), said that to prevail on an antitrust claim for impermissible restrictions,

a plaintiff must show that the defendants' conduct has an adverse effect on competition. [Daniels v. All Steel Equipment, I^{**131} Inc., 590 F.2d 111, 113 \(5th Cir. 1979\)](#); [H&B Equipment Co. v. Int'l. Harvester Co., 577 F.2d 239, 246 \(5th Cir. 1978\)](#); [Northwest Power Products, Inc. v. Ormark Industries, Inc., 576 F.2d 83, 90 \(5th Cir. 1978\)](#), cert. denied, 439 U.S. 1116, 99 S. Ct. 1021, 59 L. Ed. 2d 75 (1979); [Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 380 \(5th Cir. 1977\)](#).

Since the plaintiff has not shown it was restricted to certain geographic areas, it comes as no surprise that it has not shown any adverse effect on interbrand competition. Any adverse competitive results in the market are due to behavior of the plaintiff, not the defendants. The plaintiff has complained that W-F would not permit it to have exclusive right to the North and South Carolina market; yet it fired its salesman for that area, effectively abandoning the market to W-F and others. Any plan of the defendant to exclude LADSCO from the Carolina territory was preempted by LADSCO's own withdrawal from that market. The plaintiff will not be heard to complain about being restricted from territory it quite deliberately abandoned. The plaintiff has not alleged facts sufficient to make **[**14]** out a colorable claim for territorial restriction.

Group Boycott

The plaintiff alleged that a group of its former suppliers boycotted it and substituted HESSCO as their distributor. There was no substantial evidence, however, of concerted action on the part of these suppliers. Indeed, for reasons of its own, LADSCO did not place any orders with ALCOA, its main supplier for primary aluminum, after August 1979. Nor did it place orders with W-F for shot after this period. Consequently, for these suppliers, the opportunity to boycott LADSCO never presented itself. Though it is true that some other of LADSCO's suppliers did switch to HESSCO, this, by itself, does not establish a conspiracy. LADSCO underwent a major change in August of 1979. The man who had been in charge of the day-to-day operations left the company. The sales team, persons with many years of service and proven ability, also subsequently left. Faced with this, many suppliers could have, individually, come to the conclusion that LADSCO's sales structure was so weakened by these changes that it was no longer the able distributor it once was. Thus, what the plaintiff has established is parallel behavior **[**15]** on the

part of several suppliers acting independently in their own interest. There is simply no evidence of an improper motive or concerted action by suppliers. Nor does the effort of LADSCO's dismissed salesman to attract its suppliers constitute a group boycott or a refusal to deal by suppliers. The concerted action must be on the part of the group of suppliers, not third parties. There is no evidence to support plaintiff's group boycott claim.

As the foregoing discussion shows, there has been no violation of Sherman Act values. Fred Hester, a LADSCO Vice-President and Director, resigned. Shortly thereafter, the sales force was fired. Several of the salesmen joined with Mr. Hester and formed HESSCO, which was later purchased by Wheelabrator-Frye. The former LADSCO employees, now in competition [*144] with their old company, used ability and experience to the advantage of their new venture and, predictably, to LADSCO's disadvantage. Some of LADSCO's suppliers left it for the competition. Other of the suppliers, ALCOA and W-F among them, no longer received orders from the plaintiff. These are not the facts of a Sherman Act claim; under the second prong of the Associated [**16] Radio test, the claim fails.

In addition to plaintiff's failure to establish anticompetitive conduct through any of its four claimed Sherman Act values that were threatened, there was no showing by the plaintiff of an adverse effect on competition arising from the transactions in this case. The evidence showed that LADSCO has continued to engage in competition with the new entrant into the market, HESSCO. [HN6](#)[↑] In the absence of a showing of anticompetitive effect, the decision of a manufacturer to switch from an independent distributor to an in-house distribution system does not establish a violation of Sherman Act Section One. [Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001 \(5th Cir. 1981\)](#); [H&B Equipment Co., Inc. v. International Harvester, 577 F.2d 239 \(5th Cir. 1978\)](#). For these reasons the court concludes that the plaintiff has failed under the [Boeing v. Shipman, 411 F.2d 365, 373-76](#) and nn. 13-16 (5th Cir. 1969), standard to satisfy the second prong of the *Northwest Power* test of conduct by the defendants that threatens Sherman Act values.

The court also finds as a fact that plaintiff did not satisfy the first prong of the test, because it failed [**17] to establish a relevant geographic market and also failed to prove that defendants' actions would be prohibited under the law of mergers. These alternative findings are each sufficient reason not to change the court's earlier ruling granting a directed verdict for the defendants on the antitrust claims of the plaintiff.

The Eleventh Circuit announced the standard for directed verdicts in federal court trials in [Kaye v. Pawnee Const. Co., Inc., 680 F.2d 1360 \(11th Cir. 1982\)](#), relying on the former Fifth Circuit's *en banc* decision in [Boeing Company v. Shipman, 411 F.2d 365 \(5th Cir. 1969\)](#). The *Kaye* court held:

The Fifth Circuit *en banc* in [Boeing Company v. Shipman, 411 F.2d 365 \(5th Cir. 1969\)](#), enunciated [HN7](#)[↑] the standard to determine whether there is sufficient evidence to submit a case to the jury following a motion for a directed verdict in a federal court trial. The district court should consider all evidence and not just evidence supporting the nonmover's case. The evidence must be considered in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly [**18] in favor of one party that reasonable persons could not reach a different conclusion, the court should direct a verdict. On the other hand, if there is substantial evidence of such quality and weight that reasonable persons in the exercise of impartial judgment might reach different conclusions, the court should deny the motion for a directed verdict and submit the case to the jury. A mere scintilla of evidence is insufficient to present a question for the jury; there must be a conflict in substantial evidence to create a jury question. [Boeing, 411 F.2d at 373-76](#) & nn. 13-16.

[680 F.2d at 1364](#) (footnote omitted).

On the antitrust claims in this case, the evidence is overwhelmingly in favor of the defendants. The *Kaye* standard for directing verdicts in federal cases is met here.

Plaintiff's state law claim of unfair competition came before this court solely on the basis of pendent jurisdiction; there is no other basis for subject matter jurisdiction over this claim. The defendants have moved for a directed verdict against it. The court finds that there is sufficient evidence of one or more acts by defendant Hester that *prima facie* [**19] constitute a breach of trust that possibly may be fairly characterized as unfair competition. There is great question, however, whether under Alabama [*1145] law such a breach, if found by a jury, establishes plaintiff's broad claims for destruction of its business by means of the unfair competition alleged in Count Two of the complaint. Furthermore, to proceed with the unfair competition claim after dismissal of the antitrust claim would be impossible without the jury being infected by prejudice from evidence received on the antitrust claim. Thus it would be necessary to retry the unfair competition claim under any circumstances. The court finds that a retrial would be more fairly and appropriately accomplished in the state court.

United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966), laid down several considerations that serve as limitations on the assertion of pendent jurisdiction. First and foremost, [HN8](#) [↑] the decision whether to accept the pendent claim lies in the court's discretion. This was expressly asserted in *Gibbs* and later in *Rosado v. Wyman*, 397 U.S. 397, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970). There are several [**20] reasons why a court would use its discretion to refuse a pendent claim. Examples:

- (1) The real substance of the case is the state claim. Even if the federal question is significant, when the main orientation of the case is state based, jurisdiction may well not be taken over the pendent state claim.
- (2) The federal claim asserted is frivolous.

- (3) There would be jury confusion caused by litigating the federal and state claims together. If the state claim would have to be severed under [Rule 42](#), and separate trials held, then the efficiency-economy consideration is undercut and there is no practical reason for the federal court to take the state claim.

- (4) There is a clear statement by Justice Brennan in *Gibbs* that a federal court should dismiss the state-based insufficient claim if the federal claim collapses before trial. This was read as mandatory for many years, but in recent years the Supreme Court has indicated that this consideration likewise lies within the discretion of the district court.

The federal antitrust claim in this case is totally without merit. A review of the more than two thousand pages of trial transcript reaffirms the correctness [**21] of the court's earlier order directing a verdict for the defendants. The plaintiff was not forthcoming with evidence that would even begin to make out an antitrust case. A lesser lawyer inexperienced at evaluating the merits of antitrust claims might have, in his ignorance, failed to recognize the insubstantial, utterly frivolous character of the claims put forth here, but plaintiff's lead counsel, an eminent member of this bar, and an expert on antitrust matters, could not but know he had no colorable antitrust claim. This being the case, the court finds that the formulation and filing of an antitrust claim was but a pretext for getting the pendent state unfair competition claim into a federal court. Customarily counsel will hedge his bet by filing two suits, one in both state and federal court, if there is a colorable pendent claim. That was not done here. This shows a lack of confidence in the state claim. There is, in fact, good reason for such a lack of confidence.

The federal claim in this case did not collapse; it never appeared. There was no substantial evidence of a Sherman Act violation; thus, that claim was a false federal issue incapable of properly founding jurisdiction [**22] of a pendent claim in this court. Over the objections of the defendants, the court permitted the plaintiff to enjoy on damages issues liberal evidentiary rulings that were proper *only* on the assumption that legitimate antitrust claims were before the court. Thus the jury was exposed to evidence that could not have been properly admitted to prove the only possibly legitimate claim in this case, the one arising from state law. Much of that evidence is necessarily confusing and prejudicial now that there is no antitrust issue before the court. Fairness and substantial justice between the parties mandates that the state [*1146] claim be properly tried and judged on its merits, with a jury untainted by its unfortunate history in this court. The case should be tried in the appropriate judicial system, the state courts of Alabama.

There can be no overlap of issues here between claims because only one true issue exists: the state law claim for unfair competition. Nearly all the evidence of damage was let in under rules which contemplate an antitrust claim.

That evidence is inappropriate for a jury's consideration. Thus, this consideration provides no basis for a federal court [**23] retaining jurisdiction of this state law claim.

For the foregoing reasons, this case will have to be retried under any circumstances. Because the defendant's state law claim is a novel one (in the context of the facts presented here it is a case of first impression), this court cannot efficiently or authoritatively render judgment on the question, which is wholly a matter of Alabama law.

It is doubtful that the question in this case would qualify for certification to the Alabama Supreme Court. The Alabama Supreme Court rule requires that the certified question be a dispositive issue. It does not render advisory opinions shaping the parameter of doctrines, the requirements, limits, conditions, and exceptions that are the heart of a body of jurisprudence. The novel unfair competition and conspiracy questions presented here require a subtle, nuanced reading of the law that cannot be rendered as a response to a necessarily abstract query from this court.

Finally, comity requires that this court defer to the courts of Alabama for a ruling on the alleged unfair competition claim. That claim, as alleged in the complaint, has never been recognized by the Alabama courts. A preliminary [**24] search for Alabama authority has revealed a single case on the general issue, with facts quite dissimilar from the facts here. Thus, what is helpful in that opinion is, for the most part, mere dictum.

As the Supreme Court noted in [Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488, 20 S. Ct. 708, 44 L. Ed. 856 \(1899\)](#):

HNg Comity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has substantial value in securing uniformity of decision and discouraging repeated litigation of the same question, but its obligation is not imperative. . . . It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes into play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law.

[**25] It is in the interest of both comity and federalism for this court to defer to the courts of Alabama. It is most improper for a federal court, without suitable law to guide it, to plow new ground in a state law field. This court declines the invitation.

Defendants' motion for a directed verdict is granted as to Count One of plaintiff's complaint and denied as to Count Two of the same. The defendants' oral motion to dismiss Count Two of plaintiff's complaint is granted. Count Two is dismissed without prejudice to its disposition in state court. This dismissal is conditioned upon the offer made by defendants, before the court ruled on the motions for directed verdict, to waive any portion of the limitations period as to the unfair competition claim which fell between filing of this action and entry of final judgment. Without such offer, the court would grant the directed verdict motion on behalf of all defendants except Hester, and deny it as to Hester. The only colorable evidence of unfair competition in the record is of actions by Hester before HESSCO was created and before W-F had any connection with Hester.

[*1147] Plaintiff argues that W-F and HESSCO "joined the [**26] conspiracy later." This position ignores the total lack of evidence of conspiracy involving the corporate defendants and further ignores the fundamental truth that one cannot conspire with oneself. The argument that certain salesmen conspired with Hester is without the support of evidence. The proof would not support a verdict against the salesmen, so there is no proven conspiracy for anyone to join. Plaintiff apparently recognized the lack of proof as to the salesmen. It did not sue them. It certainly had no hesitation about suing anyone else.

A separate order in conformity herewith is being entered.

[*none] [EDITOR'S NOTE: The following court-provided text does not appear at this cite in 560 F. Supp.]

FINAL ORDER

This cause came to be heard at the close of plaintiff's case at trial upon motion of the defendants, Wheelabrator-Frye, Inc., HESSCO Industrial Supply, Inc., and Fred Z. Hester, for a directed verdict against plaintiff L.A. Draper and Son, Inc.; and upon motion of the same defendants to dismiss Count Two of plaintiff's complaint, which contains a pendent state law claim for unfair competition.

On April 1, 1982, the court issued an oral order granting **[**27]** defendants' motion for directed verdict as to the antitrust count, and denying the motion as to the unfair competition claim and dismissing the unfair competition claim without prejudice. On April 8, 1982, the plaintiff filed a pleading denominated Motions for Various Types of Alternative Relief which requested the court to reconsider its oral order and grant alternative relief. The court elected to treat this pleading as a motion for reconsideration and, on June 4, 1982, withdrew its judgment and considered findings of fact and conclusions of law which were submitted by the plaintiff on September 9, 1982. The defendants' version of the facts and the law, submitted on or about October 8, 1982, was also considered. In addition to these submissions, the court has reviewed the more than two thousand pages of trial transcript. Having considered the motions, pleadings, arguments and submissions of counsel, evidence, and the applicable law, the court is of the opinion its previous ruling directing a verdict for the defendants on the antitrust claim, denying the motion for directed verdict as to the unfair competition claim, and granting the motion to dismiss the unfair competition upon **[**28]** the condition that the limitations period be waived for the period between the filing of this action and the entry of final judgment should be reaffirmed. The plaintiff's motions for alternative relief are all due to be denied. The conclusions of fact and law supporting these rulings are found in the memorandum opinion filed contemporaneously herewith. Accordingly, it is

ORDERED, ADJUDGED and DECREED that defendants' motion for directed verdict be and the same hereby is GRANTED as to Count One of plaintiff's complaint and DENIED as to Count Two of the same. It is further

ORDER, ADJUDGED and DECREED that defendants' motion to dismiss Count Two of plaintiff's complaint be and the same hereby is GRANTED UPON THE CONDITION, stipulated to by all parties to this action, that any and all portions of the limitations period for the unfair competition claim contained in that count which fell between the filing of this action and the entry of final judgment are waived. It is further

ORDERED, ADJUDGED and DECREED that plaintiff's Motions for Various Types of Alternative Relief, which the court elects to treat as a Motion for Reconsideration, be and the same hereby is DENIED.

Costs of this **[**29]** action are taxed against the plaintiff.

End of Document

Affiliated Capital Corp. v. Houston

United States Court of Appeals for the Fifth Circuit

March 17, 1983

No. 81-2335

Reporter

700 F.2d 226 *; 1983 U.S. App. LEXIS 29574 **; 1983-1 Trade Cas. (CCH) P65,281

AFFILIATED CAPITAL CORPORATION, Etc., Plaintiff-Appellant, v. CITY OF HOUSTON, et al., Defendants, Gulf Coast Cable Television and James J. McConn, Defendants-Appellees

Subsequent History: [\[**1\]](#) Petition for Rehearing En Banc Granted August 23, 1983, Reported at [714 F.2d 25](#).

Prior History: Appeal from the United States District Court For the Southern District of Texas.

Disposition: REVERSED.

Core Terms

franchise, cable television, territorial, conspiracy, ordinance, INTERROGATORY, city council, monopoly, rule of reason, per se rule, businessmen, antitrust, costs, district court, Sherman Act, presumptions, condemn, cable, credible evidence, preponderance, immunity, overlaps, vertical, divide

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

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

[HN1](#) [down arrow] Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. § 1](#), proscribes every contract, combination, or conspiracy in restraint of trade or commerce. As the myriad of cases which interpret those words make clear, it is not every agreement in restraint of competition that is prohibited since almost every contract has that effect to some extent. In fact, most agreements are analyzed under the rule of reason. This rule obliges a court to consider whether the particular agreement places an unreasonable restraint on competition.

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

HN2 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

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.

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

Governments > Local Governments > Claims By & Against

HN3 Regulated Practices, Price Fixing & Restraints of Trade

It is not relevant whether a public official knows he can be held liable for a particular violation of the antitrust law, only whether a clearly established violation exists.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN4 Price Fixing & Restraints of Trade, Horizontal Market Allocation

Territorial market division has long been recognized as a violation of the antitrust law.

Counsel: Stephen D. Susman, Houston, Texas, William H. White, Houston, Texas, Charles J. Brink, Houston, Texas, Michael M. Barron, Austin, Texas, for Appellant.

(For: Hon. Jim McConn), Rufus Wallingford, Houston, Texas, Layne E. Kruse, Houston, Texas, (For Gulf Coast Cable), Richard B. Miller, Houston, Texas, Theodore F. Weiss, Jr., Houston, Texas, John L. Jeffers, Houston, Texas, Richard B. Miller, Houston, Texas, for Appellee.

Judges: Clark, Chief Judge, Gee and Garza, Circuit Judges. Clark, Chief Judge dissenting.

Opinion by: GARZA

Opinion

[*227] GARZA, Circuit Judge:

The district court's grant of judgment *non obstante veredicto* caused the plaintiff to initiate this appeal. After a thorough consideration of the record, we find the territorial market division involved in this case to be a *per se* violation of the Sherman Act, [15 U.S.C. § 1](#). We, therefore, reverse the lower court judgment and reinstate the jury's award of \$ 2,100,000 damages.

FACTS

The events which culminated in this litigation [**2] were played out in Houston, Texas, where in 1978, cable television franchises were awarded. This was not the first time that cable television for the city of Houston had been discussed. Six years earlier, the city had sought applicants for cable television franchises. In 1972, several firms submitted applications and, following the review of these applications by the Public Service and Legal

Departments, two were recommended to the Mayor and City Council. The vote of Mayor and City Council determined that a franchise for the entire city be awarded to one corporation.

The unsuccessful franchise applicant, Gulf Coast Cable Television Co. [hereinafter **[*228]** Gulf Coast], thereafter secured a petition of more than five hundred Houston voters calling for a referendum on the Council action.¹ When put to a vote of the populace of the city, the "monopoly" franchise was soundly defeated.

[3]** The Mayor of Houston in 1978 had been a city councilman in 1973, and accordingly, was anxious to avoid a repeat of the problems encountered. The Mayor testified at the trial below that he, therefore, determined that a number of franchises would be granted instead of the monopoly approved in 1973. Additionally, he resolved that, where qualified, local applicants would be favored. Finally, he concluded that minority participation should be permitted. Unfortunately, the Mayor did not stop there at his manipulation of the cable television franchising process.

Defendant Gulf Coast was the first of many concerns to seek a cable television franchise in 1978.² There is ample evidence that the city of Houston did not even initiate the franchise process; defendant Gulf Coast approached the city and made application for a franchise. This action served as the commencement of a very unusual process. The city of Houston must be characterized as a highly desirable market for cable television. The city, however, made no effort to take advantage of this fact by broadcasting, via trade publication or otherwise, its intention to award franchises. Instead of following this common practice, **[**4]** the city simply passively accepted applications as they arrived. From the many applications which were submitted to the Public Service Department, four emerged as strong contenders based not on the strength of their proposals, but rather the political strength of the men behind them. These four actors were Gulf Coast, Houston Cable Television Co., Houston Community Cable Television Co., and Meca. Mayor McConn had let it be known that he did not want to choose between competing applicants. He wanted the applicants to work together, resolve any overlaps in their territories and present him with a finished product. He abdicated his responsibility in the franchising process to a group of powerful Houston businessmen. In turn, these businessmen became "friendly competitors" in an effort to segment the city among themselves and prevent any outsiders from competing with them.

[5]** These businessmen and their attorneys met, and over a period of time arrived at mutually agreeable franchise areas. The Mayor reentered upon the scene at this juncture, however, and informed Gulf Coast that another applicant must be added to the ranks. Westland Corporation, a group controlled in large part by the Mayor's personal attorney, must be given a franchise. The area involved was a portion of the territory sought by Gulf Coast. Conscious of both the political realities of the situation and the need to avoid competition among potential franchises, Gulf Coast decided to redraw the franchise boundaries in order to comply with McConn's wishes. Now the businessmen were prepared to present a *fait accompli* to the Mayor and City Council.

While Gulf Coast and the above-mentioned applicants were cutting out competition by cutting up the city among themselves, the plaintiff, Affiliated Capital Corporation [hereinafter Affiliated] entered the picture. Affiliated is a publicly-held corporation that owned a savings and loan association. A federal prohibition against owning both savings and loan associations and cable television systems prevented Affiliated from making application **[**6]** for a franchise until it sold the savings and loan association. After the mid-September sale, Affiliated hired a local attorney to check into the status of the franchising process. When the attorney contacted counsel for **[*229]** Gulf Coast, he was informed that Affiliated was too late because the "pie had been cut." Amazed by this news, Affiliated's president, Billy Goldberg, went to visit the Mayor, who assured him that there was still time for Affiliated to receive a fair hearing. Consequently, Affiliated made application for a cable television franchise on October 16th.

¹ [Tex.Rev.Civ.Stat.Annot. art. 1181](#) (Vernon 1963) and the Charter of the city of Houston provided for this procedure.

² Gulf Coast is a limited partnership which operates solely in the cable television business. After its unsuccessful bid for a franchise in the city of Houston in 1972, Gulf Coast remained in business and obtained franchises for a number of the small cities that lie within the Houston metropolitan area.

Although the city never advertised its intention to award cable television franchises, it did take several other measures during this period calculated to give the appearance that the citizens of Houston would receive quality cable television service. The Public Service Department prepared a questionnaire which was distributed to all franchise applicants. The city hired a consultant, Dr. Robert Sadowski, to evaluate the applicants based on their responses to this questionnaire. By the middle of November, Dr. Sadowski had completed a report which was highly critical of the manner in which the franchising [**7] process was being handled. He declared that it was not rational to allow the applicants themselves to divide the city into franchise territories. He concluded that this was not a procedure designed to give the citizens of Houston the best possible cable television service.

In addition to this general indictment of the process, Dr. Sadowski recommended that only two of the applicants, Meca and Cable-Com, be awarded the franchise areas they sought.³ [**8] He urged that three applicants, Houston Cable, Westland, and Houston Community Cable, be rejected and that the size of defendant Gulf Coast's service area be substantially reduced. He apparently had doubts about the ability of Gulf Coast to service even this smaller territory so he made a personal visit to its facility. Shortly after this visit, Sadowski was fired. His conclusions were altered before the report was made public. The five ultimately successful applicants were pronounced qualified.⁴

The City Council was now prepared to take final action on the cable television franchise applications. The president of Affiliated appeared before City Council and requested that his application be given due consideration. Instead of due consideration, Council, through Councilman Johnny Goyen, offered the advice that Affiliated should go and work out an agreement with defendant and the other above-mentioned applicants.

Mr. Goldberg, let me address Council's wisdom. As these applications came in, they were sent to the Legal [**9] Department. Obviously, a number of lawyers got together and did whatever they did. I was not privy to it nor did I want to sit in on any meeting.

Apparently, they came up with the formula that those applicants agreed upon. I was hoping that your situation might end up in the same pot as the others, whereby there would be some kind of recommendation coming before this Council, and this Council would not have to carve from one to give to another, which we have not had to do in the past and which I do not want to do now nor do I intend to.

I do not want to taketh away and giveth to somebody else, because I haven't had to do that in the past. You have a very competent attorney, and the other people have very competent attorneys. What I would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out.

Plaintiff's Exhibit 150 at 27-28.

The message to Goldberg was clear: it was not the Council, but rather private [**230] businessmen who would decide the future of cable television in Houston. When Mr. Goldberg did not make an agreement with those businessmen, the City Council and Mayor voted for [**10] the convenient franchise package with which they were presented by Gulf Coast. This action led Affiliated to the federal courthouse with the allegation that defendants had engaged in a conspiracy to prohibit its entry into the Houston cable television market, thereby violating section 1 of the Sherman Act. Specifically, the plaintiff claimed that certain applicants for cable television franchises agreed to define the territories in which they would apply for franchises, so that no two members of the conspiracy would compete for the same territory. In addition, plaintiff charged defendants with participation in a more general conspiracy to limit competition for cable television franchises by excluding non-conspirator competitors.

³ Doctor Sadowski never evaluated the application submitted by Affiliated for this report. It was submitted after the termination of his employment.

⁴ Shortly before the franchise ordinances were considered by City Council, the Public Service Director submitted a letter to the City Attorney to the effect that he lacked the information necessary to judge the merits of each application. In relevant part, the letter concluded that "while these issues may have been considered by the drafting principals, and may have been addressed satisfactorily by them, I have no way of knowing this." Record on Appeal, vol. 14, at 616. The "drafting principals" were later identified as the attorneys for certain franchise applicants.

DISTRICT COURT JUDGMENT

At the close of evidence in the trial of the instant case, the jury was presented with a series of interrogatories. The relevant interrogatories, as well as the jury responses thereto, are reproduced below.

INTERROGATORY NO. 1

It is established that two or more franchise applicants, including defendant Gulf Coast, participated in agreements on boundary lines so as to divide the geographic areas for which these applicants [**11] would seek cable television franchises. Do you find from a preponderance of the credible evidence that these arrangements were part of a conspiracy in unreasonable restraint of trade, in violation of Section 1 of the Sherman Act. Answer "yes" or "no."

ANSWER: No.

INTERROGATORY NO. 3

Do you find from a preponderance of the credible evidence that one or more of the defendants participated in a conspiracy in unreasonable restraint of trade to limit competition for cable television franchises, in violation of Section 1 of the Sherman Act? Answer "yes" or "no."

ANSWER: Yes.

INTERROGATORY NO. 4

Do you find from a preponderance of the credible evidence that any of the following persons participated in that conspiracy? Answer "yes" or "no."

a. City of Houston

Yes

b. Mayor Jim McConn

Yes

c. Gulf Coast Cable Television

Yes

INTERROGATORY NO. 5

Do you find from a preponderance of the credible evidence that either of the conspiracies, if you have so found in answer to Interrogatories 1 or 3, proximately caused injury to the plaintiff's business or property? Answer "yes" or "no."

ANSWER: Yes.

INTERROGATORY NO. 6

What sum of money, if paid now [**12] in cash, do you find from a preponderance of the credible evidence would fairly and reasonably compensate plaintiff for the damages, if any, you find plaintiff has incurred? Answer in dollars and cents, if any.

ANSWER: \$ 2,100,000.00.

The jury's verdict was not destined to be entered into judgment. In a post-trial motion, defendant Gulf Coast argued for judgment notwithstanding the verdict on three grounds. Defendant asserted that all of plaintiff's evidence had related to boundary agreements so that there was no evidence to support the jury's finding of an independent conspiracy under interrogatory three. Likewise, defendant claimed that there was no evidence exclusive of boundary agreements to support the finding of causation [*231] on the fifth interrogatory.⁵ In a thorough and carefully researched opinion, Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991 (S.D.Tex.1981), the district court granted the requested relief. Although the judge found evidence independent of the boundary agreements to support the answer to interrogatory three,⁶ he concluded [*233] that plaintiff had failed to

⁵ Defendant also argued that the *Noerr-Pennington* doctrine mandated judgment notwithstanding the verdict. This contention is discussed in a later portion of this opinion.

demonstrate that its injury was caused by anything other [**13] than defendants' boundary agreements. Thus,

⁶ In response to defendant's motion, plaintiff cited a wealth of evidence to demonstrate a second theory of conspiracy. In its memorandum opinion the court set out all the evidence which it agreed would support a second theory of conspiracy to limit competition:

By late August 1978, Clive Runnells, on behalf of Gulf Coast, had agreed with Meca that they would be friendly competitors. Testimony of Clive Runnells. Al Levin, Affiliated Capital's lawyer during the franchising process, testified that by September 20, 1978, he contacted Bill Chamberlain, an agent of Gulf Coast. Chamberlain told him that Gulf Coast's attorney Bill Olson "was a pushing force of the cable TV situation at that point." Levin further testified that he then contacted Olson and Olson told him, "as far as I am concerned, Al, it's too late; the pie has already been cut." Olson added: "Al, tell Billy [Goldberg] he is too late on this one." "[Olson's] words were, 'the City is locked up by five franchises. '" On the day before this telephone conversation between Levin and Olson, Olson had told Jonathan Day, an attorney for Houston Cable, that Olson was "trying to put map together" and that "most of areas are defined on eastern side." Plaintiff's Exhibit 63.

On September 28, 1978 a lawyer for Houston Cable wrote to the lawyer for Gulf Coast regarding the franchise ordinance:

Enclosed is a copy of the proposed cable television ordinance marked to show deletions and additions, including some recommended by our FCC counsel. Also enclosed is an unmarked copy for your convenience.

The enclosed form of the proposed ordinance has been placed in our word processing equipment. Consequently, any changes or additions you wish to make can be easily accommodated. As we discussed, the enclosed form should be considered as an internal working draft so that we can reach an agreed proposal to present to the city.

Plaintiff's Exhibit 14. A week later he wrote another letter recounting that they had met on this franchise ordinance, and noting their discussions of various provisions of this proposed ordinance, including the provision with respect to the percentage of the City's interest in the gross revenues from the ordinances:

Enclosed is a revised form of CATV ordinance with the changes we discussed at our last meeting in Section 8.G; Section 10.B; Section 11.D; Section 12.H, J, and M; and Section 23.A.

Also enclosed is a suggested revision to Section 20.A regarding the three percent of gross revenue issue in the event we are unsuccessful in limiting the franchise fee to regular subscriber service.

If you have further comments or suggestions regarding this proposed form of ordinance, please let me know.

Plaintiff's Exhibit 15. None of the referenced sections of the proposed ordinance relates to boundaries.

In October 1978, Runnells and others met with Mayor McConn. At that meeting, Runnells was informed that McConn wanted Westland to have a franchise. Westland had applied for a portion of the area sought by Gulf Coast, and the Mayor indicated to Gulf Coast that a general area, Westbury-Meyerland, was what he wanted Westland to have. Testimony of Clive Runnells; Testimony of James McConn.

On November 22, 1978, notice of the November 29th City Council agenda indicated that six (6) ordinances, five of which ultimately were approved, would be considered. On November 27, 1978, the attorney for Houston Cable, one of the applicants scheduled on the upcoming agenda, sent a final proposed cable television ordinance to the City Attorney:

Enclosed is a revised form of the proposed cable t.v. ordinance which includes the modifications made this week-end.

In order to meet the proposed time schedule, any further revisions must be agreed by 12 noon on Tuesday, November 28. Final proofing of the enclosure will be completed by that time.

Plaintiff's Exhibit 29. He also sent a copy of the ordinance to Gulf Coast's attorney, who had discussed it with the lead counsel for Houston Cable earlier that morning:

Enclosed is the proposed cable t.v. ordinance which Jonathan Day discussed with you this morning. Also enclosed is a copy of the transmittal letter to the City attorney.

I have marked significant changes in red in order to facilitate your review. If you have any questions or comments, please let me know.

Plaintiff's Exhibit 30. The next day Houston Cable's attorney sent copies of the ordinances to the ultimately successful applicants. The proposed ordinances were complete except for the names of the applicants and their proposed service area. Plaintiff's Exhibits 32 & 189. The successful applicants then filled in the blanks with their names and service areas, and forwarded the ordinances to the City Attorney. Some applicants sent their proposed ordinances back to the Houston Cable Attorney who then forwarded them to the City. Plaintiff's Exhibit 35.

there was no evidence to support interrogatory five.

The agenda for the City Council meeting of November 29, 1978 contained six (6) cable television franchises, not including plaintiff's, Plaintiff's Exhibit 33; those ordinances had been placed on the agenda on or before November 22, 1978, Plaintiff's Exhibit 174. When Affiliated attorney Levin heard of this, he contacted Assistant City Attorney Adrian Baer. Baer relayed the following information to Levin:

The Mayor and City Council had made their decision, and [Baer] said, "I learned this directly from the Mayor, the franchises are non-exclusive, he does not know about the areas, it's still being worked out by Williams and Baer . . . so the net result will be a de facto exclusive."

He [,Baer,] explained to me that there were--the decisions as to who was going to get what areas, specifically in terms of the actual boundaries, were still under negotiations, but the decision as to who was fait accompli.

Testimony of Al Levin; Plaintiff's Exhibit 106.

After an on-site inspection of Gulf Coast's Bellaire facilities, Sadowski, the consultant hired by the City of Houston, told Earle, Director of Public Service, and Baer, Assistant City Attorney, that he would reject Gulf Coast's application. The next morning, Sadowski was fired. One day later a messenger from Earle retrieved the notes Sadowski had made concerning the applications. In his notes, Sadowski had not recommended that Gulf Coast's application be rejected, in spite of his oral suggestion to that effect to Earle and Baer, and he testified that he would have made no substantive changes in his report after the visit to Gulf Coast's facilities. He had recommended in his report, however, that Gulf Coast be given a smaller franchise area than that for which it had applied. When Sadowski's notes were typed by someone in the City, that recommendation was deleted. Moreover, other significant changes were reflected in the typed version of the notes Sadowski had turned over to Earle's messenger: his recommendations that Houston Community Cable, Houston Cable, and Columbia (Westland) be rejected were changed to recommendations that they should continue to be considered; and his statement that Cablecom had presented the only satisfactory application was omitted. Testimony of Robert Sadowski.

Prior to the plaintiff's hearing before City Council on December 12, 1978, McConn suggested to Goldberg that Affiliated seek a franchise in another area of the City rather than in the area sought by Gulf Coast. McConn testified as to his motivation for the suggestion: "I thought that, in trying to really help Mr. Goldberg, it was pretty obvious to me that Gulf Coast had the muscle and that Mr. Goldberg did not."

At the City Council hearing on plaintiff's application which was conducted on December 12, 1978, the following comments were made by Councilman Goyen:

Mr. Goldberg, let me address Council's wisdom. As these applications came in, they were sent to the Legal Department. Obviously, a number of lawyers got together and did whatever they did. I was not privy to it nor did I want to sit in on any meeting.

Apparently, they came up with the formula that those applicants agreed upon. I was hoping that your situation might end up in the same pot as the others, whereby there would be some kind of recommendation coming before this Council, and this Council would not have to carve from one to give to another, which we have not had to do in the past and which I do not want to do now nor do I intend to.

I do not want to taketh away and giveth to somebody else, because I haven't had to do that in the past. You have a very competent attorney, and the other people have very competent attorneys. What I would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out.

Plaintiff's Exhibit 150 at 27-28. Subsequently, the Council discussed how to proceed with plaintiff's application, and Councilman Mann made the following suggestions:

I want to make a substitute motion that the [plaintiff's] application be referred to the Legal Department, and they in turn can contact these other applicants who have come forward and see if they can work out something.

....

If you take this, fine, then see how much Gulf Coast is going to knock off this other group on farther down and then around and around.

....

[**14]

The agreements to allocate and divide territory cannot be considered as evidence proving causation of plaintiff's injury, and no other evidence in the record, either direct or inferential, provides the necessary connection between the second theory of conspiracy to exclude non-conspirators and the plaintiff's failure to receive a franchise.

Substitute motion that this application be referred to the Legal Department and Public Service, and they are to contact the other people that have ordinances and guarantee that these boundaries are being adjusted between them, and they report back to Council.

Plaintiff's Exhibit 150 at 37, 39, 40.

Also at that hearing, Mann indicated his knowledge of a house-count survey that had been conducted by Gulf Coast. Plaintiff's Exhibit 150 at 25. The survey resulted in a comparison between the area plaintiff was applying for and an area that was within Houston Cable's application, Plaintiff's Exhibit 84, and was conducted in conjunction with a proposal by Gulf Coast that if Houston Cable would give the identified area to Gulf Coast, then Gulf Coast would be willing to give plaintiff its area. Testimony of Al Levin. A document, prepared sometime between November 28, 1978, and December 20, 1978, by Assistant City Attorney Baer bears an alternative boundary description for the Gulf Coast franchise including the Houston Cable area, with Baer's notation: "I-10 line shifted to Hwy. 290 without Goldberg's tract--contingency." Plaintiff's Exhibit 56.

City Council favored Gulf Coast's franchise, which subsumed the area plaintiff had applied for, and at trial several councilmen and Mayor McConn testified as to their reasons therefor. McConn's concern was to keep politically influential groups content:

Q You didn't want to step on anybody's political toes, did you?

A Not if I could avoid it.

Q You didn't want to make any type of political decision where some powerful person like Walter Mischer would be unhappy, did you?

A Not if I could avoid it.

Q And if all of the parties could work things out, then you wouldn't have to make any type of decision, other than approving their agreements, isn't that correct?

A Yes, generally that is correct, yes, sir

Q And isn't that what you wanted to happen?

A That would have been beautiful, if it could have happened that way.

Q But when it didn't happen and you had to make the choice between Southwest Houston and Gulf Coast, you stated that the other--you thought the other people were more politically powerful than Southwest, isn't that correct?

A Yes, sir. I don't know if I said that, but I'll say it now.

Testimony of James McConn.

Councilman Goyen testified by deposition that he would have voted for Affiliated Capital's application if "on the 20th, Mr. Goldberg had come in and Mr. Runnells had come in, Mr. Mischer had come in, and all the principals had come in, and a piece of Houston had been carved out for Mr. Goldberg with no objection by anybody." Councilman Robinson testified that he would have supported Affiliated Capital's application if plaintiff had been able to work something out with Gulf Coast to give him what he wanted. Councilman Westmoreland testified that he did not disagree with his prior deposition testimony that Affiliated had been unable to work out any type of arrangement with Gulf Coast, and for that reason Westmoreland voted in favor of Gulf Coast.

Finally, plaintiff's expert witness, Martin Malarkey, testified at length about the detrimental results of the noncompetitive franchising process in Houston, and about the benefits to residents of other cities where the process has involved competition on the merits of the applications. According to his testimony, the benefits include lower rates, provisions for sanctions in the event of noncompliance by the franchisee, provisions for performance bonds, and provisions requiring city approval prior to changes in ownership or control of the franchises. Further, he testified that normally the city itself prepares the franchise ordinance, rather than allowing applicants to do so.

The testimony elicited by plaintiff from its expert witness further demonstrates that what plaintiff established was a causal relationship between the applicants' agreements to eliminate overlaps in territory and the plaintiff's failure to be awarded a franchise, rather than a relationship between the agreement to exclude non-conspirators and plaintiff's injury.

Record on Appeal, vol. 9 at 1846.

IMPACT ON COMPETITION

It is abundantly clear from the record of this case that a group of Houston businessmen decided to ensure the receipt of cable television franchises by agreeing to seek separate parts of the city. That they joined together at least with the blessing of the Mayor, if not at his behest, is also certain.⁷ In order to fully comprehend the devastating impact on competition occasioned by this gentlemen's agreement, we digress [****15**] briefly to set out an important characteristic of the cable television industry presented by Gulf Coast.

[***234**] Defendant Gulf Coast asserts that cable television, like the electric utility, is generally considered a natural monopoly. According to the common wisdom, the extremely high fixed costs incurred in preparing a cable television company for operation prevent the survival of competition in the marketplace. Plaintiff's expert witness on the cable television industry admitted that it did not make economic sense to grant franchises with overlapping boundaries. Record on Appeal, vol. 35, at 28. The economies of scale do not approach those of electric utilities but the theory for both industries holds that the long-run average costs tend to fall as output increases. We assume for purposes of this discussion that cable television is indeed a natural monopoly and proceed to discuss the pernicious effects of the conspiracy given this factor.

Defendant Gulf Coast [****16**] argues that since cable television is a natural monopoly and competition within franchise areas is impractical, the division of territories caused no harm. The boundary agreements did nothing more than conform to an important characteristic of this industry. In reality, however, the impact of these agreements is all the more devastating precisely because a natural monopoly is involved.

If there is to be no competition within a given territory, competition is only possible before the franchise is granted. Unfortunately for both Affiliated Capital and the citizens of Houston, there was no competition between the corporations that received franchises. The result was lower quality, higher priced cable television for Houston.⁸

Plaintiff's expert witness, Martin Malarkey, compared the Houston cable television ordinance with those of a number of Texas cities.⁹ He testified that while no performance bond was required in Houston, it was common practice to require one. [****17**] With regard to rates, the Houston ordinance states that rates can be changed upon sixty days' notice unless the city suspends them by calling a public hearing. The other cities do not countenance this practice of allowing the companies to make the first move toward rate increases. Franchise fees are also lower in Houston because the city receives three percent of gross revenues *excluding* revenues from connections, reconnections, and sale or rental of equipment. Each customer must rent a converter for the price of \$ 2.50 per month. When this amount is calculated for 100,000 subscribers over a year's time, the resulting sum equals a substantial loss for city coffers.

In addition to opining about the relative merits of the Houston ordinance, Malarkey also noted that the procedure employed in Houston did not even permit an adequate determination of the merits of each application. He stated that the city did not adequately review the financial qualifications of the applicants. [****18**]¹⁰ He also asserted that all of the applications were woefully substandard.¹¹

⁷ Record on Appeal, vol. 12, at 450.

⁸ Record on Appeal, vol. 34, at 23-27.

⁹ Record on Appeal, vol. 34, at 13-26.

¹⁰ Record on Appeal, vol. 33, at 53-54.

¹¹ Record on Appeal, vol. 33, at 58-59.

By far the most searing indictment of the procedure comes from a simple comparison of the requirements of the 1973 and 1979 ordinances, as the following colloquy with the expert witness demonstrates:

Q Sir, as a further benchmark of the Houston franchising process in 1978, did I ask you to compare the franchise ordinance awarded by the City of Houston in 1973 with the ordinance awarded in '79?

A Yes, sir, you did.

Q If you had consulted for the City of Houston in 1978, would you have made this comparison as a matter of course?

A Yes, sir.

Q All right. Was the '73 ordinance, Mr. Malarkey, awarded by Houston in certain respects a better deal for the Houston consumers than the '79 ordinance?

A Yes, it was.

Q Did the '73 ordinance require a performance bond?

[*235] A It did.

Q In what amount?

A [**19] \$ 1 million, as I recall.

Q Did the '79 ordinance require a performance bond?

A No, sir.

Q Did the '73 ordinance require free connections for city buildings, schools and colleges?

A Yes, sir, it did.

Q Did the '79 ordinance require such free connections?

A No, sir.

Q Did the '73 ordinance require commencement of construction within 90 days after obtaining all necessary permits, licenses and certificates?

A Yes, it did.

Q Did the '79 ordinance have that type of construction commencement schedule?

A No, sir, it did not.

Q Did the '73 ordinance require that the 3 per cent franchise fee be paid to the city based upon all revenues, including revenues from the sale or rental of converters?

A It required payment on all revenues.

Q Did the '79 ordinance require payment on all revenues?

A No, sir, it did not.

Record on Appeal, vol. 34, at 27-28.

PER SE RULE

HN1  [Section 1](#) of the Sherman Act proscribes "every contract, combination . . . or conspiracy in restraint of trade or commerce. . ." As the myriad of cases which interpret those words make clear, it is not *every* agreement in restraint of competition that **[**20]** is prohibited since almost every contract has that effect to some extent. In fact, most agreements are analyzed under the rule of reason.¹² This rule obliges a court to consider whether the particular agreement places an unreasonable restraint on competition.

¹² In [Chicago Board of Trade v. United States, 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683 \(1918\)](#), Justice Brandeis set forth the following classic statement of the rule of reason:

HN2  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

[**21] However, as the Supreme Court declared very recently in [Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 \(1982\)](#),

the elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex. [Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 \[78 S. Ct. 514, 518, 2 L. Ed. 2d 545\] \(1958\)](#). Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. [United States v. Topco Associates, Inc., 405 U.S. 596, 609-610 \[92 S. Ct. 1126, 1134-1135, 31 L. Ed. 2d 515\] \(1972\)](#). And the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context.

[Id. at 609, n. 10 \[92 S. Ct. at 1134, n. 10\]; Northern Pac. R. Co. v. United States, supra \[356 U.S.\] at 5 \[78 S. Ct. at 518\]](#).

The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of *per se* rules. Once experience with a particular [**22] kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a [*236] conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.

[102 S. Ct. at 2472-73](#) (footnotes omitted).

A limited number of practices have been condemned by *per se* rules.¹³ The Supreme Court, in [United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 \(1972\)](#), declared that "one of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." [405 U.S. at 608, 92 S. Ct. at 1133](#). Such agreements have been classified as naked restraints of trade. A long line of cases stretching back to the nineteenth century has condemned market division. E.g., [Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 \[**23\] S. Ct. 96, 44 L. Ed. 136 \(1899\)](#); [Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 \(1951\)](#); [United States v. Sealy, Inc., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 \(1967\)](#); [Gainesville Utilities Department v. Florida Power and Light Co., 573 F.2d 292 \(5th Cir.\), cert. denied, 439 U.S. 966, 99 S. Ct. 454, 58 L. Ed. 2d 424 \(1978\)](#).

Defendants argue vigorously against a *per se* analysis in the instant case. They concede that horizontal market division is a *per se* violation of [section 1](#). The boundary agreements in this case, however, had no effect until they received the City Council's stamp of approval. This vertical characteristic, defendants assert, [**24] must take this case outside the *per se* rule.¹⁴

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.

[246 U.S. at 238, 38 S. Ct. at 244](#).

¹³ "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." [Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 \(1958\)](#) (citations omitted).

¹⁴ Defendant Gulf Coast also asserts that a *per se* analysis is inappropriate "in this 'market' for franchises where nothing is being bought or sold in the normal sense. . . ." Defendant's Brief at 26-27. In response, plaintiff notes that one of the oldest, most frequently cited cases involving territorial market division dealt with a similar practice. See [Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 \[20 S. Ct. 96, 44 L. Ed. 136\]](#) where the Court condemned an agreement between pipe manufacturers to divide territories and apportion the business among themselves. We reject defendant's proffered distinction.

It is true that this Court has applied the rule of reason to cases involving vertical territorial restrictions. [Joe Mendelovitz v. Adolph Coors Co., 693 F.2d 570 \(1982\)](#). Vertical territorial restrictions cannot be condemned with the certainty of their horizontal counterparts. As the Supreme Court recognized in *Continental T.V.*, [**25] [Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 \(1977\)](#),

the market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition.

[433 U.S. at 51, 97 S. Ct. at 2558](#) (footnotes omitted).

There is no question here, as there is in a vertical territorial restraint case, of a stimulation of competition. The agreement between the conspirators to "cut the pie" served only to eliminate competition from other applicants such as Affiliated. As Mr. Justice Hughes recognized in [Appalachian Coals, Inc. v. United States, 288 U.S. 344, 53 S. Ct. 471, 77 L. Ed. 825 \(1933\)](#), "Realities must dominate the judgment. . . . The Anti-Trust Act aims at substance." [288 U.S. at 360, 53 S. Ct. at 474](#), quoted in [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. at 47, 97 S. Ct. at 2556](#). The conspiracy charged in this case is the classic horizontal territorial restraint for which the *per se* rule was designed. The fact that the Mayor and City Council were involved is of no moment except as it relates to the immunity questions with which we must [**26] now deal.

Although the district court grounded its grant of judgment on the lack of causation [**27] evidence, the court went on to consider the applicability of the immunity/exemption doctrines which could have precluded liability even if an antitrust violation had been established. The lower court rejected the applicability of these doctrines, and we adopt that portion of the district court's opinion. [Affiliated Capital Corp. v. City of Houston, 519 F. Supp. at 1012-1029](#).¹⁵

Mayor McConn argues strenuously that a recent Supreme Court decision, [Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 \(1982\)](#), guarantees his immunity from liability. That case announced that qualified or "good faith" immunity for public officials would be judged solely by an objective inquiry. The Court found that the subjective inquiry had proven unworkable:

The subjective element [**27] of the good faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial. [Rule 56 of the Federal Rules of Civil Procedure](#) provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

In the context of *Butz*'s attempted balancing of competing values, it now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial-distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's [**28] experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broadranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

[102 S. Ct. at 2737-38](#) (footnotes omitted).

The Court held that

¹⁵ We note that the city of Houston was dismissed as a party to this action, with the concurrence of plaintiff.

government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

102 S. Ct. at 2738.

McConn contends that the state of the law regarding a municipal official's liability for antitrust violations was unsettled in 1978. Since he could not have known that he would be liable for violating the antitrust law, the argument continues, he is entitled to qualified immunity. This argument is based upon a misinterpretation of [**29] the Supreme Court's statement. HN3[[↑]] It is not relevant whether the official knows he can be held liable for a particular violation of the antitrust law, only whether a clearly established violation exists. As stated throughout this opinion, HN4[[↑]] territorial market division has long been recognized as a violation of the antitrust law. McConn cannot escape liability on this basis.

CONCLUSION

For the reasons set forth, we conclude that the territorial market division charged is a *per se* violation of section 1 of the Sherman Act. The boundary agreements [*238] certainly prevented plaintiff from securing a cable television franchise. We are constrained, therefore, to reverse the judgment of the court below and reinstate the jury's verdict of \$ 2,100,000 in damages.

REVERSED.

Dissent by: CLARK

Dissent

CLARK, Chief Judge, dissenting:

I respectfully dissent.

The majority presumes that cable television franchises are natural monopolies. Based on this assumption, it further presumes that competition is only possible before a franchise is granted. On these two presumptions, the court then erects a third--that the rule of reason would so certainly condemn an agreement to divide areas of cable [**30] television service in a single city that, for sake of efficiency, the agreement must be ruled invalid *per se*. These presumptions are not just unwarranted, they are contrary to proof in this record about the particular business of cable television franchising in Houston, Texas.

This case does not concern price fixing. Nor does it present a case of a group boycott, tying arrangement or a horizontal division of markets (though each of these categories has not invariably been held to be a naked restraint of trade). No applicant proposed to serve the whole city of Houston. The Council would not have accepted such an application. Therefore, the relevant geographic market for potential franchisees here is not the city of Houston, but some part or area thereof. No absolute *per se* category is presented. Absent the majority's presumptions, there is no way for me to predict with confidence that the rule of reason will condemn the present boundary agreements between franchise applicants which this jury found reasonable. Thus, I cannot say that the conduct of the applicants for franchises in this case is manifestly anticompetitive.

Under the district court's instructions, the jury [**31] was asked: Was the agreement of defendant, Gulf Coast, with other companies to allocate cable television franchise territories part of a conspiracy which constituted an unreasonable restraint of trade? The jury said no. The trial court who heard the witnesses and took the evidence found this answer was supported by the record. The majority does not controvert this. Rather, it acknowledges that the political history of cable television in Houston shows Houston voters rejected a single "monopoly" cable

television franchising effort in 1972, and that the mayor's anxiety to avoid a similar situation in 1978 led to the city's demand for multiple franchises. Every applicant, including plaintiff, accepted this requirement.

Instead of analyzing the impact of these facts, the majority chooses to rely only on the theoretical testimony of the plaintiff's aptly named expert to create a series of presumptions. From other proof, a reasonable jury could have found the mayor's political concern, and a concomitant refusal by the Council to get into actually drawing boundary lines, dominated the actions of the applicants and produced a reasonable boundary agreement. Also, the jury could have [**32] found from the proof that a reasonable way to secure multiple franchises was to tell all prospective franchisees that applicants must define individual service areas without gaps and without overlaps.

There is no showing that plaintiff or any other potential applicant was limited as to formation of its own group of bidders. All those who wanted franchises were faced with the city's ukases that no single citywide franchise would be granted and that the Council would not draw lines. There was an opportunity for competition in the pre-award area, even for those who started as late as plaintiff. They could have become members of a new group of bidders or tried to attract members of the existing group to go with them. Moreover, the proof shows the city could reject any part or all of any area sought when the matter came before the Council for approval. No testimony suggested that plaintiff did not have an opportunity to urge the city to require changed boundaries to make room for its tardy entry. Indeed, it did so and a request for accommodation was made. Thus, the mere fact that Gulf Coast refused Goldberg's [*239] demand that it give up a substantial part of the area the [**33] agreement allowed it to request was not enough to require the jury to find the boundary agreement kept plaintiff from competing.

There is another pro-competitive aspect of the proof that even more clearly argues against the imposition of a *per se* rule to this particular territorial agreement. The statements of plaintiff's president, Billy Goldberg, to the city Council told the jury how competition would work between franchised areas *after* they were awarded.

"In determining the geographical breakdown of cable TV franchise areas it is my judgment that this Council is wise awarding multiple franchises throughout the city. I will say a little bit more on that at a later time.

"Conceptually, the notion of a smaller, more responsive franchise is likely to be substantially more acceptable to this community. Careful thoughts should be given to the proposition that no one applicant should receive more area to serve than could be constructed and energized within a reasonable period of time.

....

"It seems to me that . . . our application for this area is more in keeping with the wishes of the people of this community previously expressed, where they indicated to me, [**34] and I think to everyone, the desire not to have the vast territories of our city under one operation, and there's a reason for it. There's a reason of competition.

". . . Let me tell you where the competition comes in.

"If this Council does as I think it will do, divide this city up into as small portions as possible, you will have various cable companies throughout the city, and everybody in the city knows what the other fellow is doing. He's either got a friend or a relative over there, and they will be saying, 'Well, why is it, Mr. Goldberg, that your system and Affiliated's system doesn't have so-and-so, and if you go to the other part of town they have that service, ' and that's where the area of competition comes in, and I think it's healthy."

Franchise areas, levels of service, and fees were not immutable. If a franchisee's level of performance did not keep pace with neighboring cable companies, all sorts of post-franchise problems could occur, up to and including another referendum to undo everything.

I do not understand how an appellate court can erect the majority's pyramid of presumptions based on one expert's opinion, contradicted by his own employer, and [**35] allow it to overcome a factfinding by a jury that finds support in the record.

Because I believe that the jury validly found that the agreement to submit nonoverlapping bids met the rule of reason, I am further compelled to agree with the district court that the finding that any later conspiracy to refuse plaintiff's request to participate in the agreement could not have caused plaintiff harm. The interrogatories on separate conspiracies were put separately at plaintiff's insistence to accord with its theory that separate

conspiracies were proven. What turns out to have been a tactical mistake should not be allowed to bootstrap to credibility a verdict that the proof establishes was unwarranted. This is especially true where the appellate device for the levitation is supplied by unsupported presumptions of wrongdoing.

The proof tells me, just as it told the jury, that those who wanted to seek a cable television franchise in Houston in 1978 knew the only way to get one was to agree with others on boundaries for multiple service areas that would cover the city without overlaps. The jury found that after the group had validly made these agreements, plaintiff sought to have the group [**36] redo its plans and was improperly rebuffed. The district court reasoned that the failure to get a franchise was solely the result of the valid agreement, not the invalid rebuff. So do I.

At a time when the clear trend in **antitrust law** is away from the use of the "expedient" *per se* rule, except for pricefixing, and toward proving the truth of [*240] particular transactions, it seems altogether wrong to rely on speculative malarkey to assume that a conspiracy to restrain trade existed.

I would affirm the district court.¹

[**37]

End of Document

¹ As an aside, and because the majority's holding required that it address the *Noerr-Pennington* doctrine, I would briefly point out that the district court's analysis of this issue (the only analysis on which the majority relies) necessarily depends on a fact determination that the city and mayor participated in a conspiracy to unreasonably restrain trade by requiring defendants to agree on territorial boundaries. In adopting this reasoning, the majority overlooks the same basic premise missed by the district court. This judicial fact-finding is antithetical to the district court's determination that adequate proof supported the jury's finding to the contrary. That the decision-makers may have been members of a later conspiracy to refuse to change boundary lines does not affect their administrative position vis-a-vis the initial agreement.



Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc.

United States Court of Appeals for the Fourth Circuit

October 7, 1982, Argued ; March 24, 1983, Decided

Nos. 82-1131, 82-1132, 82-1133

Reporter

704 F.2d 125 *; 1983 U.S. App. LEXIS 29414 **; 1983-1 Trade Cas. (CCH) P65,291

Commonwealth of Pennsylvania on its own behalf and as Parens Patriae, Appellee, v. Mid-Atlantic Toyota Distributors, Inc., Carecraft Industries, Ltd., Frederick R. Weisman, and Al Sweet Motor Sales, Inc., Allegheny Toyota, Inc., Bel Air Motors, Inc., Bergman Toyota, Inc., Bob Mayberry Chevrolet-Toyota, Inc., Bud Haas Toyota Motors, Inc., Falconi Toyota Motors, Inc., Joel Confer AMC, Inc., Knobloch Toyota Park, Inc., McCracklin-Sturman Toyota, Inc., Meadville Toyota, Inc., Montgomery Toyota, Inc., Rohrich Cadillac, Inc., Suburban Toyota, Inc., Trostle Oldsmobile, Inc., University Toyota, Inc., Belvin J. Kishbaugh, Inc., Bobart, Inc., Continental Motor Sales Co., Inc., Hartman Motorcars Co., J.H. Bennett, Inc., James W. Halterman, Inc., Lancaster Toyota, Inc., Performance Motors, Inc., R.D. Ertley Toyota, Inc., Richard Auto Sales, Inc., Valley Toyota, Inc., A.S. Berman, Inc., Airport Toyota, Inc., Central City Toyota, Inc., Charles A. Bott, Inc., Chester Mack Toyota, Inc., Foster Toyota, Inc., Henry Kehl Enterprises, Inc., Peter Alan Toyota, Inc., Sloane Toyota, Inc., Speedcraft Enterprises, Inc., Thompson Toyota, Inc., Tony Biscotte, Inc., Appellants; District of Columbia ex rel. Rogers, Appellee, v. Mid-Atlantic Toyota Distributors, Inc., Carecraft Industries, Ltd., Frederick R. Weisman, and Rosenthal Toyota, Inc., Silver Spring Toyota, Inc., Appellants; Maryland ex rel. Sachs, Delaware ex rel. Gebelein, Appellees, v. Mid-Atlantic Toyota Distributors, Inc., Carecraft Industries, Ltd., Frederick R. Weisman, Anton Motors, Inc., Schaefer/May Motors Sales, Ltd., Torrey, Inc., Castle Toyota, Inc., Croyste Toyota, Inc., Waldorf Toyota, Inc., Younger Toyota, Inc., Annapolis-Toyota, Inc., Rosenthal Toyota, Inc., Silver Spring Toyota, Inc., Fulker Toyota, Inc., Jones Plymouth, Inc., Fredericktown Toyota, Inc., Toyota Village, Inc., R & H Motor Cars, Ltd., Russell Motor Cars, Inc., Schaefer & Strohminger, Inc., Best Toyota, Inc., Laurel Toyota, Inc., Premier Motor Co., Inc., Timonium Toyota, Inc., Royal Imports of Delaware, Inc., Airport Toyota, Inc., C. F. Schwartz Motor Company, Inc., Appellants

Prior History: [**1] Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Disposition: AFFIRMED.

Core Terms

attorney general, antitrust, parens patriae, state attorney, cause of action, state law, Improvements Act, public interest, right of action, anti trust law, prosecute, consumer

LexisNexis® Headnotes

704 F.2d 125, *125L983 U.S. App. LEXIS 29414, **1

Civil Procedure > Remedies > Damages > Monetary Damages

HN1 [down] **Public Enforcement, State Civil Actions**

The Antitrust Improvements Act of 1976, [15 U.S.C.S. § 15c\(a\)\(1\)](#), provides that an attorney general of a state may bring a civil action in the name of such state, as parens patriae on behalf of natural persons residing in such state, to secure treble money damages for injury to their property flowing from violations of the antitrust laws.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2 [down] **Public Enforcement, State Civil Actions**

The term "state attorney general" means the chief legal officer of a state, or any other person authorized by state law to bring actions under the Antitrust Improvements Act of 1976, [15 U.S.C.S. § 15c](#). [15 U.S.C.S. § 15g\(1\)](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statutory Remedies & Rights

HN3 [down] **Public Enforcement, State Civil Actions**

Emphasizing its wholly procedural cast, the Antitrust Improvements Act of , [15 U.S.C.S. § 15h](#), specifically recognizes the power of the states to forego any benefit of the Act by legislatively renouncing the right of action conferred. And, in a final procedural twist, the Act recognizes the "authority" of state attorneys general -- so far as federal interests are concerned -- to prosecute the actions in the name of the state. [15 U.S.C.S. § 15c\(a\)\(1\)](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4 [down] **Public Enforcement, State Civil Actions**

See [Md. Const. art. V, § 3\(a\)\(2\)](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5 [down] **Public Enforcement, State Civil Actions**

See [Del. Code Ann. tit. 6, § 2105](#) (Supp. 1980).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6 [down] **Public Enforcement, State Civil Actions**

See D.C. Code Ann. § 1-361.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

704 F.2d 125, *125L983 U.S. App. LEXIS 29414, **1

HN7 [down arrow] Public Enforcement, State Civil Actions

See 71 Pa. Cons. Stat. Ann. § 732-204(c) (1982).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8 [down arrow] Public Enforcement, State Civil Actions

Md. Const. art. V, § 3(a)(2) requires that either the general assembly or the governor authorize the Attorney General to prosecute an action on the part of the state.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9 [down arrow] Public Enforcement, State Civil Actions

Attorneys general have undoubted authority to pursue litigation that advances or vindicates public interests.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN10 [down arrow] Public Enforcement, State Civil Actions

The question of whether a state possesses a "quasi-sovereign" interest in an action, vitally important in challenges to a state's standing to sue under the antitrust laws, does not bear on the separate question whether a state has an interest in presenting and enforcing individual claims of its citizens as their trustee.

Counsel: William J. Murphy (Raymond W. Bergan, Scott Blake Harris, Williams & Connolly on brief), Michael G. Charapp (Basil J. Mezines, Jacob A. Stein, Stein, Mitchell & Mezines on brief), Francis P. Newell (Craig E. Zeigler, Montgomery, McCracken, Walker & Rhoades on brief) for Appellants.

Robert W. Hesselbacher, Jr., Assistant Attorney General (Stephen H. Sachs, Attorney General, Charles O. Monk, II, Assistant Attorney General and Chief, Antitrust Division, Michael F. Brockmeyer, Assistant Attorney General, Francis John Gorman, Assistant Attorney General on brief), for Appellees.

Judges: Phillips and Chapman, Circuit Judges and Walter E. Black, Jr. United States District Judge, sitting by designation.

Opinion by: PHILLIPS

Opinion

[*127] PHILLIPS, Circuit Judge:

This interlocutory appeal has been certified, pursuant to *28 U.S.C. § 1292(b)*, on the question whether the state attorneys general of Maryland, Delaware, and Pennsylvania, and the Corporation Counsel of the District of

Columbia, may maintain statutory *parens patriae* damage actions [**2] under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, [15 U.S.C. §§ 15c-15h \(1976\)](#) (the Act), in the names of their respective jurisdictions on behalf of their natural-person residents injured by an alleged price-fixing conspiracy in violation of the Sherman Act, [15 U.S.C. § 1](#). While departing somewhat from the reasoning of the district court, we affirm its ruling that the state attorneys general¹ involved here may prosecute these statutory *parens patriae* actions under the antitrust laws.

I

Between December 1980 and August 1981, the states of Maryland, Delaware, Pennsylvania, Virginia, and West Virginia, and the District of Columbia, instituted civil antitrust [**3] actions in federal district courts in their respective jurisdictions against Toyota automobile dealers and distributors in the middle-Atlantic region. These actions, brought pursuant to the Antitrust Improvements Act of 1976, [15 U.S.C. §§ 15c-15h](#), have been consolidated along with two private actions in the District of Maryland by the Judicial Panel on Multidistrict Litigation. The state attorneys general, acting in their statutory *parens patriae* capacity, seek damages on behalf of their natural-person residents injured by an alleged conspiracy to fix the prices of Toyotas.²

Defendants moved to dismiss the states' actions, alleging *inter alia* that the attorneys general lack authority to bring *parens patriae* damage actions under the federal antitrust laws.³ The district [**4] court denied the motion to dismiss, ruling (1) that the state attorneys general were authorized by federal law, irrespective of local law, to maintain these actions, or alternatively (2) that state law provided the attorneys general with authority independent of federal law to bring these actions. Following certification by the district court under [28 U.S.C. § 1292\(b\)](#), we granted defendants' petition to appeal from this interlocutory order.

[**5] II

HN1[] The Antitrust Improvements Act provides that an "attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State," to secure treble money damages for injury to their property flowing from violations of the antitrust laws.⁴ [15 U.S.C. § 15c\(a\)\(1\)](#). See generally Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 Colum. L. Rev. 679 (1977). While the structure of this statutory scheme -- whether it deals essentially with notions of cause of action, right of action, party [*128] capacity, real party in interest, representative action, or other concepts -- may not be the clearest, its essence is plain enough.

It creates in the states a new right of action under existing substantive federal *antitrust law*. [**6] See [Reiter v. Sonotone Corp.](#), [442 U.S. 330, 344 n.7, 60 L. Ed. 2d 931, 99 S. Ct. 2326 \(1979\)](#) ("the statute authorizes the states to assert [consumers' causes of action] in a *parens patriae* capacity"); [Illinois v. Sangamo Construction Co.](#), [657 F.2d 855, 859 \(7th Cir. 1981\)](#); S. Rep. No. 803, 94th Cong., 2d Sess. 42 (1976) (the Act "creates a new statutory

¹ Unless otherwise indicated, references to "attorneys general" will include the Corporation Counsel of the District of Columbia, who for all relevant purposes is classified under the statutory scheme as a state attorney general. See [15 U.S.C. § 15\(g\)](#). Similarly, references to "states" will include the District of Columbia.

² In addition, each state seeks injunctive relief under [15 U.S.C. § 26](#), Pennsylvania alleges a tie-in violation under [15 U.S.C. §§ 1 & 14](#), and Maryland and Delaware assert pendent claims under their state antitrust statutes.

³ On appeal, defendants challenge the authority of only four of the six attorneys general involved in this consolidated litigation. No challenge was made to the authority of the West Virginia Attorney General to bring a *parens patriae* action, apparently because the West Virginia legislature has vested the attorney general with explicit power to sue under the federal antitrust laws, see [W. Va. Code § 47-18-17\(a\)](#) (1980). Furthermore, no challenge is raised here to the *parens patriae* authority of the Virginia Attorney General; the Virginia case was not transferred to the District of Maryland until after the district court issued an appropriate certification under [28 U.S.C. § 1292\(b\)](#).

⁴ **HN2**[] "The term 'State attorney general' means the chief legal officer of a State, or any other person authorized by State law to bring actions under [section 15c. . .](#)." [15 U.S.C. § 15g\(1\)](#).

704 F.2d 125, *128L^A 1983 U.S. App. LEXIS 29414, **6

cause of action for States"). Because it involves no change in the substantive basis for antitrust liability, it is purely procedural⁵ in its effect. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734 n.14, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977); *In re Montgomery County Real Estate Antitrust Litigation*, 452 F. Supp. 54, 60-61 (D. Md. 1978); Scher, *supra*, at 721-25. **HN3**[⁶] Emphasizing its wholly procedural cast, the Act specifically recognizes the power of the states to forego any benefit of the Act by legislatively renouncing the right of action conferred. See [15 U.S.C. § 15h](#). And, in a final procedural twist, the Act recognizes the "authority" of state attorneys general -- so far as federal interests are concerned -- to prosecute the actions in the name of the state.⁶ See [15 U.S.C. § 15c\(a\)\(1\)](#). [**7]

As the legislative history makes apparent, see H.R. Rep. No. 499, 94th Cong., 2d Sess. 6-8, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2572, 2575-78; S. Rep. No. 803, *supra, at 42*, the Act was aimed primarily at enlarging the potential for consumer recovery for antitrust violations by effectively bypassing the burdensome requirements of *Rule 23, Fed. R. I**81 Civ. P.* 23, that might tend to dissuade private litigants from pursuing conventional consumer class actions for antitrust injury, see Scher, *supra*, at 707-12; Comment, *Parens Patriae Antitrust Actions for Treble Damages*, 14 Harv. J. Legis. 328, 336-37, 341-43 (1977). Therefore, the Act is best understood as constituting the states, acting through their attorneys general, as "consumer advocates in the [antitrust] enforcement process." H.R. Rep. No. 499, *supra*, at 8. See *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 35 (2d Cir. 1981), *cert. denied*, 460 U.S. 1068, 103 S. Ct. 1520, 75 L. Ed. 2d 945 (1982).

III

Defendants do not appear seriously to challenge the essential accuracy of this analysis of the structure and purpose of the statutory scheme. They attack instead the district court's conclusions (1) that the "authority" conferred by the Act upon state attorneys general empowers them to sue on this federally created right of action irrespective of state law limitations on their power, and (2) that, in any event, the law of each state involved supplies, or does not limit, the power of these attorneys general to maintain the right of [**9] action contemplated by the Act.

As to (1), defendants contend that, because Congress obviously lacks power to override state law definitions of the duties and authority of state officers, the Act must be interpreted as not intending to confer any federal authority at odds with state limitations. This accepted, the argument runs, none of the jurisdictions involved vests its attorney general with authority to prosecute the right of action created by the Act, so that the suits must be dismissed.

We do not think it necessary to address the validity of the district court's [*129] determination that, irrespective of state law, the authority of state attorneys general to prosecute these actions is properly conferred by the federal Act. Accepting, *arguendo*, defendants' postulate that Congress could not have intended to redefine or expand the state-defined offices of these attorneys general, we hold that each of these state attorneys general derives power from his respective state law framework to prosecute this federal right of action.

Defendants' contention that the state laws involved here do not provide for, or proscribe, suit by these attorneys general on the federal right [**10] of action has two prongs. First, they argue that such power cannot be traced to any common law authority⁷ [**11] to bring *parens patriae* actions, because the right of action defined by the Act,

⁵ Though the new procedural right does involve a remedial expansion in the form of a "civil penalty" recoverable by the state itself. See [15 U.S.C. § 15e\(2\)](#).

⁶ The state attorney general thus might be viewed as suing on the state's cause of action *ex relatione*, in a "legal proceeding . . . instituted by the attorney general . . . in the name and behalf of the state, but on the information and at the instigation of an individual." Black's Law Dictionary 522-23 (5th ed. 1979). Although obviously not dispositive, we note that each of the consolidated actions at issue here has been styled as "State" *ex rel.* "Attorney General."

⁷ The plaintiff-attorneys general here involved, like those in a vast majority of jurisdictions, possess common law powers and duties in addition to those defined expressly by statutory or constitutional provision. See *Commonwealth v. Schab*, 477 Pa. 55, 383 A.2d 819 (1978) (Pennsylvania); *Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975) (Maryland); *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 22 A.2d 397 (Del. Ch. 1941) (Delaware); cf. *Mead v. Phillips*, 77 U.S. App. D.C. 365, 135 F.2d 819,

though so denominated, expands common law *parens patriae* principles.⁸ This accepted, they contend, power to sue on the federal right of action can derive only from the statutes or constitutions of the several states. These, defendants say, limit the attorneys general to prosecuting actions that vindicate quasi-sovereign or proprietary state interests.

[**12] We disagree. The state laws and constitutions do not confine the authority of the states attorneys general to the prosecution of common law *parens patriae* actions and actions to vindicate quasi-sovereign state interests. Instead, they fully authorize [*130] prosecution of the statutory right of action here in issue,⁹ which concededly is of neither type. See *supra* note 8.

[**13] To show why requires analysis of the relevant state provisions. See *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68-69, 16 L. Ed. 2d 369, 86 S. Ct. 1301 (1966); *United States v. Yazell*, 382 U.S. 341, 352-57, 15 L. Ed. 2d 404, 86 S. Ct. 500 (1966). Cf. *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 267 n.2 (5th Cir.) (state law controls question of attorney general's authority to bring federal antitrust action), cert. denied, 429 U.S. 829, 97 S. Ct. 88, 50 L. Ed. 2d 92 (1976); accord, *Ohio v. United Transportation, Inc.*, 506 F. Supp. 1278, 1281 (S.D. Ohio 1981).

824 (D.C. Cir. 1943) (common law an important and substantial part of the law of the District of Columbia). See generally Shepperd, *Common Law Powers and Duties of the Attorney General*, 7 Baylor L. Rev. 1, 1-3 (1955). None of the four jurisdictions involved in this appeal explicitly forbids its attorney general to maintain these actions, and "in the absence of express statutory or constitutional restrictions, the common law duties and powers attach themselves to the office as far as they are applicable and in harmony with our system of government." *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813, 818-19 (Okla. 1974) (citing cases); see also *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 112 Cal. Rptr. 786, 520 P.2d 10, 20 (1974); *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 558 (Me. 1973).

⁸ We agree that the statutory right of action is more expansive. In strict contemplation, common law *parens patriae* actions only involved the state in two capacities: as "the general guardian of all infants, idiots, and lunatics" and supervisor of "all charitable uses in the kingdom," 3 W. Blackstone, *Commentaries* *47; and as the watchdog of its "quasi-sovereign" interests. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-58, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir.), cert. denied, 404 U.S. 871, 92 S. Ct. 81, 30 L. Ed. 2d 115 (1971). See generally Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant*, 25 DePaul L. Rev. 895 (1976). Neither capacity embraces actions such as those here in issue where the state sues on behalf of injured natural residents. The putatively injured consumers do not suffer from any legal disability; indeed, the statute presumes in them existing individual rights of action, see *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734 n.14, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977). Furthermore, "no state has a legitimate quasi-sovereign interest in seeing that consumers or any other group of persons receive a given sum of money." Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. L. Rev. 193, 214 (1970). In Justice Holmes' classic formulation, there cannot be a state quasi-sovereign interest "independent of and behind the titles of its citizens," *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 51 L. Ed. 1038, 27 S. Ct. 618 (1907), when by definition the statute empowers the state to enforce the rights of injured citizens. See *Pfizer, Inc. v. Lord*, 522 F.2d 612, 616-18 (8th Cir. 1975), cert. denied sub nom. *Imperial Government of Iran v. Pfizer, Inc.*, 424 U.S. 950, 96 S. Ct. 1422, 47 L. Ed. 2d 356 (1976); *California v. Frito-Lay, Inc.*, 474 F.2d 774, 775-77 (9th Cir.), cert. denied, 412 U.S. 908, 36 L. Ed. 2d 974, 93 S. Ct. 2291 (1973); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057, 1062-63 (E.D. Pa. 1969); *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, 160 F. Supp. 387, 388-89 (E.D. La. 1958).

But, as our discussion in text indicates, the fact that the statutory "*parens patriae*" action is broader in scope than the common law action is not dispositive of the issue raised by defendants.

⁹ It is important to distinguish Congress' assumed lack of power (or intention) to expand the authority of state attorneys general from its obvious power to create a right of action which would be available to a state attorney general acting fully within the scope of predefined powers. On oral argument, counsel for defendants blurred this distinction by urging that Congress had necessarily expanded the powers of state attorneys general because a "*parens patriae*" action seeking damages on behalf of individual consumers could not have been maintained prior to passage of the Antitrust Improvements Act. See *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908, 36 L. Ed. 2d 974, 93 S. Ct. 2291 (1973). But it is entirely possible that a state attorney general could be acting within the limits of state-defined power while prosecuting a new federal right of action.

While the statutory and constitutional definitions of the powers of the several plaintiff-attorneys general differ significantly, a common thread runs throughout. The Maryland Constitution provides that the Attorney General shall [HN4](#) "commence, and prosecute . . . any civil . . . action . . . on the part of the State or in which the State may be interested," [Md. Const. art. V, § 3\(a\)\(2\)](#); ¹⁰ [HN5](#) the Delaware Antitrust Act empowers the Attorney General to institute proceedings "on behalf of the State and its public bodies; for suspected antitrust violations, [Del. Code Ann. tit. 6, § 2105](#) (Supp. [**14] 1980); District of Columbia law provides that the Corporation Counsel shall [HN6](#) "have charge and conduct of all law business" of the District, D.C. Code Ann. § 1-361 (1981); and Pennsylvania's Commonwealth Attorneys Act specifies that the Attorney General [HN7](#) "shall represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws," 71 Pa. Cons. Stat. Ann. § 732-204(c) (Purdon Supp. 1982).

While the language differs, each provision allocates to the attorney general power and authority to represent the jurisdiction and its interests in litigation. In at least two ways, we find the present actions to fall clearly within the ambit of each [**15] of the attorneys general's state-derived authority.¹¹

A

First, these attorneys general have brought suits in the names of their respective states to enforce causes of action created by federal law. Whether the state is a real party in interest or merely a representative party, this cause of action exists in favor of the state. See *New Mexico v. Scott & Fetzer* [**16] Co., 1981-2 Trade Cas. (CCH) para. 64,439, at 75,149 (D.N.M. Dec. 22, 1981). Because the attorneys general are suing to enforce their jurisdictions' causes of action, these lawsuits indeed are "on the part of" Maryland, on "on behalf of" Delaware, and representative of the Commonwealth [*131] of Pennsylvania and the "law business" of the District of Columbia.¹² Cf. [Oklahoma ex rel. Johnson v. Cook](#), 304 U.S. 387, 390-91, 82 L. Ed. 1416, 58 S. Ct. 954 (1938) ("Since the state is the proper party plaintiff by virtue of the . . . statute, it may maintain the action regardless of whether it is the real party in interest or merely a nominal plaintiff for the use and benefit of [affected citizens].") (quoting [State ex rel. Murray v. Pure Oil Co.](#), 169 Okl. 507, 509, 37 P.2d 608, 610 (1934)); [State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.](#), 85 N.M. 521, 524, 514 P.2d 40, 43 (1973) (in suit brought *ex relatione* in the name of the state by the attorney general, the state is the proper party litigant and the attorney general is the attorney for the state).

[**17] B

In addition to their authority to sue to enforce their jurisdictions' statutory causes of action, these [HN9](#) attorneys general have undoubted authority to pursue litigation that advances or vindicates public interests. See [Brown v. Stanton](#), 617 F.2d 1224, 1232 n.14 (7th Cir. 1980) ("In general, a state Attorney General may institute such suits as he deems necessary for . . . the protection of public rights."), vacated and remanded on other grounds, 453 U.S. 917, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1981). See, e.g., [Md. Const. art. V, § 3\(a\)\(2\)](#) (Attorney General may bring any civil action "in which the state may be interested"); [Darling Apartment Co. v. Springer](#), 25 Del. Ch. 420, 22 A.2d 397, 403 (Del. Ch. 1941) (Attorney General may represent the State "in all litigation where the public interests are

¹⁰ [HN8](#) The Maryland Constitution requires as well that either the General Assembly or the Governor authorize the Attorney General to prosecute an action on the part of the State. See [Md. Const. art. V, § 3\(a\)\(2\)](#). As the parties concede, the Maryland Attorney General has received authorization from the Governor to maintain this cause of action.

¹¹ Our resolution avoids a substantial separation-of-powers question that would be presented by a judicial determination that a state attorney general has exceeded the broad scope of legislatively and constitutionally delegated authority. Cf. [Nader v. Kleindienst](#), 375 F. Supp. 1138, 1141-42 (D.D.C. 1973) (discussing separation-of-powers issue presented by judicial review of prosecutor's discretion to refuse to prosecute); [Secretary of Administration v. Attorney General](#), 367 Mass. 154, 326 N.E.2d 334, 339 (1975) (suggesting that recourse to the political arena must serve as the ultimate check on the powers of a state attorney general).

¹² We do not mean to suggest, as the district court seemingly did, that any action brought by the attorney general and captioned in the name of the state *ipso facto* falls within the scope of an attorney general's functions. Here, however, we do not rely on the styling of the complaint, but look rather to whether there exists an underlying federal right of action in the name of the state.

concerned"); cf. *District of Columbia v. Pryor*, 366 A.2d 141 (D.C. 1976) (Corporation Counsel may represent a private party in a civil commitment proceeding when proper or necessary, in the judgment of the executive). Indeed, the notion that these attorneys general may institute actions to remedy invasions of the public interest appears implicit in the statutory [**18] and constitutional schemes defining their powers.¹³

[**19] As Congress fully recognized in enacting the Antitrust Improvements Act, see H.R. [*132] Rep. No. 499, 94th Cong., 2d Sess. 6-8, reprinted in 1976 U.S. Code Cong. & Ad. News 2572, 2575-78; S. Rep. No. 803, 94th Cong., 2d Sess. 39-40 (1976), this statutory cause of action promotes enforcement of the federal antitrust laws, which promotes at the same time a state's public interest in protecting its citizens from violations of these laws,¹⁴ see *New Mexico v. Scott & Fetzer Co.*, 1981-2 Trade Cas. (CCH) para. 69,439, at 75,149 (D.N.M. Dec. 22, 1981); *Clark Oil & Refining Corp. v. Ashcroft*, 639 S.W.2d 594, 596-97 (Mo. 1982); see also *Iowa v. Scott & Fetzer Co.*, 1982-2 Trade Cas. (CCH) para. 64,873, at 72,359 (S.D. Iowa July 8, 1982). We reject the defendants' contention that a state has an "interest," under the various provisions involved here, only in those suits which vindicate quasi-sovereign or proprietary interests. Undoubtedly, a state can have a legitimate public interest in ensuring the economic well-being of its citizens -- and in indirectly promoting a smoothly functioning economy freed of antitrust violations -- even though the most obvious beneficiaries [**20] may be individual consumers who ultimately recoup money damages.¹⁵ See *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 391, 82 L. Ed. 1416, 58 S. Ct. 954 (1938); *Hyland v. Kirkman*, 157 N.J. Super. 565, 576, 385 A.2d 284, 289 (N.J. Super. Ct. Ch. Div. 1978).

¹³ A state may well have a "public interest" in maintaining an action without having a "quasi-sovereign" interest sufficient to support original jurisdiction in the Supreme Court or to overcome an *Eleventh Amendment* bar to the recovery of damages. Cf. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 102 S. Ct. 3260, 3271, 73 L. Ed. 2d 995 (1982) (Brennan, J., concurring) ("the question whether a State can bring a *parens patriae* action within the original jurisdiction of this Court may well turn on considerations quite different from those implicated where the State seeks to press a *parens patriae* claim in the district courts"). **HN10** The question of whether a state possesses a "quasi-sovereign" interest in an action, vitally important in challenges to a state's standing to sue under the antitrust laws, see, e.g., *Alfred L. Snapp & Son*, or suits seeking to invoke the original jurisdiction of the Supreme Court, see, e.g., *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 (1945); *Oklahoma v. Atchison, Topeka, & Santa Fe Railway Co.*, 220 U.S. 277, 55 L. Ed. 465, 31 S. Ct. 434 (1911); *New Hampshire v. Louisiana*, 108 U.S. 76, 27 L. Ed. 656, 2 S. Ct. 176 (1883), does not bear on the separate question whether a state has an interest in "present[ing] and enforc[ing] individual claims of its citizens as their trustee." *North Dakota v. Minnesota*, 263 U.S. 365, 376, 68 L. Ed. 342, 44 S. Ct. 138 (1923).

This distinction was recognized in *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 82 L. Ed. 1416, 58 S. Ct. 954 (1938), where the Supreme Court held that Oklahoma could not invoke the Court's original jurisdiction in an action brought by the state seeking to liquidate the assets of an insolvent bank and repay depositors and creditors. At the same time, however, the Court observed that "the protection of depositors of insolvent state banks is a distinct economic policy of the state" and that "in so far as the object of th[e] action is to further the established economic policy of the state, the state may be said to have a real interest created by its governmental policy, as distinguished from a mere nominal interest, even though the pecuniary benefits of the litigation, if ultimately successful, go to the depositors and creditors of the insolvent bank." *Id. at 391, 58 S. Ct. at 956* (quoting *State ex rel. Murray v. Pure Oil Co.*, 169 Okla. 507, 510, 37 P.2d 608, 610 (1934)).

¹⁴ In this circumstance, where the state seeks recovery of damages on behalf of specific individuals injured by antitrust violations, it is concededly not acting in its "quasi-sovereign" capacity. See *supra* note 8. But see *Massachusetts ex rel. Bellotti v. Russell Stover Candies, Inc.*, 541 F. Supp. 143, 145 (D. Mass. 1982).

¹⁵ Furthermore, many cases have recognized vast discretion in state attorneys general to determine the scope of the public interest, to be disturbed only where the action is "clearly inimical to the people's interest." *Michigan State Chiropractic Association v. Kelley*, 79 Mich. App. 789, 262 N.W.2d 676, 677 (Mich. Ct. App. 1978). See, e.g., *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268-69 (5th Cir.) (citing cases), cert. denied, 429 U.S. 829, 97 S. Ct. 88, 50 L. Ed. 2d 92 (1976); *Hyland v. Kirkman*, 157 N.J. Super. 565, 576, 385 A.2d 284, 289 (N.J. Super. Ct. Ch. Div. 1978). Cf. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 102 S. Ct. 3260, 3271-72, 73 L. Ed. 2d 995 (1982) (Brennan, J., concurring) ("I know of nothing -- except the Constitution or overriding federal law -- that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest.").

[**21] Moreover, in addition to enforcing the public interest in protecting citizens from antitrust injury, damage actions under the Antitrust Improvements Act such as the ones in issue, which allege illegal price-fixing behavior, may result in an award "deemed a civil penalty . . . and deposited with the State as general revenues." [15 U.S.C. § 15e\(2\)](#); see Scher, *supra*, at 727-28. It would seem beyond question that all the jurisdictions involved in this litigation have vested their respective attorneys general with the authority to maintain antitrust actions in the federal courts that could, quite conceivably, result in substantial monetary awards to their state treasuries.

IV

For the foregoing reasons, we hold that the attorneys general of Maryland, Delaware, and Pennsylvania, and the Corporation Counsel of the District of Columbia, properly may maintain these actions under the Antitrust Improvements Act of 1976, [15 U.S.C. §§ 15c-15h](#).

AFFIRMED.

End of Document



Smith v. Northern Mich. Hosps.

United States Court of Appeals for the Sixth Circuit

Cause argued October 21, 1982 ; March 25, 1983, Decided

No. 81-1513

Reporter

703 F.2d 942 *; 1983 U.S. App. LEXIS 29379 **; 1983-1 Trade Cas. (CCH) P65,289

James R. Smith, M.D., Richard A. Knecht, M.D., Thomas G. Depuydt, M.D., Bradford S. Foster, M.D., and Clark E. Taylor, D.O., Plaintiffs-Appellants, v. Northern Michigan Hospitals, Inc., a Michigan nonprofit corporation, and Burns Clinic Medical Center, P.C., a Michigan professional corporation, Defendants-Appellees

Prior History: **[**1]** APPEAL from the United States District Court for the Western District of Michigan, Southern Division.

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

emergency room, Clinic, appellants', referrals, monopolization, conspiracy, antitrust, summary judgment, pediatrician, patients, staff, exclusive contract, infer, consolidated, medicine, professional corporation, conspired, practices, emergency room physician, factual basis, concerted, full-time, anti trust law, present case, restrain, probative evidence, monopoly power, Sherman Act, allegations, follow-up

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

HN1 [down arrow] Regulated Practices, Private Actions

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

703 F.2d 942, *942L^A 1983 U.S. App. LEXIS 29379, **1

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

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

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

HN2 **Summary Judgment, Evidentiary Considerations**

Even in an antitrust action, the party opposing summary judgment may not rest on its pleadings. The adverse party must present sufficient evidence supporting its claims to require a judge or jury to resolve the parties' differing versions of the truth at trial. Although the court should treat antitrust plaintiffs leniently in examining their proofs for issues of fact on a summary judgment motion, those proofs must nonetheless provide some factual basis upon which the conspiracy and intent elements may be reasonably inferred. Once the defendant has adequately rebutted the plaintiff's allegations by establishing legitimate alternative explanations for its conduct which disprove the inferences the plaintiffs seek to draw, then the plaintiffs must come forward with some significant probative evidence tending to support the complaint.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

HN3 **Sherman Act, Claims**

To establish a violation of [§ 1](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#), the plaintiff must establish that the defendants combined or conspired with an intent to unreasonably restrain trade.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN4 **Price Fixing & Restraints of Trade, Vertical Restraints**

Close ties between defendants or even the power of one to dominate the other are not, by themselves, sufficient predicates for inferring the existence of a conspiracy to restrain trade.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

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

HN5 **Antitrust & Trade Law, Sherman Act**

703 F.2d 942, *942L 1983 U.S. App. LEXIS 29379, **1

Two or more individual officers, directors or agents within a corporation, acting on behalf of that corporation, are considered incapable of conspiring with each other or with their corporation, for purposes of [§ 1](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#). To find liability on this basis would require approval and application of a limited independent personal stake exception to the traditional rule that a corporation cannot conspire with its officers or agents. Under this exception, a conspiracy may be found to exist between a corporation and its employee by virtue of the employer's independent personal stake in achieving the object of the conspiracy.

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

[**HN6**](#) **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Not all exclusive dealing contracts even by a monopolist are illegal.

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

[**HN7**](#) **Monopolies & Monopolization, Actual Monopolization**

To establish the offense of monopolization a plaintiff must show that a defendant either unfairly attained or maintained monopoly power. Monopoly power consists of the power to control prices or exclude competition.

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

[**HN8**](#) **Monopolies & Monopolization, Attempts to Monopolize**

An attempted monopolization occurs when a competitor, with a dangerous probability of success, engages in anti-competitive practices the specific design of which are, to build a monopoly or exclude or destroy competition.

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

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

[**HN9**](#) **Monopolies & Monopolization, Actual Monopolization**

In order to succeed on either a monopolization or attempt to monopolize claim, plaintiffs must establish the relevant product and geographic markets in which they compete with the alleged monopolizers.

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

Evidence > Inferences & Presumptions > Inferences

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Evidence > Inferences & Presumptions > General Overview

[**HN10**](#) **Monopolies & Monopolization, Conspiracy to Monopolize**

In the absence of legitimate explanation for conduct a fact finder may be warranted in drawing an inference that the anti-competitive conduct resulted from concerted activity and an improper motive. However, such an inference is not permissible when there is persuasive evidence of legitimate purposes or other explanation which negates that inference.

Counsel: Grady Avant, Jr., Long, Preston, Kinnaird and Avant, Detroit, Michigan, Cheryl Bailey Estes, John C. Buchanan, Hecht, Buchanan & Cheney, Grand Rapids, Michigan, for Appellant.

Gregory L. Curtner, Miller, Canfield, Paddock & Stone, Detroit, Michigan, Derek I. Meier, Dykema, Gossett, Spencer et al., Detroit, Michigan, for Appellee.

Judges: Lively and Kennedy, Circuit Judges; and Spiegel, * District Judge.

Opinion by: KENNEDY

Opinion

[*945] KENNEDY, Circuit Judge.

Plaintiff physicians appeal the District Court's grant of summary judgment dismissing their claim that the defendants, Northern Michigan Hospitals, Inc., and the Burns Clinic Medical Center, P.C., had violated sections 1 and 2 of the Sherman Antitrust Act.¹ We affirm the summary judgment on appellants' ² section 1 and 2 claims involving conspiracy but reverse and remand appellants' section 2 monopolization and attempted monopolization [*2] claims against the Burns Clinic for further consideration by the District Court.³

On June 1, 1977 the Little Traverse and Lockwood-MacDonald hospitals of Petoskey, Michigan merged to form Northern Michigan Hospitals, Inc. (NMH), one of two defendants in this lawsuit.⁴ The second defendant, Burns Clinic Medical Center, P.C. (Burns Clinic), is a multi-specialty professional corporation of which 90% of the doctors and nearly all of the specialists in Petoskey are members. The plaintiffs are independent physicians formerly on the Lockwood-MacDonald staff who became members of the NMH staff with the merger. All of the plaintiffs, except one, [*3] practice or had practiced family medicine in Petoskey.⁵

After the merger in 1977, the emergency rooms of Little Traverse and Lockwood-MacDonald were consolidated into one [*4] facility at the Little Traverse division of NMH. It is not claimed that the consolidation was undertaken for other than legitimate medical and financial reasons. However, appellants assert that the method of staffing the

* Honorable S. Arthur Spiegel, United States District Court for the Southern District of Ohio, sitting by designation.

¹ *Smith v. Northern Michigan Hospitals, Inc.*, 518 F. Supp. 644 (W.D. Mich. 1981).

² The five plaintiff physicians will be referred to, for convenience, interchangeably as either "plaintiffs" or "appellants."

³ All claims against defendant Northern Michigan Hospitals must be dismissed under our disposition of this case. See text, *infra*, at p. 26.

⁴ One major impetus for this merger was the desire of Little Traverse to expand its facilities. To do so required the approval of the regional Health Systems Agency and the Michigan Department of Public Health. Lockwood-MacDonald at the same time had excess capacity. The Michigan Department of Public Health approved a scaled down version of Little Traverse expansion conditioned on the merger taking place.

⁵ Three of the five plaintiff physicians left the Petoskey area subsequent to the merger of the two former hospitals. Dr. DePuydt left Petoskey on June 1, 1979, and Dr. Foster moved to Indiana in August of that same year. Dr. Taylor moved his practice to Cheboygan, Michigan on October 17, 1977, prior to any of the allegedly anti-competitive acts now complained of had occurred. His claims must be dismissed on this basis alone.

consolidated emergency facility and hospital practices with respect to referrals of emergency room patients, violated and continues to violate the antitrust laws. Three practices at NMH form the basis of the appellants' complaints.⁶

The appellants first challenge the award of an exclusive contract to the Burns Clinic for the provision of emergency room services. Shortly after the merger, NMH determined, through a staff committee comprised of both Burns Clinic and independent [*946] physicians, [**5] that its new consolidated emergency room would be staffed by a small group of full-time physicians specializing in emergency room medicine.⁷ [**6] To this end, NMH solicited bids from the Burns Clinic, independent physicians in Petoskey, and the "Williams Group," a private company that specializes in providing emergency room staffing. Although only two weeks were allowed for preparation of bids, both the Burns Clinic and the Williams Group submitted proposals. The appellants did not. The exclusive contract was, not unexpectedly, awarded to the Burns Clinic.⁸ The appellants contend that this grant of an exclusive contract for the provision of the emergency room services constitutes an unreasonable restraint of trade in violation of section 1. The appellants also urge that this arrangement results from a conspiracy designed to monopolize acute care medicine in the Petoskey market in violation of section 2.

The second practice complained of involves NMH's system of referring uncommitted emergency room patients for follow-up care. Under this system, emergency room patients who do not have or do not prefer a particular doctor in the community are referred, in accordance with the medical judgment of the emergency room physician, to an "on-call" NMH physician in the appropriate area of medical expertise. All physicians on the NMH staff, including the appellants, share rotation on the "on-call" list and theoretically would receive a "fair-share" of those uncommitted patients requiring follow-up care in the area of medicine they practice. The appellants, however, assert that the referral system, while fair on its face, was applied in a discriminatory fashion from 1977 to 1978 before NMH instituted formal [**7] auditing. This discriminatory application of the referral system is alleged to have been designed to drive the appellants out of the practice of medicine in Petoskey, in violation of both sections 1 and 2 of the Sherman Act.

Finally, the appellants assert that NMH's so-called "pediatrician rule" violates sections 1 and 2. This rule requires that medical emergencies involving children 14 and younger, who have no physician, be treated by a pediatrician. All of the pediatricians in Petoskey are with Burns Clinic.⁹ A similar rule had been in effect at the Little Traverse emergency room since 1955. The rule was, in a manner not clearly disclosed by the record, continued at NMH after merger and consolidation of emergency room services.¹⁰ Appellants allege that the rule was continued at NMH at the behest of Burns Clinic pediatricians with whom the appellants compete directly for the general or "primary" treatment of children. Although there are no pediatricians among the non-Burns Clinic physicians, all of

⁶ The appellants' theories for recovery have shifted as the case has developed through almost two years of discovery. Initially, the appellants challenged both the merger and the consolidation of emergency rooms. These claims were dropped prior to the District Court's grant of summary judgment.

⁷ Prior to the merger the emergency room at Lockwood-MacDonald was staffed by various independent physicians including appellants on a rotating part-time basis. The emergency room at Little Traverse was staffed by Burns Clinic under an exclusive contract.

⁸ The cost differential between the only two competitors, Burns and the Williams Group, was apparently minimal. NMH awarded the contract to the Burns Clinic on the basis of prior favorable experience with the Burns emergency room physicians and a strong NMH staff preference for "in house" staffing. .

⁹ Although the rule does not require treatment by a Burns Clinic pediatrician, that is, in fact, its practical effect. The record reveals that an independent pediatrician has investigated setting up practice in Petoskey but has not done so. He was offered staff privileges but Burns Clinic pediatricians were unwilling to cover for him on weekends or emergencies.

¹⁰ The hospital also requires mandatory consultations with a pediatrician for all patients who are admitted with certain medical problems, e.g., Cesarean section and neonatal care infants require an attending physician. The appellants vaguely complain of these rules but fail to specify how such manifestly reasonable medical practice requirements imposed by the hospital are in any way violative of the antitrust laws. Such rules, therefore, play no part in our disposition of the appellants' claims.

the appellants enjoy or enjoyed pediatric privileges at NMH and assert that they are and were fully qualified to treat many of the children in the emergency room who are automatically [**8] treated by Burns Clinic pediatricians.

[*947] Defendants moved for summary judgment shortly before the scheduled trial date. This was two [**9] years after the case had been filed and after extensive discovery including depositions from most, if not all, potential witnesses. The District Court found that the appellants had failed to make "even a preliminary showing" that the defendants had "unfairly restrained" trade or conspired to do so and granted summary judgment. In light of the appellants' weak factual proofs and the countervailing medical purposes justifying the practices complained of, the court concluded that no legal basis existed upon which to try the case.

On appeal the appellants assert three grounds for reversal. First, the District Court erroneously failed to apply the more stringent standard for summary judgment appropriate in antitrust actions. Second, the court ignored substantial evidence from which a reasonable jury could infer a conspiracy to eliminate the appellants from acute care practice and to monopolize such services in the Petoskey market. Finally, the District Court erroneously failed to premise its decision on economic analysis and instead accepted the defendants' incantation of medical justifications.

While there is some merit to the appellants' first and third assertions of legal error, [**10] we nevertheless find that summary judgment was appropriate on appellants' [section 1](#) and [2](#) conspiracy claims. Because the District Court's inquiry on appellants' [section 2](#) monopolization and attempted monopolization claims is incomplete, we remand for further development of those claims.

Summary Judgment in Antitrust Litigation

Both the Supreme Court and this Circuit have expressed a clear reluctance to dispose of antitrust litigation on motions for summary judgment. *E.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 474, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 284-90, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1197 (6th Cir. 1982); *Taylor Drug Stores, Inc. v. Associated Dry Goods Corp.*, 560 F.2d 211, 213 (6th Cir. 1977); *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962). This reluctance to utilize summary judgment dispositions stems from the crucial role that intent and motive have in antitrust claims and the difficulty of proving conspiracy by means other than factual inference. Thus, the [**11] Supreme Court in *Poller* stated that:

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

[368 U.S. at 473.](#)

The District Court interpreted language in [First National Bank](#), 391 U.S. at 284-90, as eliminating the distinction between summary judgment in antitrust cases and other civil litigation. We do not believe it can be read so broadly. Rather, the Court merely re-emphasized that [HN2](#) even in an antitrust action the party opposing summary judgment may not rest on its pleadings. See [Fed. R. Civ. P. 56\(e\)](#). The adverse party must present sufficient evidence supporting its claims to " require a judge or jury to resolve the parties' differing versions of the truth at trial." [First National Bank](#), 391 U.S. at 286-90. See [Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.](#), 394 U.S. 700, 701, 703-04, 22 L. Ed. 2d 658, 89 S. Ct. 1391 (1968) (per curiam). In *First National Bank*, summary judgment was found appropriate because the plaintiff's "total failure to produce evidence [**12] tending to show [the defendant's] part in a conspiracy" and the adversity of interests among co-conspirators "conclusively showed" that the allegations were "not susceptible" of the interpretation the plaintiff sought. [391 U.S. at 286-90.](#)

To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that [Rule 56\(e\)](#) should, in effect, be read out of antitrust cases and permit [*948] plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of

evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Id. at 289-90.

The lesson learned from *Poller* and *First National Bank* is that, although the court should treat antitrust plaintiffs leniently in examining [**13] their proofs for issues of fact on a summary judgment motion, those proofs must nonetheless provide some factual basis upon which the conspiracy and intent elements may be reasonably inferred.¹¹ Once the defendant has adequately rebutted the plaintiff's allegations by establishing legitimate alternative explanations for its conduct which disprove the inferences the plaintiffs seek to draw, then the plaintiffs must come forward with some "significant probative evidence tending to support the complaint." *First National Bank*, 391 U.S. at 290.

[**14] Although the District Court in the present case appears to have misinterpreted the effect of *First National Bank* on summary judgment standards in antitrust litigation, this error does not require reversal. The defendants have provided a number of legitimate alternative explanations for their conduct which adequately rebut the inferences of intent and conspiracy alleged by the plaintiffs. And by affidavit and reference to their depositions they have denied under oath the existence of any conspiracy. The appellants have failed to advance any "significant probative evidence" in response which would provide a sufficient factual basis to withstand summary judgment even under the more lenient standard. We, therefore, reject the appellants' second and more dispositive asserted error, that the District Court ignored substantial probative evidence from which a jury could infer a conspiracy to violate the antitrust laws. Appellants' Section 1 claims are treated first.

Appellants' Section 1 Claims

The three practices of NMH alleged to violate Section 1 of the Sherman Antitrust Act are (1) discriminatory application of the NMH's emergency room referral system from 1977 to 1979; [**15] (2) continuation of a "pediatrician rule" requiring emergency room patients 14 years old and younger who exhibit medical as opposed to traumatic injury to be seen by a pediatrician; and (3) the grant of an exclusive contract to the [*949] Burns Clinic to staff the NMH emergency room.

¹¹ The Seventh Circuit in *Weit v. Continental Ill. National Bank & Trust Co.*, 641 F.2d 457, 464 (7th Cir. 1981), cert. denied, 455 U.S. 988, 71 L. Ed. 2d 847, 102 S. Ct. 1610 (1982) suggests that the distinction between summary judgment in antitrust litigation versus other civil matters is no longer viable. However, this Circuit, as well as others, has reaffirmed the distinction as recognized in *Poller* and clarified in *First National Bank*. E.g., *David-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1197 (6th Cir. 1982); *Taylor Drug Stores v. Assoc. Dry Goods*, 560 F.2d 211, 213 (6th Cir. 1977); *National Electrical Contractors Ass'n, Inc. v. National Constructors Ass'n*, 678 F.2d 492, 497 (4th Cir. 1982); *Clark v. United Bank of Denver National Ass'n*, 480 F.2d 235, 240 (10th Cir.), cert. denied, 414 U.S. 1004, 38 L. Ed. 2d 240, 94 S. Ct. 360 (1973); *Battle v. Lubrizol Corp.*, 673 F.2d 984, 987 (8th Cir. 1982) (rehrg. en banc granted May 21, 1982); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 548 (5th Cir. 1978), cert. denied, 444 U.S. 921, 100 S. Ct. 262, 62 L. Ed. 2d 180 (1979). See also *Norfolk Monument v. Woodlawn*, 394 U.S. 700, 701, 703-04, 89 S. Ct. 1391, 22 L. Ed. 2d 658 (1968) (per curiam); *ALW, Inc. v. United Airlines, Inc.*, 510 F.2d 52, 55 (9th Cir. 1975) (expressing reluctance to grant summary judgment in antitrust litigation but nonetheless requiring that the plaintiff come forward with specific factual support upon which the requisite inference of conspiracy may be drawn once the defendant rebuts plaintiff's allegations with probative evidence). *Proctor v. State Farm Mutual Auto. Ins. Co.*, 218 U.S. App. D.C. 289, 675 F.2d 308, 335 (D.C. Cir. 1982) (the amount of discovery taken weighs against traditional reluctance to grant summary disposition).

HN3[] To establish a violation of [section 1](#) of the Act the plaintiff must establish that the defendants combined or conspired with an intent to unreasonably restrain trade.¹² E.g., [Perma Life Mufflers, Inc. v. International Parts Corp.](#), 392 U.S. 134, 141-42, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968). The appellants have failed to provide a sufficient factual basis upon which to even infer the existence of the prerequisite conspiracy.

[**16] (1) The Referral System:

Under the NMH emergency room referral system the emergency room physician who initially examines patients must determine whether follow-up treatment is needed, and if so, what type of care would be medically prudent. Victims of heart disease are presumably referred to heart specialists, broken bones are sent to orthopedists, and more common problems referred to generalists or family practitioners. If a patient has no local physician, a referral is made to the physician "on-call" on a rotating list of physicians which includes appellants in the appropriate category of medical care as determined by the individual emergency room physician.

That the rule is fair on its face is undisputed. However, the appellants claim that they have been deprived of their "fair share" of these referrals through inconsistent application of the rules. We will assume that this may, in fact, have been true. Such deprivation alone, however, would not constitute a violation of [section 1](#). The appellant must provide some factual basis upon which to find that the ostensibly independent referral decisions of the emergency room physicians are part of some concerted design between [**17] the two defendants or one defendant and some other conspirator. They have not done so.

The appellants have not alleged knowledge much less participation on the [*950] part of NMH in the unfair implementation of this referral. Indeed, when independent orthopedists complained of a lack of referrals early in the life of the system, the hospital immediately responded by conducting spot audits of orthopedic referrals.¹³ There is nothing in the present record to indicate that the alleged abuses of the referral system were, if they occurred, anything other than the result of unilateral actions by individuals in the emergency room. The emergency room doctors were not employees of the hospital. Their acts are exclusively those of the Burns Clinic. **HN4**[] Close ties

¹² The medical profession is, of course, not exempt from application of the antitrust laws. E.g., [Arizona v. Maricopa County Medical Society](#), 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466, 2475-76 (1982). See also [National Society of Professional Engineers v. United States](#), 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978); [Goldfarb v. Virginia State Bar](#), 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1977). Nevertheless, some professional practices might survive antitrust scrutiny under the rule of reason even though illegal in other contexts. [Maricopa County](#), 457 U.S. at 349, 102 S. Ct. at 2475, 73 L. Ed. 2d 48; [National Society of Professional Engineers](#), 435 U.S. at 686, 696; [Goldfarb](#), 421 U.S. at 788-89 n.17.

The Supreme Court has not delineated exactly when or how the special circumstances relevant to learned professions should properly affect application of the antitrust laws. In *National Society of Professional Engineers*, the Court reasserted the basic principle that the focus of inquiry in any antitrust analysis is confined to consideration of "the challenged restraint's impact on competitive conditions." [435 U.S. at 688](#). In response to the defendant engineer's professional ethics and public safety justifications for their restraint on competitive bidding the Court emphasized that "the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by Congress." *Id. at 692*. See [National Gerimedical Hospital v. Blue Cross](#), 452 U.S. 378, 393 n.19, 69 L. Ed. 2d 89, 101 S. Ct. 2415 (1981); [Academy of Clinical Psychologists v. Blue Shield of Va.](#), 624 F.2d 476, 485-86 (4th Cir. 1980), cert. denied [450 U.S. 916](#), 67 L. Ed. 2d 342, 101 S. Ct. 1360 (1981). The Court thereby "intimated" that the professions may adopt ethical rules which regulate and promote competition in a manner appropriate to the profession but may not create rules which have an "overall anti-competitive effect." *Id. at 686, 696 n. 22*. See *id. at 699* (Blackmun, J. concurring). Despite this language the Court has apparently not entirely foreclosed consideration of benefits other than enhanced competition -- such as quality of service, or protection from malpractice claims -- when applying the rule of reason to the professions. See [Maricopa County](#), 457 U.S. at 349, 102 S. Ct. at 2475.

In the present case, since there is no evidence to support an inference of the required concerted action, it is not necessary to consider what effect, if any, the defendants' potential medical justifications would have on a rule of reason analysis.

¹³ The results of these audits found that only a small number of errors had actually been made.

between defendants or even the power of one to dominate the other are not, by themselves, sufficient predicates for inferring the existence of a conspiracy to restrain trade. See *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), cert. denied, 454 U.S. 1083, 70 L. Ed. 2d 618, 102 S. Ct. 639 (1981).

[**18] The appellants advance the theory that the emergency room staff, all members of the Burns Clinic, conspired with other specialists in the Burns Clinic who stood to directly benefit from the alleged improper diversion of referrals. Appellant's theory directly contradicts the traditional rule that " HN5¹⁴ Two or more individual officers, directors or agents within a corporation, acting on behalf of that corporation, are considered incapable of conspiring with each other or with their corporation, for § 1 purposes." *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 n.7 (9th Cir. 1979) (citing cases). To find liability on this basis would require approval and application of a limited "independent personal stake" exception to the traditional rule that a corporation cannot conspire with its officers or agents.¹⁴ See, e.g., *Greenville Publishing Co., Inv. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974); *Nurse Midwifery Assoc. v. Hibbett*, 549 F. Supp. 1185, 1189-90 (M.D. Tenn. 1982); *Hoffman v. Delta Dental Plan of Minn.*, 517 F. Supp. 564, 571 (D.Minn. 1981). Under this exception, a conspiracy may be found to exist between a corporation and its employee [**19] by virtue of the employer's independent personal stake in achieving the object of the conspiracy. Without in any way endorsing the merits of this theory in general¹⁵ we hold that no such conspiracy is possible in the present case.

[**20] There has been no showing to support even an inference of an understanding, explicit or tacit, between the Burns Clinic specialists and the Burns Clinic emergency room staff. Indeed, plaintiffs' own evidence indicates that, if in fact referrals to specialists predominated emergency room referrals, it was because the emergency room doctors believed specialists were better qualified to undertake the follow-up care required. Thus, even if we were to find that the circumstances of this case warranted looking beyond the corporate form of the Burns Clinic, there would nonetheless be insufficient evidence of the required plurality of action and meeting of the minds.

It is true that the income of specialists in the clinic depends, in part, upon each physician's individual billing contribution to the clinic. However, even were we to accept the dubious proposition that such income constitutes a personal independent stake, only the specialists are in a position to benefit from discrimination in referrals in a manner independent of the advancement of [*951] the Burns Clinic as a corporate enterprise.¹⁶ [**22] The emergency room physicians cannot, by hospital rule, make self-referrals for [**21] follow-up care. Thus, these doctors -- the only doctors in this case with the power to wrongfully withhold referrals -- do not themselves have any personal stake in the outcome of the alleged conspiracy independent of their stake in the clinic itself. A potential motive on the part of the specialists alone is too speculative a basis upon which to infer an illicit combination.¹⁷ To

¹⁴ Although often referred to as the "intra-enterprise" theory of conspiracy, the exception at issue in this case is distinct from those cases in which conspiracy is alleged to exist among the vertically related corporate subsidiaries of a defendant parent corporation. See, e.g., *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 141-42, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215, 95 L. Ed. 219, 71 S. Ct. 259 (1951). Here the conspiracy is supposed to exist between a single, professional corporation and its member physicians.

¹⁵ There are rather substantial policy reasons for not adopting such an exception. See Note, "Conspiring Entities" Under Section 1 of the Sherman Act, 95 Harv. L.Rev. 661 (1981-82) (summarizing the policy aspects of the intra-enterprise doctrine of corporation conspiracies).

¹⁶ The present case should be distinguished from the *Nurse Midwifery* and *Delta Dental Plan* cases cited by the appellants. In those cases the corporations involved were incorporated associations of independent physician members created to provide health care insurance programs. These corporate entities served purposes other than the actual physical delivery of health care services by member physicians. Each participating physician in the incorporated association maintained the actual practice of their profession independent of that corporate body. Under these circumstances, the independent personal stake of either member is readily apparent. Compare *Virginia Academy*, 624 F.2d at 479 (finding that "Blue Shield" of Virginia was an agent under the direction and control of its member physicians and not a single entity for antitrust purposes). In contrast, the Burns Clinic in the present case was organized by member physicians to facilitate delivery of specialized medical services in a group practice. The interest of each clinic physician is one and the same as the enterprise they form a part of.

apply this supposed exception for "independent stake" to the present case would be paramount to allowing the exception to subsume the rule.

Appellants also ask that we disregard the corporate structure of the Burns Clinic because it is a professional corporation. Appellants argue that because the Michigan Professional Service Corporations Act¹⁸ provides that an officer, stockholder, agent or employee of such corporation remains personally liable for his or her acts while rendering professional care, doctor members of a professional corporation should be treated as individuals for antitrust purposes. We see no reason to treat professional corporations in any [**23] different manner than any other corporation. Group practice by professional corporations is a common method of delivering health care. Such corporations are lawfully organized.¹⁹ The professional corporation has the same needs as any corporation to have its officers, members and employees engage in concerted activity. As with every corporation, it cannot exist unless its shareholder members can agree among themselves with respect to all aspects of its operation. It is recognition of this need which forms the basis for the rule that since a corporation cannot combine or conspire with itself, the acts of a corporation acting through its directors, officers, and employees are not generally subject to condemnation under section 1. Greenville Publishing Co., 496 F.2d at 399. See, e.g., Tamaron Distrib. Corp. v. Weiner, 418 F.2d 137, 138-39 (7th Cir. 1969); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 205-06 (5th Cir. 1969); Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 642-43 (9th Cir. 1969); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925, 97 L. Ed. 1356, 73 S. Ct. 783 (1953); Allen [**24] Organ Co. v. North Am. Rockwell Corp., 363 F. Supp. 1117, 1128-29 (E.D. Pa. 1973).

Appellants raise the specter of doctors incorporating for the purpose of avoiding the antitrust laws. However, the agreement to form a corporation for that [*952] purpose would be subject to the scrutiny of the antitrust laws.²⁰ And the use of a professional corporation for that purpose would run afoul of the attempt to monopolize prohibition of section 2. Moreover, there is no claim that the Burns Clinic was organized for that purpose. Burns Clinic had been in existence, first as a partnership and later as a professional corporation, for many years. It owns its own building in which all the members practice. It is not a [**25] mere shell.

(2) NMH Pediatrician Rule:

The second anti-competitive practice of the defendants alleged to be the result of an illegal combination concerns the existence of a "pediatrician rule" at the NMH emergency room. This rule requires that all emergency patients 14 years of age or younger, who have no family physician, must be seen by a pediatrician if they suffer from a medical problem as opposed to a traumatic injury. The Burns Clinic had instituted the rule originally at the Little Traverse emergency room in 1955, and it was apparently adopted or continued by NMH in its present form sometime after merger and consolidation.²¹

¹⁷ The present case is in this sense clearly distinguishable from the *Greenfield Publishing* cases. There, the individual employee held capable of conspiring with his corporation had both an independent personal stake in achieving the conspiracy's object and the power to himself institute the anti-competitive policy for his corporation. However, even were this distinguishing feature absent, it is doubtful that we would follow the analysis in that case. Compare with America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328 (N.D. Ind. 1972).

¹⁸ See Mich. Comp. Laws Ann. § 450.226 (West 1967).

¹⁹ That such corporations are often organized primarily for tax and pension purposes does not warrant disregarding their corporate structure under Michigan state law. See Kline v. Kline, 104 Mich. App. 700, 305 N.W.2d 297 (1981).

²⁰ E. Kintner, *Federal Antitrust Law*, Vol. II, § 9.8, pp. 22-23 (1980), discusses and agrees with this proposition.

²¹ The Little Traverse Hospital rule originally required that both medical and trauma cases be referred to a pediatrician and set a higher age limit of 16. With changes in patient load and staffing, however, the rule was modified to its present form sometime prior to the merger of Little Traverse and Lockwood-MacDonald hospitals. Apparently a further informal modification has recently changed the rule so that medical problems are also treated by the emergency room physician if the patient is admitted after midnight. In that circumstance the pediatrician is called for consultation.

[**26] The appellants' claim is essentially that the rule unnecessarily eliminates their access to a certain segment of the new patient population treated at the NMH emergency room. Since the appellants have pediatric privileges at NMH they are in direct competition with pediatricians insofar as the routine treatment of children are concerned. Yet, the rule requires that only a pediatrician be called whether or not the individual case is also actually within the acknowledged capabilities of the family practitioners.

We agree with the appellants that the pediatrician rule may in theory ²² restrain competition between family practitioners and pediatric specialists. The appellants have failed, however, to provide any factual basis upon which a jury might find the prerequisite concerted activity for a [section 1](#) violation. Although the record is not clear, it appears that the decision to continue the Little Traverse pediatrician rule was made by the NMH board of directors upon the endorsement of the NMH executive committee and an emergency room subcommittee formed of both Burns Clinic and independent doctors. However, no record of these committee meetings or other evidence has been offered [**27] which even implies that continuation of the rule was other than solely the product of NMH's singular efforts to provide appropriate medical care. The appellants have again failed to provide probative evidence tending to infer the existence of a conspiracy sufficient to withstand summary judgment.

(3) Exclusive Emergency Room Contact:

The final act of the defendants alleged to be a concerted effort to unreasonably restrain trade is the award of an exclusive contract to provide emergency services at NMH to a small group of Burns Clinic physicians. Sometime after consolidation of the Little Traverse and Lockwood-MacDonald emergency rooms [**28] NMH determined that the consolidated services should be operated by a small group of full-time emergency room specialists. The appellants, [*953] who did not bid for the contract themselves and were unwilling to work in the emergency room on a full-time basis, claim that the award of an exclusive contract violates [section 1](#) of the Sherman Act. We disagree.

HN6 [↑] Not all exclusive dealing contracts even by a monopolist are illegal.²³ See, e.g., [Harron v. United Hospital Center, Inc.](#), 522 F.2d 1133 (4th Cir. 1975), cert. denied, 424 U.S. 916, 47 L. Ed. 2d 321, 96 S. Ct. 1116 (1976) (exclusive radiology contract); [Brown v. Hansen Publications, Inc.](#), 556 F.2d 969, 970 (9th Cir. 1977) (exclusive sales agreement imposed on retail outlets for defendant's products); [Export Liquor Sales, Inc. v. Ammax Warehouse Company, Inc.](#), 426 F.2d 251 (6th Cir. 1970), cert. denied, 400 U.S. 1000, 27 L. Ed. 2d 451, 91 S. Ct. 460 (1971) (exclusive leasing of facilities on toll bridge in tax free zone). See also [Tampa Electric](#), 365 U.S. at 327-29 (exclusive "requirements" contract held lawful under § 3 of the Clayton Act and, *a fortiori*, lawful under [section 1](#) and [2](#) of the [**29] Sherman Act). But see [Hyde v. Jefferson Parish Hospital District No. 2](#), 686 F.2d 286 (1982), cert. granted, 460 U.S. 1021, 103 S. Ct. 1271, 75 L. Ed. 2d 493 (1983) (analyzing an exclusive contract to provide anesthesia services as a tying arrangement illegal per se under the Sherman Act).²⁴

[**30] In the present case NMH has only one emergency room through which to provide emergency services to the public. It was required to choose among alternative methods of providing this service in an effective, efficient and medically prudent manner. We agree with the District Court that the defendant NMH chose to staff its

²² We say "in theory" because the appellants have not actually presented any evidence as to the number of uncommitted children that are actually admitted to NMH with medical problems within the appellants' range of qualifications. However, finding no evidence to support an inference of conspiracy this deficiency is superfluous to disposition of appellants' [section 1](#) claims.

²³ Exclusive dealing contracts are analytically similar to cases involving unilateral refusals to deal in that the defendant has, in an exclusive contract, unilaterally determined to deal only with a single entity. Compare, [United States v. Colgate & Company](#), 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919); [Byars v. Bluff City News Co., Inc.](#), 609 F.2d 843, 863 (6th Cir. 1979), with [Tampa Electric Co. v. Nashville Coal Co.](#), 365 U.S. 320, 327-29, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961); [Brown v. Hansen Publications, Inc.](#), 556 F.2d 969, 970 (9th Cir. 1977). However, this category of cases is more helpful in analyzing whether a monopolist's refusal to deal with a potential competitor violates [section 2](#) of the Sherman Act.

²⁴ Unlike [Hyde](#), 686 F.2d at 289, 293, there is no discernible "tying" arrangement in the present case, nor has one been alleged.

consolidated emergency room with full-time specialists in emergency care for undisputedly legitimate financial and medical reasons. The appellants have failed to present any evidence which would contradict NMH's manifestly legitimate and well-supported justification that full-time specialists trained as emergency room physicians provide medical services superior to those of generalists who rotate on a part-time basis while maintaining full private practices.

The appellants' analogy to the "bottle neck" theory exemplified by cases such as *United States v. Terminal Railroad Association*, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912), is unsound. The present case does not involve a group of horizontal competitors whose joint control over some essential facility produces an unreasonable restraint on trade. Rather, NMH, as the coordinator and supplier of an [**31] essential but limited public service, stands in a vertical relationship to both the Burns Clinic and the independent physicians in Petoskey. NMH not only may, but also is obliged, to staff its limited facilities in the manner which best serves the public interest. The evidence is overwhelming that it has done just that. There is nothing which would permit a jury to infer that the NMH Board adopted the exclusive contract concept to force appellants out of any market.

The "non-competitive" nature of emergency room services also supports the legitimacy of exclusive contracts for their provision under the antitrust laws. Patients may conceivably choose between two competing hospitals in seeking emergency services, depending upon the proximity of the hospitals and the nature of their injuries. The patient necessarily has only limited choices as to how that service is to be provided, however, once a certain hospital has been selected. Presumably the fees [*954] charged by the hospital for various treatments are consistent from one emergency room physician to the next and the choice of treatment a matter left to the medical judgment of the emergency room doctor and hospital policies. [**32] In essence it makes virtually no competitive difference to the consuming public in terms of acute care service whether the emergency room is run by full-time specialists or part-time physicians supplementing their regular practices.

To the extent that exclusive contracts for emergency room services may adversely affect the practice of medicine by reducing the number of new patient referrals, that effect is ancillary and uniform among all competing physicians on the NMH staff. The system of referrals at the NMH emergency room is, without dispute, a fair means of distributing such new patients among the various physicians on the NMH staff including the appellants. Nor can the appellants legitimately complain that NMH has collusively or unfairly awarded its exclusive emergency room contract to the Burns Clinic. Appellants, by their own admission, failed to submit bids for the emergency room contract and were unwilling to staff the service on the required full-time basis.

Appellants' Section 2 Claims:

The appellants' various assertions of antitrust liability include ill-defined claims of monopolization, attempted monopolization and a conspiracy to monopolize in violation [**33] of section 2 of the Sherman Act.²⁵ [**34] The claim of a conspiracy to monopolize fails for the same reason as did the appellants' section 1 claims; there has been no factual basis presented upon which to reasonably infer the existence of a conspiracy in view of the legitimate explanations for defendant's conduct. The appellants' remaining section 2 claims, however, may be established solely by unilateral actions of the defendants. We agree with the District Court that these remaining section 2 claims are somewhat speculative. However, because the court failed to fully develop the initial factual issues concerning relevant product and geographic markets, summary disposition of appellants' monopolization and attempted monopolization was premature. We therefore, remand the section 2 claim against the Burns Clinic to the District Court for further development.²⁶

²⁵ 15 U.S.C. § 2 provides: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

²⁶ The District Court may, of course, still dispose of these claims by summary judgment if after development of the necessary facts it determines that no genuine issues of material fact remain for trial.

HN7 To establish the offense of monopolization a plaintiff must show that a defendant either unfairly attained or maintained monopoly power. [United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#). Monopoly power consists of "the power to control prices or exclude competition." [Id. at 571](#).

HN8 An attempted monopolization occurs when a competitor, with a "dangerous probability of success," engages in anti-competitive practices the specific design of which are, to build a monopoly or exclude or destroy competition. See [Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 627, 73 S. Ct. 872, 97 L. Ed. 1277 \(1952\)](#); [Swift & Co. v. United States, 196 U.S. 375, 396, 25 S. Ct. 276, 49 L. Ed. 518 \(1905\)](#); E. Kintner, [Federal Antitrust Law](#), Vol. II, § 13.1, p. 406 (1980) (citing cases).

HN9 In order to succeed on either a monopolization or **[**35]** attempt to monopolize claim plaintiffs must establish the relevant product and geographic markets in which they compete with the alleged monopolizers. See, e.g., [United States v. Grinnell Corp., 384 U.S. 563, 571-73, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#); [Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 \(1965\)](#); [United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 395-99, 396 n.23, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#); [Times-Picayune, 345 U.S. at 611-12 \(1953\)](#).

In the present case the District Court granted summary judgment on appellants' [section 2](#) claims because it found that neither defendant enjoyed monopoly power in a market in which appellants compete.

As to NMH we agree. It is beyond question that NMH does not compete in any fashion with the appellants. Indeed, the appellants have not so alleged.²⁷ Accordingly, NMH must on remand be dismissed as a defendant to this lawsuit.

[36]** There is, however, no evidence provided by the present record to contradict the appellants' allegations that competition exists between appellants and the Burns Clinic for referral patients from the NMH emergency room. It is true, as the District Court points out, that Burns Clinic provides specialized secondary care medicine almost exclusively. The appellants, on the other hand, are all, except one, family practitioners whose services center on the delivery of primary care. However, there may exist, as the appellants allege,²⁸ an area of overlap at which these two broad classifications of medicine compete. Appellants, for example, have a wide-range of privileges at NMH for treating medical problems that might also be treated by a Burns Clinic specialist.

[37]** If the evidence shows that this area of overlap properly constitutes a relevant discernible market,²⁹ **[**38]** then a summary disposition of the appellants' monopolization and attempted monopolization claims was

²⁷ NMH provided the District Court with an affidavit disclaiming that any point of competition existed between it and the appellants -- all of whom were members of the NMH medical staff. The appellants have provided no contrary evidence.

²⁸ The appellants have admittedly not cogently defined a relevant product market. In their initial complaint appellants alleged a conspiracy designed to eliminate them from the practice of "medicine." In oral arguments before the District Court appellants narrowed their concept of the market to that of "primary care." On appeal the appellants have focused their arguments on "acute medical care." Acute medical care, if a market, must include referrals from the emergency room for follow-up treatment in order to support the appellants' claims. We assume the appellants intended this version of acute care. Appellants have offered no evidence supporting their shifting definitions of the product market. Such a failure is typically fatal to a plaintiff's [section 2](#) claims. See, e.g., [Morton Bldgs. of Neb. v. Morton Bldgs., Inc., 531 F.2d 910, 918 \(8th Cir. 1976\)](#). The defendants however, have not presented any probative evidence to contradict the appellants' various asserted markets. For this reason in reviewing the grant of summary judgment we will assume that product market alleged which would prove most supportive of the appellants' respective claims.

²⁹ This area of overlap, if it exists, might conceivably be as narrow as "acute care referrals" or "acute care referrals for follow-up primary care." See, e.g., [E.I. duPont de Nemours & Co., 351 U.S. at 395-96](#); [Byars v. Bluff City News, 609 F.2d at 852-53](#). See also [Borden, Inc. v. FTC, 674 F.2d 498, 508-09 \(6th Cir. 1982\)](#) (cert. granted, [461 U.S. 940, 103 S. Ct. 2115, 77 L. Ed. 2d 1298 \(1983\)](#)) (discussing submarket analysis). We intimate no view on whether such a market in fact exists as distinct from the broader classification of primary care and specialized secondary care. It is an issue which must be considered first by the

inappropriate. The Burns Clinic has an obvious, but legitimately obtained monopoly in Petoskey³⁰ over the delivery of acute care medicine to the extent it is delivered through an emergency room.³¹ If this is a submarket and if the Burns Clinic has utilized this monopoly power unfairly to either exclude competition for emergency room [*956] referrals or in an attempt to gain monopoly power in primary care³² or the "overlap" market alleged to exist by the appellants, liability under section 2 might be established. The District Court must, therefore, fully consider the issue of relevant market prior to final disposition of appellants' section 2 claims.³³

Economic Analysis of Antitrust Claims Against the Professions

The appellants also argue that the District Court erred by failing to premise its decision on economic [**39] analysis. While the appellants' argument accurately states the law, the appellants mischaracterize the District Court's opinion. The court premised its judgment on appellants section 1 claims primarily upon the appellants' failure to provide any factual basis upon which to reasonably infer the prerequisite concerted action. The court also emphasized that the defendants had offered substantial medical justifications to contradict any potential inferences of either concerted action or an intent to restrain trade. In this the District Court was perfectly correct. HN10[] In the absence of legitimate explanation for conduct a fact finder may be warranted in drawing an inference that the anti-competitive conduct resulted from concerted activity and an improper motive.³⁴ However, such an inference is not permissible when there is persuasive evidence of legitimate purposes or other explanation which negates that inference. See, e.g., Times-Picayune, 345 U.S. at 627; Davis-Watkins Co., 686 F.2d at 1199. For this purpose the medical justification is highly relevant. To the extent that the District Court's opinion may be read to imply that economic analysis of an antitrust claim is [**40] unnecessary once a defendant in a learned profession proffers justifications it must be rejected. Such a proposition would be contrary to basic anti-trust principles, see, e.g., National Society of Professional Engineers, 435 U.S. at 688, 696 n.22; Virginia Academy, 624 F.2d at 485-86, and plays no part in our disposition of this case.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings in accordance with this opinion.

End of Document

District Court, however, prior to final disposition of the appellants' section 2 claims. Similarly, the District Court must consider the relevant geographic dimensions of this market in evaluating these claims.

³⁰ The record again does not reveal whether Petoskey is the relevant geographic market for acute care medicine assuming that acute care is a discernible product market. The Burns Clinic may, of course, present contrary evidence to the District Court.

³¹ The clinic's monopoly is one created by a contract held lawful in this opinion. See **supra, at 954-956**. It is not, of course, a necessarily permanent one in that NMH controls its existence through competitive bidding.

³² The Burns Clinic apparently maintains, contrary to the District Court's assertions, primary care services in direct competition with the appellants. This fact must also be evaluated by the District Court on remand.

³³ Since NMH's pediatrician role was presumably endorsed and adopted by the hospital and there is no evidence of actual Burns Clinic input much less responsibility in its adoption, it should play no part in the decision on remand.

³⁴ This is equally true in the context of section 2 monopolization and attempted monopolization claims. See, e.g., Times-Picayune, 345 U.S. at 627. In the present case, however, it is difficult to perceive what justification there could be for totally excluding the appellants -- all qualified by hospital rules -- from receiving their fair share of emergency room referrals. This matter is, of course, left for development by the District Court.



M & H Tire Co. v. Hoosier Racing Tire Corp.

United States District Court for the District of Massachusetts

March 29, 1983

Civil Action No. 82-0697-C

Reporter

560 F. Supp. 591 *; 1983 U.S. Dist. LEXIS 18162 **; 1983-1 Trade Cas. (CCH) P65,311

M & H TIRE COMPANY, INC., Plaintiff, v. HOOSIER RACING TIRE CORPORATION, ET AL., Defendants

Core Terms

tire, tracks, racing, season, promoters, track-tire, sports, modified, drivers, tire company, testing, rule of reason, manufacturers, regulation, Sherman Act, group boycott, sanctioning, conspiracy, designated, automobile racing, anti trust law, brand, rules committee, competitors, cases, anticompetitive, participated, single-brand, injunction, purposes

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

The Sherman Act, [15 U.S.C.S. § 1](#), requires that there be concerted action among businessmen from which the court or jury can reasonably infer that the participants had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

HN3[] Antitrust & Trade Law, Sherman Act

560 F. Supp. 591, *591A 1983 U.S. Dist. LEXIS 18162, **18162

Proof of a combination or conspiracy under the Sherman Act, [15 U.S.C.S. § 1](#), does not require the existence of an express agreement. It is enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.

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

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

[**HN4**](#) **Per Se Rule & Rule of Reason, Sherman Act**

While the language of the Sherman Act, [15 U.S.C.S. § 1](#), is broad enough to render illegal many commercial understandings, the "rule of reason" is the prevailing mode of analysis. Under this rule, the fact finder balances all the circumstances of a case in deciding whether a restrictive practice is illegal under the Act as an unreasonable restraint on competition. The analysis required by the rule of reason, however, is laborious, and as the courts gained experience with antitrust problems they identified certain types of agreements that were so consistently unreasonable that they could be deemed illegal per se, without exhaustive inquiry into their purported justifications.

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

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

Among the practices that have been deemed so pernicious as to be unreasonable per se are group boycotts. The classic group boycott, deserving of per se condemnation, is an agreement designed to eliminate competition by a concerted refusal to purchase from or sell to the business rivals of one or more of the conspirators.

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

[**HN6**](#) **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The traditional definition of group boycott is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. In other words, the agreement is between business competitors in the traditional sense.

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 > Per Se Rule & Rule of Reason > General Overview

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

[**HN7**](#) Price Fixing & Restraints of Trade, Vertical Restraints

A conspiracy between a store and the manufacturers and distributors of a product may constitute a per se violation of the Sherman Act, [15 U.S.C.S. § 1](#), even though the conspiracy involves only a single retailer and is directed at only a single competitor.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

[**HN8**](#) Price Fixing & Restraints of Trade, Vertical Restraints

Where it is shown that a vertically imposed restraint is intended to suppress horizontal competition, the agreement is the equivalent of a horizontal restraint of trade.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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

[**HN9**](#) Practices Governed by Per Se Rule, Boycotts

Where the evidence shows that a group of purchasers combined with promoters and a company to fix the maximum price of a product by eliminating competition from other sellers, this combination is in fact within the undeniably anti-competitive per se boycott paradigm.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

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

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Business & Corporate Law > Cooperatives > General Overview

[**HN10**](#) Sports, Baseball

Sports other than baseball are subject to the antitrust laws, and among the antitrust restrictions that apply to sports are prohibitions against group boycotts. However, in professional sports, unlike many other forms of business competition, a few rules are essential to survival, and courts have been reluctant automatically to subject the cooperative activities of sports organizations to application of the group boycott per se rule. The legitimate goal of

such sports regulation is the preservation of participant parity and competitive equivalency, and some courts have chosen a more extended analysis of the administrative regulations of sports organizations that focuses on the purpose of the regulation and the procedures followed in adopting it. Sports organizations, however, do not have unlimited discretion in adopting rules and regulations. When the purpose of a sports regulation is to eliminate business competition, the concerted action is not eligible for rule of reason analysis and must be subjected to per se treatment.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

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

HN11[**Regulated Industries, Sports**

Sports regulations must satisfy basic tenets of procedural fairness. According to the following three-pronged test, a sports regulation can escape per se treatment only if: (1) there is a legislative mandate for self-regulation, or otherwise, and; (2) the collective action is intended to achieve an objective consistent with the policy justifying self-regulation, is reasonably related to that objective, and is no more extensive than necessary, and; (3) the governing organization provides procedural safeguards to protect against arbitrary restraints and to provide a basis for judicial review.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

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

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

HN12[**Regulated Industries, Higher Education & Professional Associations**

Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. In making this evaluation, the court analyzes the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the anticompetitive evils of the challenged practice must be balanced carefully against its pro-competitive virtues to ascertain whether the former outweighs the latter. A restraint is unreasonable if it has the net effect of substantially impeding competition. 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.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

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

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

[**HN13**](#) [blue icon] Regulated Industries, Sports

A sports regulation that seeks an improper objective, or is overly broad, or was not adopted pursuant to fair procedures, is condemned as a per se violation of the antitrust laws without further inquiry into its ultimate economic consequences.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN14**](#) [blue icon] Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. § 1 et seq.](#), is aimed primarily at combinations having commercial objectives and should be applied sparingly to organizations that normally have other objectives such as labor unions, political lobbying groups, or sports associations.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN15**](#) [blue icon] Regulated Industries, Higher Education & Professional Associations

Analysis under the rule of reason starts from the premise that the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The purpose of a rule of reason analysis is to form a judgment about the competitive significance of the restraint. And practices which are unreasonably restrictive of competitive conditions must be condemned, even though they have beneficial effects in other areas.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN16**](#) [blue icon] Antitrust & Trade Law, Sherman Act

The law protects the impersonal forces of competition, rather than consumer preference, on the basis that economic forces will ultimately enhance consumer welfare.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

[**HN17**](#) [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A plaintiff must, as part of his *prima facie* case under the rule of reason, provide proof of a well-defined relevant market upon which the challenged anticompetitive actions would have had a substantial impact.

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

[**HN18**](#) [] **Private Actions, Remedies**

Once the fact of injury to the plaintiff has been established, the amount of damages may be fixed by the trier of fact according to a just and reasonable estimate of the damages based on relevant data, including both probable and inferential, as well as direct and positive proof.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

[**HN19**](#) [] **Remedies, Damages**

Under the Clayton Act, a plaintiff is entitled to an injunction to prevent threatened loss or damage by a violation of the antitrust laws. [15 U.S.C.S. § 26 \(1982\)](#). Injunctive relief is appropriate, even though the illegal practice has been seasonally discontinued, unless it is clear that the practice will not recur.

Counsel: [**1] Gael Mahony, Hill & Barlow, Boston, Massachusetts, Thomas J. Dacey, esq., for Plaintiff.

Hoosier Racing Tire & B. Summers, John Hally, Esq. & Wm. Baker, esq., Nutter, McClellan, & Fish, Boston, Massachusetts, For All Defendants.

Judges: Caffrey, Ch. J.

Opinion by: CAFFREY

Opinion

[*594] CAFFREY, Ch. J.

Plaintiff brings this action under the antitrust laws of the United States seeking permanent injunctive relief and treble damages pursuant to Sections 4 and 16 of the Clayton Act, [15 U.S.C. §§ 15](#) and [26](#), for defendants' alleged violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#). The Court has jurisdiction of the action and the parties under [15 U.S.C. §§ 15, 22](#), and [26](#).

I. *Proceedings to Date*

Plaintiff commenced this action on March 11, 1982, alleging that the so-called "single tire rule" (described below), as adopted under the circumstances of this case, violated [Section 1](#) of the Sherman Act in that it constituted an illegal group boycott, a tying arrangement, and a tortious interference with plaintiff's advantageous business relations.

[*595] Plaintiff sought a preliminary injunction against the use of the tire rules at the defendant tracks for the 1982 racing season. [*2] After an evidentiary hearing upon the motion on March 22, 1982, this Court denied plaintiff's motion for preliminary injunction in an opinion dated March 31, 1982.

On April 15, 1982 defendant filed a counterclaim for a declaratory judgment as to the validity under the antitrust laws of the single tire rule, as adopted in this case, and if adopted in the future.

The case was tried to this Court from December 14 through 20, 1982. At the close of its case plaintiff waived Counts 3 through 7, leaving only claims that the adoption of the single tire rule was a concerted refusal to deal, and as such was unlawful under the Sherman Act, Section 1 either *per se* (Count 1), or under the rule of reason (Count 2). Hoosier waived its counterclaim.

This opinion will constitute the Court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

II. Parties

A. Plaintiff

M & H Tire Co., Inc. (M&H) is a Massachusetts Corporation with its principal place of business in Watertown, Massachusetts. M&H designs, produces, and sells racing tires for use in organized motorcar-racing competition. Marvin Rifchin is the President of M&H.

B. Defendants

1. Hoosier [*3] Racing Tire Corp. (Hoosier) is an Indiana Corporation with its principal place of business in Lakeville, Indiana. Hoosier also designs, produces, manufactures, and sells racing tires and does business in direct competition with M&H. Robert Newton is the President of Hoosier.
 2. Bobby Summers is the New England distributor for Hoosier and resides in Connecticut.
 3. New England Drivers and Owners Club (NEDOC), organized in 1970, is an unincorporated association existing under the laws of Massachusetts, with an address in Franklin, Massachusetts. NEDOC is an association many of whose members are racing-car owners or drivers who compete in organized racing events in the Northeastern United States. NEDOC is composed of many but not all, of the racing car drivers and owners who compete in the modified class at Stafford Motor Speedway, Seekonk Speedway, Thompson Speedway, and Riverside Speedway. Richard Armstrong is the President of NEDOC.
 4. Stafford Springs Enterprises, Inc. is a Connecticut corporation with its principal place of business in New Britain, Connecticut. Stafford Springs Enterprises, Inc. owns and manages Stafford Motor Speedway (Stafford), in Stafford Springs, [*4] Connecticut, and promotes organized automobile racing events at that facility. Edwin Yerrington is the promoter of that track.
 5. Bristol County Stadium, Inc. (Bristol County) is a Massachusetts corporation with its principal place of business in Seekonk, Massachusetts. Bristol County leases the Seekonk Speedway in Seekonk, Massachusetts. Bristol County is owned and managed by D. Anthony Venditti and his family, and has its principal place of business in Venditti's home. Through ARC (below) and Venditti, Bristol County is responsible for promoting auto racing and other events at the track.
- Both Stafford and Seekonk Speedway (Seekonk) feature "short oval" or "circle" track automobile racing in various classes, including the modified class. The bulk of the participants in such racing are amateur drivers who race several times weekly during the season.
6. Auto Racing Club (ARC) is a non-profit Massachusetts corporation. ARC was organized by Venditti and also has its headquarters in Venditti's home. ARC promotes the automobile racing conducted at Seekonk, segregating divisions, supplying insurance, handicapping racers, conducting the races, paying referees and officials, disbursing [*5] prize money from funds it received from Bristol County and promulgating rules (including the subject single-tire rule).

[*596] III. General Background

The present controversy grew out of a decision involving Hoosier, its dealer Summers, NEDOC, and the promoters at four major automobile race tracks, to adopt a rule requiring drivers to use a Hoosier "Budget" tire during the 1982 automobile racing season. Under this commonly called "track-tire" rule, only one brand of tire can be used at a particular track during a racing season.

A. The Racing Tire Market

It is not disputed that the production and sale of racing tires constitutes a distinct market in interstate commerce. Racing tires are designed for use on high performance vehicles in organized competition rather than for street or highway use. They differ from street tires, in size, construction, and materials and they require specialized equipment and technical knowledge for their manufacture.

During 1982, the active manufacturers of racing tires of the sort involved in this case were M&H, McCreary Tire and Rubber Co. (McCreary), Goodyear, and Hoosier, Firestone had largely dropped out of this market by [*6] 1982.

Traditionally, racing tires were sold by independent dealers to racing car owners and drivers. Tires were transported by dealers to the race tracks and sold directly to drivers and owners from the dealers' trucks on the day of the race. Under the open competition system which traditionally has prevailed in the racing tire market, the sales of a particular brand of tire were directly related to the success which the tire had enjoyed at recent races. As Hoosier President Robert Newton testified, sales were based on last night's or last week's results, the reasonable inference being, that upon learning that winning cars have raced with a particular tire, drivers and owners would change brands to purchase the "winning circle" brand for their own cars. Consequently, tire companies competed vigorously throughout the racing season by making technical adjustments and introducing new tires in order to improve their sales.

B. Racing in the Northeast

There are numerous distinct classes of racing cars, each with its own set of rules, and its own special tire needs. The most popular and prestigious class of racing in the Northeast is the modified class, which attracts the fastest [*7] cars, draws the most spectators, and pays the largest purses in the region. Technical standards for modified race cars are promulgated by the National Association of Stock Car Auto Racing, Inc. (NASCAR). NASCAR, which is not a party in this lawsuit, sanctions and administers races at those tracks that adhere to its rules and conducts a "point fund" for drivers who compile the best record in NASCAR-sanctioned events. Modified racing is conducted at Stafford, Seekonk, Riverside Park Speedway (Riverside), and Thompson Speedway (Thompson). Stafford, Thompson, and Riverside are sanctioned by NASCAR. In order to allow drivers the opportunity to compete for NASCAR points, these three tracks schedule their regular events on different days of the week so that drivers can race at each track in the course of a weekend. NASCAR does not sanction races at Seekonk, but Seekonk follows the NASCAR rule book for its modified class.

NASCAR is not a recognized sanctioning organization. The NASCAR rules regulate only sanctioned events and thus do not embody a thoroughly regulatory scheme over the tracks as a whole, or even over all modified races at the tracks. The NASCAR rules leave the tracks [*8] free to promulgate regulations regarding the equipment used by competitors. It is to be noted that NASCAR regulations do not regulate the compounds or the brands of tires to be used at NASCAR-sanctioned events.

NEDOC, as stated above, is composed of drivers and owners who race in the modified divisions at the four above-stated tracks. As is the case with NASCAR, NEDOC is not a recognized sanctioning organization. NEDOC's principal function has been to negotiate with promoters on behalf of drivers and owners. The organization [*597] has also been a source of proposals for rules to be adopted by the tracks. Among the rules proposed were those regulating equipment such as gear and carburetor rules, as well as bans on the use of fuel injection and aluminum block engines. Rules such as these regulating equipment had the avowed purpose of enhancing participant equality.

C. The Cost of Automobile Racing

Modified racing cars originally resembled "stock cars" sold for street use and ran on tires similar to street tires. During the 1960's, however, competitors began to refurbish their cars with special racing components that increased engine horsepower and reduced car weight. **[**9]** In response, tire companies began to produce wider, softer tires capable of handling greater horsepower and speed. Since 1975, the costs of modified racing have increased substantially due to more expensive engines, chassis, frames, fuel, and tires. However, according to Arute, owner of Stafford, the prize money has remained relatively stable.

Arute also testified regarding the evolution of the so-called tire problem. Commencing at a time when M&H was the only manufacturer involved in furnishing tires specially for modified racing, and continuing through a period when the several manufacturers competed to provide even faster and softer compounds creating more demands for tires and tire changes from race to race, the sport of automobile racing had allegedly become a tire race, not a driver's race. Thus, in the early years of modified racing, a relatively small recapped tire was being used by all drivers at a more reasonable cost; but as tire technology evolved and tire sizes increased to the 15-inch tread of the 1981 modified season, tires became increasingly softer and, correspondingly, faster, less durable, and more expensive. The cost of a single 15-inch modified tire, as **[**10]** sold by Goodyear in the 1981 racing season, was \$140 and the price of the comparable tire at the beginning of the 1982 season was \$170.

In an effort to control costs, promoters in the Northeast advocated track-tire rules under which all competitors at a particular track are required to race with a single brand of tire for an entire season. As early as 1972, Seekonk adopted a track-tire rule for the modified class. Three years later, Arute organized a meeting in New York City among track promoters and tire company representatives to discuss tire rules. In 1978, the Northeast Promoters Association, organized by Stafford promoter Edwin Yerrington, proposed that twenty tracks in the Northeast implement a one-brand, one-tire rule. Initially and for various reasons, drivers and owners opposed track-tire rules. The track-tire rule adopted at Seekonk in 1972 led to a driver's strike allegedly due to manufacturer failure to supply enough of the designated tires. The 1978 proposal for a twenty-track tire rule was rejected by NEDOC members, in part because they believed that the single brand rule would violate federal antitrust laws.

IV. Facts

In 1980, Stafford's Yerrington **[**11]** renewed his proposal for a track-tire rule. At a NEDOC meeting held on August 5, 1980, Yerrington informed the members present that Stafford planned to impose its own track-tire rule for the 1981 season. The promoters at Seekonk, Thompson, and Riverside later made similar announcements. Following Yerrington's announcement, NEDOC selected a rules committee to investigate the adoption of a single-brand tire rule.

At the annual meeting of NEDOC held on January 6, 1981, Yerrington informed the membership that he had conducted some tire tests at Stafford. He further suggested that NEDOC itself adopt a single-brand rule. The members voted to study the feasibility of a tire rule and contact tire companies regarding their ability to supply the required tires. The day after NEDOC's annual meeting, Yerrington contacted Hoosier and McCreary to inform them of NEDOC's interest in a single-brand tire rule and to request those companies to submit proposals for such a rule. In response to Yerrington's inquiry and a subsequent request by NEDOC president Armstrong, **[*598]** Newton, president of Hoosier, replied that Hoosier was ready to recommend a suitable tire. McCreary also replied that **[**12]** it was willing to supply a tire for track-tire rule purposes.

At a March 3, 1981 meeting, NEDOC members voted to conduct tests to select a single-brand, low cost tire for use in modified racing. After the March 3 vote, NEDOC again contacted the tire companies, this time to request tires for testing. The date set for testing was May 1, 1981. In response, M&H questioned the legality of the rule and the fairness of the proposed test in a memorandum to NEDOC dated April 19, 1981.

M&H agreed to submit tires for testing, but otherwise refused to participate in the NEDOC program until the issues of legality and fairness were addressed. NEDOC did not attempt to answer M&H upon these issues.

The May 1, 1981 test was cancelled because only two volunteer drivers and two tire companies appeared. As a result, NEDOC did not adopt a tire rule for the 1981 season.

NEDOC again tried to implement a tire rule in the fall of 1981. On October 1, 1981, the NEDOC Rules Committee met with representatives of Hoosier, M&H, Goodyear, and McCreary to discuss a tire rule for the 1982 racing season. Armstrong informed each tire company representative that the company whose tire was chosen would be required [**13] to supply all the tires needed at the four tracks where NEDOC members raced at a guaranteed price for the entire 1982 season. Armstrong also told the tire company representatives that NEDOC required a tire in the \$90-\$100 range, about \$40-\$50 less than the prevailing price for modified tires during the 1981 season.

NEDOC conducted two tire tests at Stafford in the fall of 1981: the first in September or October; and the second on November 7. That organization did not adopt any written procedures for conducting the tire tests prior to the beginning of testing. According to the testimony, NEDOC gave relatively short notice of the first test, so that M&H had only a four-year old tire available and Goodyear was unable to produce a tire in the required size in time for the first test. Armstrong did, nevertheless, use the available tires from these two companies for testing purposes.

The first test was held at Stafford and took about two to two and one-half hours. Three cars participated and four tire companies: Hoosier, M&H, Goodyear, and McCreary. Notes were taken regarding the testing by Richard Armstrong's wife as well as by Robert Garbarino, Chairman of the Rules Committee.

[**14] On the basis of the first day of testing, it was Armstrong's opinion that at least two of the tires might meet NEDOC's requirements: The Hoosier Budget Tire and the M&H 91.

The second day of testing took place on November 7, 1981 and took one and one-half to two hours. Two different cars participated in the second test and were driven by two different drivers. The same four tire companies took part although not necessarily using the same tires that had been used in the first test. Both M&H and Goodyear furnished new tires for the second test. NEDOC did not inform Goodyear or M&H that the new tires had to be tested twice for "repeatability" in order to be considered for the NEDOC rule. According to Armstrong's testimony he believed the tire companies knew or should have known this fact without being told. In any event, neither the M&H 91 nor M&H's new tire were tested a second time.

After the second test, NEDOC solicited and received bids from the four tire companies. The Rules Committee then selected the Hoosier 13-inch Budget Tire for use in modified racing during the 1982 season.

On November 23, 1981, the NEDOC Rules Committee met with Stafford promoter Yerrington, the [**15] original proponent of the track-tire rule. Yerrington, however, was reluctant to adopt the proposed rule unless the promoters at the other area tracks also agreed to implement the rule. At Yerrington's request, the Rules Committee arranged [*599] a meeting at the Howard Johnson's Motor Lodge in Warwick, Rhode Island on December 17, 1981 attended by Stafford promoter Yerrington, Seekonk promoter D. Anthony Venditti, and Irving Potter, president of NEPRA, the promoter at Thompson and Riverside. At the meeting, the promoters and NEDOC officials unanimously agreed to require all cars in the modified division to use the Hoosier 13" Budget tire for the 1982 season.

In order to be assured that Hoosier had the capacity to supply the required number of tires, members of the Rules Committee, NEDOC President Armstrong, and Seekonk promoter Venditti visited the Hoosier plant in Lakeville, Indiana on January 15, 1982.

At NEDOC's 1982 Annual Meeting held on January 19, 1982, the Rules Committee reported on the selection of the Hoosier Tire and the visit to the Hoosier plant. On January 28, 1982, NEPRA President Potter withdrew from the tire rule agreement because of the advice of counsel [**16] to the effect that the tire rule could cause antitrust problems. On February 18, 1982, NEDOC held a Special Car Owners Meeting to discuss rule changes and immediately after that, on March 11, 1982, M&H filed the present suit. At the start of the 1982 season, both Seekonk and Stafford enforced the Hoosier tire rule. Problems with the Hoosier tire began to surface, soon after the season began. Despite attempted modifications, the problems persisted and consequently, Stafford abandoned the tire rule on August 6, 1982. Seekonk continued to enforce it through the 1982 season.

V. Applicable Law

The issue in this case is whether the Hoosier track-tire rule proposed by NEDOC and enforced at Stafford and Seekonk during the 1982 season constituted a group boycott of non-tire rule tires, having the express purpose as well as the effect of restraining competition in the manufacture and distribution of modified class racing tires in violation of [Section 1](#) of the Sherman Act. [Section 1](#) of the Sherman Act provides, in relevant part, that

HN1[] Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states, . . . is declared to be illegal [**17] . . .

[15 U.S.C. § 1.](#)

This case requires the Court to consider: 1) whether the legality of the track-tire rule is governed by a *per se* rule or by the rule of reason, and; 2) whether the track-tire rule, if tested by the rule of reason, is a reasonable restraint. On the basis of each test considered separately, I rule the tire rule violates the Sherman Act.

A. Per Se Illegality

1. Conspiracy

HN2[] [Section 1](#) of the Sherman Act requires that there be concerted action among businessmen from which the Court or jury can reasonably infer that the participants had a conscious commitment to a common scheme designed to achieve an unlawful objective. [Sweeney & Sons, Inc. v. Texaco](#), 637 F.2d 105, 111 (3d Cir. 1980).

I find that on December 17, 1981, there was a meeting at the Howard Johnson Motor Lodge in Warwick, Rhode Island, attended by members of the NEDOC Rules Committee and by the promoters at Stafford, Seekonk, Thompson, and Riverside. At that meeting, NEDOC President Richard Armstrong proposed that the tracks adopt a Hoosier tire rule. I also find that the promoters unanimously agreed with Armstrong's recommendation and that the Hoosier tire rule was thereafter [**18] enforced at Stafford and Seekonk. NEPRA, the promoter at Thompson and Riverside, withdrew from the Hoosier tire rule only after its attorney advised that participation in the tire rule could cause legal problems.

Despite this uncontested evidence of coordinated behavior, the defendants maintain that the adoption of the Hoosier tire rule was a separate and unilateral decision on the part of each track. I find no such separate or unilateral decision. Defendants' position ignores both the law of illegal combinations and the evidence at trial.

[*600] **HN3**[] Proof of a combination or conspiracy under [Section 1](#) of the Sherman Act does not require the existence of an express agreement. In the leading case of [Interstate Circuit Inc. v. United States](#), 306 U.S. 208, 226, 83 L. Ed. 610, 59 S. Ct. 467 (1939) the Supreme Court ruled that it was "enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." [United States v. Paramount Pictures, Inc.](#), 334 U.S. 131, 142, 92 L. Ed. 1260, 68 S. Ct. 915 (1948); [United States v. Parke, Davis & Co.](#), 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960); [**19] [United States v. Container Corp. of America](#), 393 U.S. 333, 337, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969); [Sweeney & Sons, Inc. v. Texaco](#), *supra*.

The evidence at trial proved that concerted action was contemplated, invited, and adhered to. New England promoters had been attempting to institute track-tire rules since 1972, when Venditti introduced such a rule at Seekonk. According to Joseph Jacobs, Manager of Racing for McCreary Tire and the self-proclaimed inventor of track-tire rules, track rules permit promoters to offer competitors some relief from the escalating costs of racing without increasing prize money.

However, I find that to introduce a track-tire rule successfully, the promoter must have the acquiescence of the drivers who regularly race at his track. Drivers have the power to undermine unwanted rules by staying home, as they did in 1972, when Venditti introduced a tire rule at Seekonk. Moreover, when a promoter adopts a track-tire rule at a NASCAR-sanctioned track, he risks the wrath of drivers who travel from track to track in pursuit of point

money, and who resent having to purchase special equipment to race one track. Thus, the promoters have a strong incentive [**20] to coordinate their tire rules with each other and with car owners.

In this case, I find that the invitation to concerted activity was first extended by Yerrington on August 5, 1980, when he informed a meeting of NEDOC car owners that he planned to implement a track-tire rule at Stafford for the 1981 season. Yerrington renewed this invitation in January 1981, when he told the Annual Meeting of NEDOC that NEDOC should adopt its own tire rule. Later, the promoters at Seekonk, Thompson, and Riverside informed NEDOC that they too would adopt track-tire rules unless NEDOC acted.

I find that the NEDOC membership, concerned that the tracks would adopt inconsistent rules, formed a committee to investigate available tires. The Committee met with representatives of major tire companies, conducted two tests at Stafford, solicited bids from the tire companies, and decided to recommend that the tracks adopt the Hoosier 13-inch Budget tire for the 1982 season.

As soon as the NEDOC committee selected the Hoosier Budget tire, it met with Yerrington, the original proponent of the rule. Yerrington was reluctant, however, to commit Stafford unless promoters at the other three area tracks also [**21] agreed. NEDOC then summoned the promoters to the December 17 meeting at the Howard Johnson Motor Lodge, at which I find that it was unanimously agreed by the four race facilities promoters to adopt the NEDOC proposed Hoosier 13-inch Budget tire for the 1982 racing season.

I rule that from this evidence it is clear that, for purposes of the Sherman Act, NEDOC and the tracks contemplated and participated in concerted action to adopt the Hoosier tire rule.

I further find that Hoosier participated in the combination between NEDOC and the track promoters. Among the actions that I find were taken by Hoosier to insure that its Budget tire would be designated by NEDOC are the following. Hoosier offered to participate in the tire test originally scheduled for May 1, 1981. Hoosier representative Bobby Summers attended the meeting between NEDOC and the tire companies on October, 1981. Hoosier submitted tires for testing at the two tire tests held in the fall of 1981. After the tire tests, Hoosier submitted a bid. Hoosier agreed to hold the [*601] retail price at a specified price for the entire 1982 season and to supply all the tires needed at the four New England tracks where NEDOC [**22] members raced. Newton invited NEDOC and the track promoters to visit Hoosier's plant in Lakeville, Indiana. After the racing season began Hoosier, at the request of NEDOC, made technical changes in its track tire. From this evidence, the Court finds that Hoosier as well as NEDOC and the tracks participated in a combination within the meaning of Section 1.

Contrary to defendant's assertions, the conspiracy was not terminated as of February 18, 1982, when Seekonk and Stafford became aware of NEPRA's withdrawal from the track-tire rule agreement. The conspiracy existed as of December 17, 1981 and continued until the end of the 1982 racing season at Seekonk, the last remaining track operating, pursuant to the conspiracy. The withdrawal of various conspirators along the way did not affect the existence of the conspiracy itself which continued until its objectives were fulfilled. Accordingly, I rule that plaintiff has proved that NEDOC, the tracks and Hoosier shared a mutual commitment to an anticompetitive course when they contemplated and participated in a concerted action to adopt the Hoosier tire rule to the exclusion of all competing tires.

2. Group Boycott

HN4 [↑] While the language [**23] of Section 1 is broad enough to render illegal many commercial understandings, the Supreme Court in Standard Oil of New Jersey v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911), established the "rule of reason" as the prevailing mode of analysis. Under this rule, the fact finder balances all the circumstances of a case in deciding whether a restrictive practice is illegal under the Act as an unreasonable restraint on competition. The analysis required by the rule of reason, however, is laborious, and as the courts gained experience with antitrust problems they identified certain types of agreements that were so consistently unreasonable that they could be deemed illegal *per se*, without exhaustive inquiry into their purported justifications. Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). **HN5** [↑] Among the practices that have been deemed so pernicious as to be unreasonable *per se* are group boycotts. United States

v. General Motors Corp., 384 U.S. 127, 145-46, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966); Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. [*241] 365 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-13, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941); See Silver v. N.Y. Stock Exchange, 373 U.S. 341, 347, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963). The classic group boycott, deserving of *per se* condemnation, is an agreement designed to eliminate competition by a concerted refusal to purchase from or sell to the business rivals of one or more of the conspirators. United States v. General Motors Corp., *supra*, at 140; Klor's Inc. v. Broadway-Hale Stores, Inc., *supra*, at 213.

The tire rule agreed upon by Hoosier, NEDOC, Stafford Springs, and Seekonk represents precisely such an agreement: a group of purchasers (the NEDOC members) combined with a group of middlemen (the track promoters) and with one supplier (Hoosier) to eliminate all competition for the sale of racing tires at the affected tracks. The adoption of the track-tire rule in effect enabled Hoosier to foreclose other racing tire manufacturers from the most popular class of racing at some of the most prestigious tracks in the Northeast.

Defendants argue [**25] correctly that the circumstances of this case do not fit the traditional parameters of horizontal group boycott activity. HN6 [↑] The traditional definition of group boycott is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. Klor's Inc. v. Broadway-Hale Stores, Inc., *supra*, at 212; Brenner v. World Boxing Council, 675 F.2d 445, 454 (2d Cir. 1982). In other words, the agreement is "between business competitors in the traditional sense." Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976). Defendants claim, in effect, that a group boycott would exist in this case only if two or more tire companies joined together to eliminate a third.

Defendants' argument overlooks however, the clear teaching of Klor's, Inc. v. Broadway-Hale Stores, Inc., *supra*, at 107. In that case, Klor's operated an appliance store next door to one of the outlets of Broadway-Hale. Klor's alleged that Broadway-Hale had conspired with major manufacturers and distributors of appliances not to sell to Klor's. The Supreme Court held that HN7 [↑] the conspiracy between Broadway-Hale [**26] and the manufacturers and distributors of appliances constituted a *per se* violation of Section 1 of the Sherman Act, even though the conspiracy involved only a single retailer and was directed at only a single competitor. The case of United States v. Ciba Geigy Corp., 508 F. Supp. 1118 (D.N.J. 1976), is also relevant on the issue whether to treat business arrangements as horizontal or vertical for purposes of group boycott analysis. In *Ciba Geigy* there were a series of supply agreements which limited the range of uses to which a purchaser was entitled to put sold material. Although the contracts were reached in a vertical, supplier-purchaser contract, the Court found that they in fact were designed to limit horizontal competition between Ciba and its vendees. The Court further held that HN8 [↑] where it is shown that a vertically imposed restraint is intended to suppress horizontal competition, the agreement is the equivalent of a horizontal restraint of trade. United States v. Ciba Geigy Corp., *supra*, at 1146.

Defendants claim that the arrangement among NEDOC, the track promoters and Hoosier is analogous to a vertical relationship, and that vertical agreements are illegal [**27] *per se* only if their purpose is price fixing. Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Companies, 682 F.2d 660, 663 (7th Cir. 1982). The combination among NEDOC, the tracks, and Hoosier bears little resemblance to the vertical relationship between manufacturer and dealer dealt within the leading case of Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52-54, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). Moreover, even if the proposed analogy to vertical relationships were apt, the combination among the defendants' would still be illegal *per se*, because the aim of the tire rule was unmistakably to fix prices.

At the meeting between NEDOC and the tire companies on October 1, 1981, NEDOC informed each of the tire companies that it expected them to guarantee a fixed price of between \$90 and \$100 for the upcoming season. To achieve this goal, it was necessary to adopt track rules designating a single brand of tire at a stated price. Only through single-brand rules could NEDOC and the tracks assure themselves that the price of racing tires would not rise over the course of a season through the introduction of new, more successful, and [**28] accordingly more expensive products.

HN9 [↑] The evidence demonstrates, therefore, that a group of purchasers combined with two track promoters and a tire company to fix the maximum price of tires by eliminating competition from other sellers. I rule that this combination is in fact "within the undeniably anti-competitive *per se* boycott paradigm." [U.S. Trotting Assoc. v. Chicago Downs Assoc. Inc., 665 F.2d 781, 790 \(7th Cir. 1981\)](#).

3. Sports Self-Regulation

Defendants argue that this case is a case of attempted sports self-regulation by a sports organization, and that the rule of reason, not the *per se* rule is uniformly applied to such cases of self-regulation.

The Court notes in the first instance that **HN10** [↑] sports other than baseball are subject to the antitrust laws, [Flood v. Kuhn, 407 U.S. 258, 276-83, 32 L. Ed. 2d 728, 92 S. Ct. 2099 \(1972\)](#), and among the antitrust restrictions that apply to sports are prohibitions [*603] against group boycotts. [Washington State Bowling Proprietors Assoc. v. Pacific Lanes Inc., 356 F.2d 371, 376 \(9th Cir. 1966\)](#); [Blalock v. Ladies Professional Golf Assoc., 359 F. Supp. 1260, 1264-68 \(N.D. Ga. 1973\)](#).

There has been judicial [**29] recognition, however, that in professional sports, unlike many other forms of business competition, "a few rules are essential to survival," [Hatley v. American Quarter Horse Assoc., 552 F.2d 646, 652 \(5th Cir. 1977\)](#), and accordingly courts have been reluctant automatically to subject the cooperative activities of sports organizations to application of the group boycott *per se* rule. [Brenner v. World Boxing Council, 675 F.2d 445, 454 \(2d Cir. 1982\)](#). These cases all recognize that the legitimate goal of such sports regulation is the preservation of participant parity and competitive equivalency,¹ and some courts have chosen a more extended analysis of the administrative regulations of sports organizations that focuses on the purpose of the regulation and the procedures followed in adopting it. See, e.g., [Brenner v. World Boxing Council, supra at 454-55](#). The cases do not, however, give sports organizations unlimited discretion in adopting rules and regulations. First, it has been recognized generally that when the purpose of a sports regulation is to eliminate business competition, the concerted action is not eligible for rule of reason analysis and must be subjected [**30] to *per se* treatment. See [U.S. Trotting Assoc. v. Chicago Downs Assoc., supra at 788-89](#); [Smith v. Pro Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173, 1177-80 \(D.C. Cir. 1978\)](#); [Blalock v. Ladies Professional Golf Assoc., supra, at 1265-68](#).

[**31] Second, recent cases have recognized that **HN11** [↑] sports regulations must satisfy basic tenets of procedural fairness. According to the three-pronged test announced in [Denver Rockets v. All-Pro Management Co., Inc., 325 F. Supp. 1049, 1064-65 \(C.D.Cal. 1971\)](#), a sports regulation can escape *per se* treatment only if: 1) there is a legislative mandate for self-regulation, or otherwise, and; 2) the collective action is intended to achieve an objective consistent with the policy justifying self-regulation, is reasonably related to that objective, and is no more extensive than necessary, and; 3) the governing organization provides procedural safeguards to protect against arbitrary restraints and to provide a basis for judicial review. Accord, [Brenner v. World Boxing Council, supra, at 454-55](#); [Gunter Harz Sports, Inc. v. United States Tennis Assoc., 511 F. Supp. 1103, 1116 \(D.Neb.\), aff'd, 665 F.2d 222 \(8th Cir. 1981\)](#); [Linseman v. World Hockey Assoc., 439 F. Supp. 1315, 1321 \(D.Conn. 1977\)](#).

The Hoosier track-tire rule does not meet these standards for several reasons. First, the objective of the rule is plainly to fix prices. NEDOC recommended the adoption of the tire [**32] rule in order to fix the price of modified racing tires in the range of \$90-\$100 for the 1982 season. Price-fixing even to achieve a legitimate goal such as competitive equivalency is not an objective of sports regulation.

¹ [Brenner v. World Boxing Council, 675 F.2d 445 \(2d Cir. 1982\)](#); [North American Soccer League v. National Football League, 670 F.2d 1249, 1258-59 \(2d Cir. 1982\)](#); [U.S. Trotting Assoc. v. Chicago Downs Assoc., Inc., 665 F.2d 781, 789-90 \(7th Cir. 1981\)](#); [Gunter Harz Sports, Inc. v. United States Tennis Assoc., 511 F. Supp. 1103, 1115-16 \(8th Cir. 1981\)](#); [Hatley v. American Quarter Horse Assoc., 552 F.2d 646, 652 \(5th Cir. 1977\)](#); [Neeld v. NHL, 594 F.2d 1297, 1298-1300 \(9th Cir. 1979\)](#); [Mackey v. NFL, 543 F.2d 606, 619 \(8th Cir. 1976\)](#), cert. denied, [434 U.S. 801, 54 L. Ed. 2d 59, 98 S. Ct. 28 \(1977\)](#); [Cooney v. American Horse Shows Assoc., 495 F. Supp. 424, 430 \(S.D.N.Y. 1980\)](#); [Denver Rockets v. All-Pro Management Inc., 325 F. Supp. 1049, 1064-65 \(C.D. Cal. 1971\)](#); [STP Corp. v. U.S. Auto Club, Inc., 286 F. Supp. 146 \(S.D. Ind. 1968\)](#).

Second, the goal of fixing the price of modified racing tires was achieved by designating one tire company as the sole supplier of tires, thereby eliminating all inter-brand competition at the affected tracks. The Court is not aware of any case that has approved the elimination of inter-brand competition as a legitimate form of sports self-regulation.

[*604] Third, the rule was not adopted by an independent sanctioning organization interested in the health of the sport as a whole. The defendants admit that neither NEDOC, NEPRA nor NASCAR (the latter two not parties to this suit) is the recognized sanctioning organization governing amateur and/or professional automobile racing in the Northeast. Defendants contend that "short oval" automobile racing lacks the formal overall regulatory scheme of such sports as football and basketball, and that the tracks themselves are the customary and primary source of the rules and regulations governing their races in [*33] the various divisions. Defendants would have the Court hold that each race track is itself a recognized sanctioning organization for purposes of antitrust analysis. That position is not supportable in law. If the Court were to hold that any sports organization lacking in overall regulatory scheme were exempt from *per se* application of the antitrust laws, it would in effect extend to such independent sports groups *carte blanche* permission to adopt any rules they chose regardless of the anticompetitive effect. The weight of the antitrust law, on the contrary, suggests that if sports associations wish to avoid strict application of the antitrust laws, they must organize and create sanctioning bodies whose responsibility it is to insure the integrity and continuity of the sport.

Defendants claim that the existence of a formal sanctioning body is not formally required by law before defendants can claim the benefit of the rule of reason holdings in the sports cases. Defendants argue that to impose such requirement is tantamount to forcing defendants to conspire (i.e. to form a league or sanctioning body) before they could further conspire (i.e. under the aegis of such a league) [*34] to adopt a reasonable rule. Defendants assert that the situation of the unorganized tracks here is analogous to local golf clubs who in conjunction with their membership adopt rules respecting permitted equipment. The Court suggests that were all the major golf clubs in the Northeast to decide as a group that, to insure competitive equivalency among golfers, they would adopt a rule designating one brand of golf club to be manufactured by one company; and were the clubs further to agree that no golfer without the designated brand could play in tournaments at those clubs, there would be an antitrust problem in that situation as serious as the one in this case.

Fourth, the procedures followed by NEDOC in arriving at the Hoosier tire rule lacked procedural fairness. The notice given to the tire manufacturers of the tests held in the fall of 1981 was inadequate; the tire manufacturers were not informed of key criteria used in judging the tires; the procedures followed during the tire tests were hit or miss as well, in that they failed to account for relevant variables and were not adequately recorded. Moreover, from the scanty NEDOC records which survived, it is not possible for the [*35] Court to determine why NEDOC thought that the Hoosier Budget tire was superior to other tires tested, such as the Goodyear M-23 or the M&H 91 and 95. Compare [Silver v. New York Stock Exchange, supra, 373 U.S. at 362-363](#) (discussing importance of procedural due process as providing a basis for judicial review).

The Court fully supports the proposition that professional sports need some rules preferably ones superior to the law of the jungle in order to survive. However, that proposition does not legalize the track-tire rule under the circumstances of this case, since it is a device designed by a group of purchasers to fix the price of tires by eliminating inter-brand competition. This Court accordingly rules that the tract-tire rule proposed by NEDOC and enforced at Stafford and Seekonk during the 1982 racing season constituted a group boycott in *per se* violation of [Section 1](#) of the Sherman Act.

B. Rule of Reason

I further rule that even if judged under the rule of reason, the track-tire rule violated the antitrust laws. [HN12](#) Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. [*605] [*36] In making this evaluation the Court will analyze "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." [National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 \(1978\)](#); [Smith v. Pro Football, Inc., supra, at 1183](#). If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the anticompetitive evils of the challenged practice must be balanced carefully against its

procompetitive virtues to ascertain whether the former outweighs the latter.² [**37] A restraint is unreasonable if it has the net effect of substantially impeding competition.³

The Court notes that the more carefully considered sports regulation cases have applied a very restricted version of the rule of reason. Under the test announced in *Denver Rockets*, *supra*, [HN13](#)[] a sports regulation that seeks an improper objective, or is overly broad, or was not adopted pursuant to fair procedures, is condemned as a *per se* violation of the antitrust laws without further inquiry into its ultimate economic consequences. In this respect, the *Denver Rockets* decision follows the teachings of the Supreme Court in [*Silver v. New York Stock Exchange, supra, 373 U.S. at 364-65*](#). As analyzed by the Court above, the Hoosier tire rule fails the *Denver Rockets* test and is therefore illegal [**38] *per se*.

Defendants argue that the *Denver Rockets* case is not applicable in the present context. They argue that *Denver Rockets* involved a situation in which the particular restriction entirely precluded the complainant from the market in question, in that the rule was adopted by a sporting association whose determination then became binding on every competitor in the league. Defendants contend that in the instant case, the challenged rule-making activities were done on a single or two-track basis and that plaintiff was not precluded from doing business with the other two tracks who withdrew from the track-tire rule prior to the opening of the 1982 season. Defendant argues that whether or not the adoption of the rule was joint as between Seekonk and Stafford, it was certainly confined to those two tracks alone and did not have any further exclusionary effect.

The Court has found *supra* that the December 17, 1981 meeting resulted in a conspiracy among all four major Northeast automobile racing tracks to adopt the tire rule, and that the conspiracy continued until the end of the 1982 racing season. Accordingly, M&H was initially foreclosed from the tire market at [**39] all four tracks, and ultimately foreclosed from 50 percent of the market during most of the 1982 season. The exclusionary effect of foreclosure from even 50 percent of the market is significant and substantial for purposes of antitrust analysis.

Defendants further object to the use of the *Denver Rockets* case on the grounds that it is now a largely outmoded analytic approach to the avoidance of *per se* rule. The more modern analysis, defendants suggest, is reflected in the First Circuit's recent case, [*Allied International, Inc. v. ILA, 640 F.2d 1368 \(1st Cir. 1981\)*](#). *Allied* involved a suit by a Massachusetts importer of wood products from the Soviet Union [*606] against the longshoremen's union for refusing to unload a Soviet ship in a United States harbor as a protest against the Soviet Union's invasion of Afghanistan.

Allied involves a politically motivated boycott. In this regard it is similar to the case of [*Missouri v. National Organization of Women, Inc., 620 F.2d 1301 \(8th Cir. 1980\)*](#) which involved a boycott of all convention facilities in states that had not ratified the equal rights amendment. In neither of these cases did the Court apply the [**40] Sherman Act. As stated by those Courts, and as stated above by this Court, [HN14](#)[] the Act is aimed primarily at combinations having commercial objectives and should be applied sparingly to organizations that normally have other objectives such as labor unions, political lobbying groups, or sports associations.

² See [*Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 \(1977\)*](#), citing [*Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 \(1918\)*](#) (under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition"). Cf. [*id. at 50 n.16, 97 S. Ct. at 2558*](#) (in determining whether a particular commercial practice should be prohibited *per se*, "the probability that anticompetitive consequences will result from [the] practice and the severity of those consequences must be balanced against its pro-competitive consequences").

³ See [*National Society of Professional Engineers v. United States, 435 U.S. at 691, 98 S. Ct. at 1365*](#), quoting [*Chicago Bd. of Trade v. United States, 246 U.S. at 238, 38 S. Ct. at 244*](#), ("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.")

Contrary to defendants contentions, however, the case at bar is not appropriately analyzed within a political framework such as the one in *Allied* or *Missouri*. It is appropriately analyzed within the rule of reason framework as it is established in the sports regulation cases including *Denver Rockets* and its progeny.

Moreover, even under the extended rule of reason analysis advocated by the defendants, the Hoosier track-tire rule must fail. [HN15](#)[[↑]] Analysis under the rule of reason starts from the premise that the Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. [*National Society of Professional Engineers v. United States, supra, 435 U.S. at 695*](#). The purpose of a rule of reason analysis is to form a judgment about the competitive significance of the restraint. And practices which [**41] are unreasonably restrictive of competitive conditions must be condemned, even though they have beneficial effects in other areas.

In this case there was evidence in the form of testimony from Dr. Dalton, that multi-track tire rules have a detrimental impact on competition in the racing tire market. Although the racing tire market is relatively concentrated with only four or five active suppliers, it is nevertheless highly competitive, primarily because, according to Dr. Dalton, open competition gives tire manufacturers the opportunity and the incentive to innovate. Track-tire rules eliminate competition over the course of the season and substitute, instead, the designation of a single tire made from less-expensive material. Such rules lessen both the incentive and the opportunity to innovate. Such rules also raise barriers to entry into the market and increase opportunities for collusion, although there was no evidence of collusion in this case. Thus, in the long run, these rules are likely to lead to higher prices and lower-quality tires.

Defendants have offered the testimony of certain drivers who claim to prefer competition under track-tire rules. No doubt many drivers [**42] are in favor of such rules because under the Hoosier tire rule, the price of tires was approximately \$50 less in 1982 than in 1981. In our economy, however, prices are set by the impersonal forces of competition, and not by consumer preference. Furthermore [HN16](#)[[↑]] the law protects the impersonal forces of competition, rather than consumer preference, on the basis that economic forces will ultimately enhance consumer welfare. See [*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486, 50 L. Ed. 2d 701, 97 S. Ct. 690 n. 10 \(1977\); Reiter v. Sonotone Corp., 442 U.S. 330, 343, 60 L. Ed. 2d 931, 99 S. Ct. 2326 \(1979\)*](#).

The defendants also seek to justify tire rules as essential to controlling the cost crisis in racing. The evidence at trial, however, indicated that the cost crisis affects not only racing tires, but also racing engines, racing chassis, gasoline, and other components as well. The evidence further demonstrated that one of the reasons for the crisis is that purses offered by track promoters have not kept pace with the every-day cost of racing an automobile. Alternative approaches to the cost crisis could include increased purses, objective specifications restricting [**43] engine performance, or [*607] some more reasonable approach to tire specification.

In sum, the evidence at trial did not demonstrate that the Hoosier tire rule was essential to the survival of professional auto racing as a sport, or that, over time, such a tire rule would effectively cut costs at all.

Defendant argues that when a restraint is challenged under the rule of reason, the plaintiff has the burden of establishing not only that the restraint is unreasonable but also a relevant geographic and product market within which to measure the effect of the restraint. [*Gough v. Rossmoor Corp., 585 F.2d 381 \(9th Cir. 1978\)*](#) (the restraint, even if unreasonable, must adversely affect competition and not merely one competitor); [*Dougherty v. Continental Oil Co., 579 F.2d 954 \(5th Cir. 1978\)*](#) (must evaluate the operation of the restraint in the context of a defined geographic and product market).

As stipulated among the parties, the relevant product market was racing tires. Plaintiff has established that the relevant geographic market was the Northeastern United States. Plaintiff further established that there are four major New England race tracks that conduct such racing. [**44] Defendants contend that in addition to the four defendant tracks there were other tracks in New England that conduct modified racing. Since no sales data was furnished on tire sales at those tracks, defendant argues that plaintiff has failed to establish a defined geographic market. The Court holds, to the contrary, that [HN17](#)[[↑]] plaintiff has made out a prima facie case under the rule of reason of "proof of a well-defined relevant market upon which the challenged anticompetitive actions would have

had a substantial impact." *Dougherty v. Continental Oil Co., supra, at 963*. Plaintiff has presented evidence that there are four *major* tracks in the Northeast that conduct automobile racing in the modified class. Defendant has presented no convincing evidence to the contrary and therefore plaintiff adequately established the existence of a relevant market.

Accordingly, the Court rules that under a rule of reason analysis, the Hoosier track-tire rule as it existed in 1982 had severe anticompetitive effects and demonstrated insufficient procompetitive virtues, and that it therefore unreasonably restrained trade in violation of *Section 1* of the Sherman Act.

VI. Damages

HN18 [**45] Once the fact of injury to the plaintiff has been established, the amount of damages may be fixed by the trier of fact according to a just and reasonable estimate of the damages based on relevant data, including both probable and inferential, as well as direct and positive proof. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574 (1946); see *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 75 L. Ed. 544, 51 S. Ct. 248 (1931).

At Thompson and Riverside in 1982 where open tire competition was permitted, M&H, according to Rifchin and Garuti, his distributor, sold approximately 40 percent of the tires sold at Riverside and approximately 60 to 65 percent of those sold at Thompson. Potter, the promoter at those two tracks, contradicted this testimony. Potter testified that in the beginning of the 1982 season M&H had a 45 to 50 percent share of sales at those two tracks but that, by the end of the season, that figure had declined to approximately 35 percent. According to Potter's testimony, Goodyear had the major portion of the tire market for the modified class in 1981 when drivers were running on a 15-inch tire. When track promoters [**46] revised the allowable tire size on the modified division in 1982 to 13 inches, however, Goodyear was late in producing the new-sized tire, apparently giving M&H a competitive edge in the 1982 season. By the end of the season Goodyear had come out with its 13-inch tire and, according to Potter, M&H's lead was reduced.

In 1982, Hoosier sold 1,822 13-inch Budget tires for use under track-tire rules at Seekonk for the whole season and at Stafford until August 6. Rifchin testified that M&H could have supplied all these tires without purchasing additional equipment, hiring additional personnel, leasing additional [*608] space, or incurring other overhead expenses. The Court finds that, based upon Goodyear and M&H tire sales at Riverside and Thompson, it is reasonable to infer that, had the track-tire rule not been in effect, M&H would have obtained approximately 45 percent of those Hoosier sales, at a gross profit of \$30 per tire equalling \$24,597.⁴

[**47] VII. Injunctive Relief

HN19 [**48] Under Section 16 of the Clayton Act, a plaintiff is entitled to an injunction to prevent threatened loss or damage by a violation of the antitrust laws. *15 U.S.C. § 26 (1982)*. Injunctive relief is appropriate, even though the illegal practice has been seasonally discontinued, unless it is clear that the practice will not recur. *United States v. Concentrated Phosphate Export Assoc.*, 393 U.S. 199, 203, 21 L. Ed. 2d 344, 89 S. Ct. 361 (1968); *United States v. W. T. Grant*, 345 U.S. 629, 632, 97 L. Ed. 1303, 73 S. Ct. 894 (1953); *Allee v. Medrano*, 416 U.S. 802, 810-11, 40 L. Ed. 2d 566, 94 S. Ct. 2191 (1974). In this case it is likely that, due to driver pressure, multi-track tire rules will be proposed and may well be adopted in the future. Track promoters have advocated such rules for over a decade, and at least two tire companies, McCreary and Hoosier, advertise the availability of tires for such rules. Moreover, successful tire rules in the modified class require the cooperation of drivers and owners. Therefore I rule that M&H is entitled to injunctive relief against multi-track, single-brand tire rules that designate in the conjunctive, [**48] one compound, one manufacturer, and one price.

Order accordingly.

⁴Total Hoosier sales (1,822 tires) X M&H market share (45%) X M&H gross profit per tire (\$30) = \$24,597.

ORDER

CAFFREY, Ch. J.

In accordance with opinion filed this date, it is ORDERED:

1. That M&H Tire Company, Inc. is awarded single damages in the amount of \$24,597 which when trebled produces a judgment for \$73,791 for plaintiff.
2. Defendants are permanently enjoined from promulgating or enforcing a multi-track, single-brand tire rule which designates one compound, one manufacturer, and one tire price.

March 29, 1983

End of Document



Chipanno v. Champion International Corp.

United States Court of Appeals for the Ninth Circuit

January 8, 1982, Argued and Submitted ; March 30, 1983, Decided

No. 80-3533

Reporter

702 F.2d 827 *; 1983 U.S. App. LEXIS 29264 **; 1983-1 Trade Cas. (CCH) P65,296; 36 Fed. R. Serv. 2d (Callaghan) 931

JOSEPH E. CHIPANNO, YOLANDA DESBRISAY, Personal Representative of the Estate of Leslie O. Desbrisay, deceased, W. HARLEY BOATSMAN, and LOUIS RIVAS, Plaintiffs-Appellants, v. CHAMPION INTERNATIONAL CORPORATION, a New York Corporation, WILLAMETTE INDUSTRIES, INC., an Oregon Corporation, FRERES LUMBER COMPANY, INC., an Oregon Corporation, both individually and d/b/a/ FRERES VENEER COMPANY, an Oregon joint venture, Defendants-Appellants

Prior History: [\[**1\]](#) Appeal from the United States District Court for the District of Oregon.

Helen J. Frye, District Judge, Presiding

Disposition: Reversed and remanded for further proceedings consistent with this opinion.

Core Terms

timber, conspiracy, plaintiffs', Forest, certificate, defendants', limitations, prices, tolled, statute of limitations, district court, lack standing, territorial, antitrust, bid

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

[**HN1**](#) **[] Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 16\(i\).](#)

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

[**HN2**](#) **[] Pretrial Judgments, Judgment on Pleadings**

In considering a motion to dismiss for lack of standing, plaintiffs are entitled to have the allegations of their complaint read broadly and liberally, and to have them taken as true.

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

HN3 [down arrow] **Private Actions, Standing**

As a potential seller in the market affected by the alleged conspiracy, plaintiffs clearly had standing.

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN4 [down arrow] **Public Enforcement, US Department of Justice Actions**

Consideration of whether a later private suit is based in whole or in part on any matter complained of in a prior government action, as required to suspend the running of limitations on the private claim during the pendency of the government suit under [15 U.S.C.S. § 16\(i\)](#), in general must be limited to a comparison of the two complaints on their face.

Counsel: Roger Tilbury, Esq, Haessler, Tilbury & Platten, Portland, Oregon, for Appellant/Petitioner.

R. Alan Wight, Esq., Norman J. Wiener, Esq, Miller, Nash, Yerke, Weiner & Hager, Portland, Oregon, Karen K. Creason, Esq., Stoel, Rives, Boley, Fraser & Wyse, Portland, Oregon, for Appellee/Respondent.

Judges: Browning, Chief Judge, Wallace and Boochever, Circuit Judges.

Opinion by: BROWNING

Opinion

[*829] BROWNING, Chief Judge:

The district court dismissed plaintiffs-appellants' antitrust treble damage action on the grounds that the statute of limitations barred a portion of the claim and plaintiffs lacked standing to sue on the remainder. We reverse.

I.

Plaintiffs' complaint alleged defendant-appellees, who were engaged in the lumbering and milling business in Oregon, entered into a combination and conspiracy to restrain trade and commerce in timber, logs, and other forest products, the substantial terms of which were:

- (a) To eliminate competitive bidding for United States Forest [**2](#) Service and other timber;
- (b) To allocate United States Forest Service and other timber among themselves;
- (c) To fix, reduce, and stabilize the price paid for United States Forest Service and other timber at or near the minimum acceptable bid set by the United States Forest Service;
- (d) To bid up any non-conspirator who attempted to bid on United States Forest Service and other timber;
- (e) To allocate geographical areas among themselves for buying timber and logs from private landowners, and thus make it difficult for private landowners to receive a fair price for their timber.

The effects of the conspiracy were alleged to have been to eliminate competition and reduce prices paid for Forest Service timber and consequently all timber within the State of Oregon; to prevent sellers of timber such as plaintiffs from selling timber at competitive prices; and to eliminate plaintiffs as a source of logs.

The complaint alleged that in February 1973 plaintiffs acquired an option to purchase certain timber lands in Oregon. The option was to expire May 3, 1973. Plaintiffs intended to finance the purchase by selling timber from the land. As a result of defendants' conspiracy, **[**3]** plaintiffs were prevented from selling the timber at competitive prices. They were forced to relinquish their interest in the property, losing anticipated profits from the sale of the timber and \$35,000 in earnest money.

Plaintiffs' complaint was filed November 6, 1979. Since plaintiffs allegedly lost their option May 3, 1973, the four-year limitations period established by [15 U.S.C. § 15b](#), had expired unless tolled. Plaintiffs alleged the running of the limitations period was suspended pursuant to [15 U.S.C. § 16\(i\)](#) because their complaint was based in part upon facts alleged in prior civil and criminal proceedings instituted by the United States.¹ See [United States v. Champion International Corp., 1975-2 Trade Cas. \(CCH\) P60, 453](#), Crim. No. 74-183 (D. Or. 1975) and [United States v. Champion International Corp.](#), Civ. No. 74-698 (D. Or. 1981).

[4]** Within a month of the filing of the complaint three of the four defendants filed a motion to dismiss under [Federal Rule of Civil Procedure 12](#) on the grounds that the suit was barred by limitations and that plaintiffs lacked standing. The motion also asked the court "to examine into the certificate of the attorneys filing the complaint that there is good ground to support it and that it is not interposed for delay, and, if such certificate is found to be false, to strike the complaint as sham and false." These three defendants requested a stay of discovery pending filing of a [Rule 11](#) certificate. [Fed. R. Civ. P. 11](#). The fourth defendant filed a motion for summary judgment. On January 7, two months after the complaint was filed, the magistrate ordered all discovery stayed pending the filing by plaintiffs' counsel of a "detailed certificate showing facts in [plaintiffs] possession" supporting their contention that the statute of limitations had been tolled. Plaintiffs eventually filed three such certificates in response to the order.

Following oral argument on all pending motions, the district court dismissed the complaint.

The district court noted that three of the four defendants **[**5]** in this action were charged in the prior government proceedings with illegal price fixing in the sale of United States Forest Service timber in the Detroit Ranger District of the Willamette National Forest. The elements of the conspiracy alleged in this action were identical to those alleged in the government actions, except for the addition in the first four elements (subparagraphs (a) through (d) quoted above) of this complaint of the words "and other timber," and the addition of a fifth element -- the allocation among the conspirators of geographic territories for the purchase of timber from private landowners (subparagraph (e) quoted above). The court concluded that "in spite of the added words 'and other timber,' plaintiffs' first four allegations of an illegal conspiracy simply restate the conduct complained of in the government cases."

The court held plaintiffs lacked standing as to this part of the alleged conduct for two reasons: First, plaintiffs' inability to sell timber from private lands outside the Detroit Ranger District, as alleged in their complaint, "was at best incidental to defendants' illegal bidding activities in the Detroit Ranger District" relating to Forest **[**6]** Service timber alleged in both the government and private suits. Second, "plaintiffs have made no showing that, absent defendants' conduct in the Detroit Ranger District, they would have found a buyer" in time to exercise their option, and therefore the relationship between plaintiffs' alleged loss in the sale of private timber outside the Detroit Ranger District and defendants' price fixing in the purchase of Forest Service timber within that District was "totally speculative and [did] not confer standing." Accordingly, the court dismissed "that portion of plaintiffs' claim that rests on the conspiracy complained of in the prior government cases."

The court held plaintiffs' remaining claim of illegal territorial allocation was barred by the statute of limitations. The court held, and plaintiffs agree, that since the judgment was entered against defendants in the criminal case more than a year before the plaintiffs filed their complaint, by the express terms of [15 U.S.C. § 16\(i\)](#) plaintiffs may not rely

¹  [15 U.S.C. § 16\(i\)](#) provides:

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 or State 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. . . .

upon the criminal action to toll the running of the four-year limitations period of [15 U.S.C. § 15b](#). The court also held that the statute of limitations was not tolled by the [**7] government's civil case, which was then pending. The court said, "the conspiracy regarding timber sales in the Detroit Ranger District complained of in the government's civil action does not bear a real relation to plaintiffs' claim of territorial [**831] allocation designed to depress the price of private timber. This action is therefore not based in whole or in part on matters complained of in the government civil action. That action accordingly does not toll the statute of limitations for purposes of this action."

Summarizing, the court said, "to the extent plaintiffs' . . . claim is based solely upon the defendants' illegal activities in the Detroit Ranger District, the plaintiffs lack standing and . . . to the extent it is one of illegal territorial allocation of private timber, [it] is barred by the statute of limitations."

II.

The district court did not state that it relied in any way upon the challenge to the [Rule 11](#) certification, and clearly any such reliance would have been error.

Plaintiffs' counsel signed the complaint. By the terms of [Rule 11](#), those signatures constituted a certification "that to the best of [their] knowledge, information, and belief [**8] there is good ground to support" the pleading. No more is required. See [United States v. International Association of Bridge, Structural & Ornamental Iron Workers, Local No. 1, 438 F.2d 679, 681 \(7th Cir. 1971\)](#). The rule is not a discovery device. It is not to be used to require plaintiff to offer proof of his case through supplemented [Rule 11](#) certificates before discovery and before trial. See [Lau Ah Yew v. Dulles, 236 F.2d 415, 416 \(9th Cir. 1956\)](#); Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1, 34 (1976). Filing of groundless litigation for harassment or delay should be dealt with under Rule 16, Rule 36, or [Rule 56](#), rather than under [Rule 11](#). 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1333, at 500 (1969). Requiring supplementary certificates under [Rule 11](#) improperly exposes plaintiff to the risk of adverse judgment without the safeguards of [Rule 56](#).

III.

The district court's rulings on both standing and limitations rested upon the court's erroneous construction of the complaint.²

[**9] Standing

HN2 Plaintiffs were entitled to have the allegation of their complaint read broadly and liberally, and to have them taken as true. [Beltz Travel Service, Inc. v. International Air Transport Association, 620 F.2d 1360, 1365 \(9th Cir. 1980\)](#); [Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 3-4 \(9th Cir. 1963\)](#). So read, plaintiffs alleged a single conspiracy among the defendants and other purchasers of timber, beginning in 1968 and continuing through June 1973, to eliminate competition, fix prices, and allocate timber from United States Forest Service lands and other lands in Oregon.

² If the court relied in any part upon any deficiency in plaintiffs' factual showing in opposition to defendants' motion for summary judgment, it would have been error to do so since discovery was stayed and plaintiffs were not afforded an adequate opportunity to develop facts in opposition to the motion. See [Portland Retail Druggists Association v. Kaiser Foundation Health Plan, 662 F.2d 641, 645-46 \(9th Cir. 1981\)](#); [Program Engineering, Inc. v. Triangle Publications, Inc., 634 F.2d 1188, 1193 \(9th Cir. 1980\)](#); [Schoenbaum v. Firstbrook, 405 F.2d 215, 218 \(2d Cir. 1968\)](#) (en banc); [Fed. R. Civ. P. 56\(f\)](#). See also [Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 \(1976\)](#).

Defendants contend that discovery was not totally foreclosed but only limited to potentially dispositive issues, an entirely proper procedure. [Hayashi v. Red Wing Peat Corp., 396 F.2d 13, 14-15 \(9th Cir. 1968\)](#); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2040 (1970). However, the minute order reflecting the court's ruling prohibited discovery without limitations. Defendants say they invited plaintiffs to engage in discovery as to the dispositive issues and plaintiffs declined to do so. We agree with plaintiffs that the transcript does not reflect such an offer and rejection.

HN3 As a potential seller of timber in the market affected by the alleged conspiracy, plaintiffs clearly had standing. *Solinger v. A & M Records, Inc.*, 586 F.2d 1304, 1310-11 (9th Cir. 1978). They were not merely "incidental" victims of a conspiracy to fix prices of timber from Forest Service land in another area, but were the intended "targets" of at least the territorial allocation aspect of a broader conspiracy encompassing the sale of timber for private lands in an area in which they sought unsuccessfully to do business, and therefore had standing to challenge **[**10]** the overall conspiracy. See *id.*

Nor was there merit in the court's alternate holding that plaintiffs lacked standing because it was "totally speculative" whether they would have found a buyer in time to exercise their option. The complaint alleges that "as a direct and proximate result of the aforesaid combination and conspiracy, plaintiffs were prevented from selling the logs to be cut from timber standing on the property at competitive prices, forcing them to forfeit their earnest money and to relinquish all interest in the property." The causation alleged is not so inherently speculative as to justify denying plaintiffs an opportunity to prove it. See *id.* Cf. *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1048-49 (9th Cir. 1979).

Limitations

The pace of government antitrust litigation is slow. A private litigant should not be required to defer filing suit until after the defendants' conduct has been disclosed by the government's proof at trial. Nor should the private litigant's right to his day in court depend upon the government's success in its litigation, or upon the likelihood that the private litigant will be able to establish his case. "Suspension of **[**11]** the running of the statute of limitations pending resolution of the government action may not be made to turn on whether the United States is successful in proving the allegations of the complaint . . . Equally, the availability of section 5(b) to the private claimant may not be made dependent on his ability to prove his case, however fatal failure may prove to his hopes of success on the merits." *Leh v. General Petroleum Corp.*, 382 U.S. at 65-66. Cf. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. at 336 (1978).

For these reasons **HN4** consideration of whether a later private suit is "based in whole or in part on any matter complained of" in a prior government action, as required to suspend the running of limitations on the private claim during the pendency of the government suit under *section 16(i)*, "in general . . . must be limited to a comparison of the two complaints on their face." *Leh v. General Petroleum Corp.*, 382 U.S. 54, 65-66, 15 L. Ed. 2d 134, 86 S. Ct. 203 (1965). See also *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 331, 57 L. Ed. 2d 239, 98 S. Ct. 2370 (1978); *Rader v. Balfour*, 440 F.2d 469, 473 (7th Cir. 1971).

It is clear from the face **[**12]** of the two complaints that plaintiffs' action is "based . . . in part on any matter complained of" in the government's civil suit, and *15 U.S.C. § 16(i)* therefore tolled the running of the period of limitations on plaintiffs' suit during the pendency of the government action. Plaintiffs' complaint alleged a conspiracy that included the objectives, means, time span, and geographic scope of the conspiracy alleged in the government suit. Because of this overlap, evidence adduced in the trial of the government suit would be of practical assistance to plaintiffs in proving their own complaint. It was precisely the purpose of *section 16(i)* to provide such assistance to private antitrust complainants. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. at 333-34; *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317-19, 14 L. Ed. 2d 405, 85 S. Ct. 1473 (1965). This is true, and accordingly *section 16(i)* applies, if the private action is based "in part" on "any matter" complained of in the government suit. If the necessary overlap is present, the purpose of the statute is served though there are differences in the allegations of the two complaints **[**13]** as to the **[*833]** means used, the defendants named, and the time period and geographic area involved. *Leh v. General Petroleum Corp.*, 382 U.S. at 59, 61, 62-63, 64; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 335-36, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971).

Section 16(i) does not apply if the government suit is initiated "under section 15a of this title." Section 15a authorizes the government to recover actual damages for injuries sustained by reason of an antitrust violation. Since the government's civil suit sought damages, defendants argued below and argue here that it was excluded from *section 16(i)*. The district court rejected the argument and we agree. The government also sought injunctive

relief as authorized by [15 U.S.C. § 4](#). Because [section 16\(i\)](#) must be broadly construed to accomplish its remedial purpose, see [Leh v. General Petroleum Corp.](#), [382 U.S. at 59](#), its exclusionary clause must be restricted to cases brought solely under section 15a. So long as the government suit seeks to "prevent, restrain, or punish" an antitrust violation, [section 16\(i\)](#) is not rendered inapplicable by the fact that monetary relief is also sought. Defendants' [**14] suggestion that the result should turn upon the relative importance of the claim for damages and the request for injunctive relief in the particular case is inconsistent both with liberal construction of the statute and with the requirement that the statute be construed to achieve certainty and predictability. See [Greyhound Corp. v. Mt. Hood Stages, Inc.](#), [437 U.S. at 335-36 \(1978\)](#); [Dungan v. Morgan Drive-Away, Inc.](#), [570 F.2d 867, 870-71 \(9th Cir. 1978\)](#).

Reversed and remanded for further proceedings consistent with this opinion.

End of Document



Charley's Taxi Radio Dispatch Corp. v. Sida of Hawaii, Inc.

United States District Court for the District of Hawaii

March 31, 1983

Civil No. 79-0383

Reporter

562 F. Supp. 712 *; 1983 U.S. Dist. LEXIS 18059 **; 1983-1 Trade Cas. (CCH) P65,312

Charley's Taxi Radio Dispatch Corporation, Plaintiff v. SIDA of Hawaii, Inc., et al., Defendants

Subsequent History: [**1] Affirmed in Part, Vacated in Part and Remanded February 12, 1987.

Core Terms

airport, passengers, drivers, taxi service, anti trust law, articulated, state policy, exemption, taxi, Transportation, supervised, antitrust, taxicab, state regulation, contracts, displace, terminal, summary judgment, Sherman Act, anticompetitive, licenses, bid, exclusive contract, state action, pre-arranged, deplaning, metered, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

HN1 [down arrow] **Regulated Practices, Private Actions**

Summary judgment should be used but sparingly in antitrust litigation.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN2 [down arrow] **Exemptions & Immunities, Parker State Action Doctrine**

For conduct to be shielded from application of federal antitrust laws the conduct must pass a two-part test which requires that the conduct be pursuant to a clearly articulated and affirmatively expressed state policy to displace competition and that it be actively supervised by the state itself. This test is to be used in deciding whether either a state agency or a private individual may be granted immunity from federal antitrust law.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN3 Exemptions & Immunities, Parker State Action Doctrine

Competition may be replaced with state regulation where the state has taken a positive and clearly enunciated stand to do so. A state cannot legitimize otherwise illegal anticompetitive activity merely by authorizing it; there has to be a state policy to replace the forces of the marketplace with the benefits of state regulation. Thus, for conduct to be exempt, first it must be based upon a state policy to displace competition that is clearly articulated and affirmatively expressed, and second, the conduct must be actively supervised by the state itself. Clear articulation with active supervision show that the state is not merely acquiescing in the anticompetitive activity of others, but is truly involved in replacing competition with adequate state regulation.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN4 Exemptions & Immunities, Parker State Action Doctrine

Even where the state has authorized or participated in the challenged anticompetitive activity, that activity must be required by a clearly articulated and affirmatively expressed state policy to displace competition with active state supervision for the state action exemption to apply.

Counsel: Eugene C. Crew, Daniel J. Furniss, and Joel Linzer, of Khourie & Crew, San Francisco, California, Kazuhisa Abe and Arnold T. Abe, of Abe & Abe, Honolulu, Hawaii, for plaintiff.

Terrence M. Lee, and Robert S. Katz, of Torkildson, Katz, Jossem & Loden, Honolulu, Hawaii, for SIDA of Hawaii, Inc.

Tany S. Hong, Atty. Gen., Gerald Y. Y. Chang, Deputy Atty. Gen., Honolulu, Hawaii, for State defendants, for defendants.

Judges: Burns, D.J.

Opinion by: BURNS

Opinion

[*713] Opinion and Order

Introduction

BURNS, D.J.:

The economies of the State of Hawaii and of her citizens are more dependent on the airplane than are those of any other state in the Union.¹ As an island people with tourism as their major source of income,² Hawaiians focus great attention on their airport and its ancillary services. Many of these services, including car rental, tour bus, currency and photographic greeting services, have been or currently are involved in anti-trust litigation.³ [**3]

¹ Horvat, *Above the Pacific* (1966)

² *The State of Hawaii Data Book* (1981). In 1980 tourism brought \$3.0 billion to Hawaii. Defense spending, Hawaii's second source of outside income, generated \$1.3 billion in 1980.

562 F. Supp. 712, *713L^A983 U.S. Dist. LEXIS 18059, **3

Unlike [*714] most airports Honolulu International Airport (HIA) is state owned ⁴ and its contracts for airport services are, with the exception of [*2] lei stands, exclusive.⁵

The subject of this case is a fifteen-year contract between defendants State of Hawaii and SIDA, an association of independent taxicab owner-operators, by which SIDA acquired the exclusive right to provide metered taxicab service to deplaning passengers at both terminals of HIA (International and inter-island terminals). Plaintiff (Charley's) is a Hawaii corporation whose drivers are licensed by the City and County of Honolulu to provide metered taxicab service. Plaintiff alleges that the exclusive contract between the defendants violates sections one and two of the Sherman Act ([15 U.S.C. §§ 1, 2](#)); it has moved for partial summary judgment on the issues of 1) the legality of the SIDA/State contract and 2) the availability to the defendants of the so-called state action immunity defense. [*4] Both defendants SIDA and the state defendants (the State of Hawaii and the State Department of Transportation)⁶ have moved for summary judgment contending they are exempt from federal anti-trust laws under the *Parker* doctrine. *Parker v. Brown* [1940-1943 TRADE CASES P 56,250], [317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#).

Because plaintiff has failed to show that no genuine issues of material fact remain to be determined, I deny its motion for partial summary judgment on the legality of the SIDA-State contract. This motion involves canvassing the issues of what constitutes a group boycott and whether [*5] one exists in this case; whether SIDA's composition and the nature of its activities constitute a horizontal restraint of trade; whether a *per se* rule or "rule of reason" should be used in this case; what constitutes the relevant market in this case; whether SIDA possesses

³ The car rental litigation is on-going. *Pacific Auto Rental Corp., dba Dollar Rent-A-Car Systems v. State of Hawaii et al.*, Civ. No. 79-0146 (D. Hawaii) was filed on March 30, 1979, and on July 23, 1979 was transferred to the Northern District of California to be made a part of the multi-district litigation. In March 1978 the Judicial Panel on Multi-district Litigation centralized in that district six cases pending in five districts charging major car rental companies with violation of the antitrust laws. [In re Airport Car Rental Antitrust Litigation, 448 F. Supp. 273 \(J. Pan. M.L. 1978\)](#). Currently the cases are awaiting the outcome of a petition for certiorari following the Ninth Circuit's affirmance of Judge Schwarzer's granting of a motion for summary judgment for defendants against one plaintiff. [In re Airport Car Rental Antitrust Litigation, 521 F. Supp. 568 \(N.D. Cal. 1981\)](#) aff'd, [693 F.2d 84 \(9th Cir. 1982\)](#). These rulings involved the *Noerr-Pennington* exemption from [antitrust law](#) rather than state action immunity. This applies to lobbying and other attempts to influence official government action. See [United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#); [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#).

The tour bus case is a part of this litigation; *Charley's Taxi* was consolidated on August 10, 1981 with *Charley's Tour & Transportation, Inc. dba Charley's Scenic Tours v. Interisland Resorts Ltd. et al.*, Civ. No. 80-0060 (D. Hawaii) filed February 5, 1980. It is likely that the two cases will be deconsolidated, at least for trial purposes.

The currency concession was at issue in [Deak-Perera Hawaii, Inc. v. Department of Transportation, 553 F. Supp. 976 \(D. Hawaii 1983\)](#), in which Judge Pence granted defendants' motion for summary judgment on the basis of [Parker. Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#). See text, *infra* slip op. at 6-8. Photographic greeting services were at issue in *Leia, Inc. v. Photo Management et al.*, Civ. No. 78-0263 (D. Hawaii March 18, 1982). In an opinion filed February 4, 1980 Judge Weigel denied the defendants' motion for summary judgment on the grounds of state action "immunity", finding that defendants could not pass the *Midcal* test. [California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)](#). See text, *infra* slip op. at 6, 8, 11, 13-14. *Leia* was dismissed for lack of prosecution in March 1982.

⁴ Only in Hawaii, Alaska and Rhode Island are airports owned and operated by the state. *Membership Directory, Airport Operators Council International* (1983).

⁵ Defendant State of Hawaii's memorandum in opposition to plaintiff's motion for partial summary judgment at 8; *Deak-Perera*, slip op. at 3.

⁶ Plaintiffs originally had filed suit against the Hawaii Department of Land and Natural Resources and Messrs. S. Ono, M. Kealoha, S. Hong, R. Higashi, T. Yagi and T. Yamamoto in their capacities as members of the Board of Land and Natural Resources and against Dr. R. Higashionna as Director of Transportation. By stipulation the case against these state defendants was dropped on March 25, 1983.

monopoly power; whether that power -- if it exists -- was acquired or maintained wilfully; and whether plaintiff has suffered injury cognizable under the Sherman Act. The question of whether the contract between SIDA and the state unlawfully restrains and monopolizes [*715] trade is the "meat of the coconut"; neither side has yet sufficiently honed the issues of which it is composed. [HN1](#) Summary judgment should be used but sparingly in antitrust litigation. [*Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 \(1962\);](#) [*General Business Systems v. North American Philips Corp.*, 699 F.2d 965 at 971](#), (9th Cir. 1983). On the current state of the record the question of the legality of the contract cannot be adequately dealt with by way of a summary judgment motion. The time may come when such a motion is apposite. However, I decline to find that this case now [**6] presents one of those infrequent situations where summary judgment on the central issue is appropriate in an anti-trust case.

I grant plaintiff's, and therefore deny defendants', motion for partial summary judgment on the issue of the availability to defendants of the state action immunity defense. Defendants have failed to show that their conduct is beyond the reach of the federal antitrust laws pursuant to the state action doctrine of *Parker v. Brown*.

Statement of Facts

In 1978 defendants State of Hawaii and SIDA of Hawaii entered into a fifteen-year contract whereby SIDA was granted the exclusive right to provide metered taxicab service at HIA's two terminals. SIDA had first received this contract in 1963. It had been renewed every two years until 1973 when SIDA's contract was renewed for five years. In 1974 plaintiff was awarded the contract to provide metered taxicab service at HIA's inter-island terminal, a substantially less lucrative market than the international terminal.⁷ The contract was scheduled to run until the end of 1978 but was terminated by the state in 1977 for payment default.

[**7] The contract awards SIDA "the exclusive privilege of soliciting passengers for and providing metered taxicab services to such passengers at the domestic and foreign arrivals area, Honolulu International Airport . . .". No other taxicab company or independent taxi driver unaffiliated with SIDA may solicit passengers at HIA or provide taxi service if hailed, unless the passenger has pre-arranged for this service. "Pre-arranged" taxi service refers to service either arranged by the passenger before leaving her mainland or foreign port of departure or service arranged by a deplaning passenger at HIA who telephones to taxi companies located in Honolulu. Absent such a "pre-arrangement" only SIDA may serve deplaning passengers. It is undisputed that the "pre-arranged" taxi market is negligible; Mr. Miyamoto, Chief of [*716] Airports Division of defendant DOT characterized the number of HIA passengers who "pre-arrange" taxi service as "very few if any" (Miyamoto Dep. at 90.) Taxicabs other than SIDA's

⁷ Defendants in this case have not asserted, and are unlikely to assert, the defense of *in pari delicto* against Charley's on the basis of this inter-island contract. The doctrine was severely limited, if not dealt a fatal blow, by the Supreme Court in [*Perma Life Mufflers Inc. v. International Parts Corp.*, 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 \(1968\)](#).

The Ninth Circuit has, on several occasions, asserted the doctrine's demise, see, e.g., [*Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 n. 5 \(9th Cir. 1980\);](#) [*Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 688-90 \(9th Cir. 1976\)](#), and has held that for public policy reasons the illegal conduct of an antitrust plaintiff does not completely and automatically bar his claim. [*First Beverages, Inc. of Las Vegas v. Royal Crown Cola Co.*, 612 F.2d 1164, 1174-75 \(9th Cir. 1980\);](#) [*Memorex Corp. v. International Business Machines Corp.*, 555 F.2d 1379, 1380-82 \(9th Cir. 1977\)](#).

In [*Thi-Hawaii v. First Commerce Financial Corp.*, 627 F.2d 991 \(9th Cir. 1980\)](#), its latest statement on the status of the *in pari delicto* defense, the Ninth Circuit recognized that the defense still exists to the extent of barring recovery by a plaintiff who is "truly complete[ly] involve[d] and participat[ing]" in the illegal activity. [*Perma Life*, 392 U.S. at 140](#). The Ninth Circuit has adopted the "but for" test in determining whether a plaintiff's participation in the monopoly is so complete as to give the defendant an *in pari delicto* defense. By this test a "plaintiff's recovery is not barred unless the illegal conspiracy would not have been formed but for its participation. See [*Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 279 \(9th Cir. 1976\)](#)." [*Thi-Hawaii* 627 F.2d at 995](#).

In this circuit, therefore, a defense of *in pari delicto* can apparently only be successfully asserted against an antitrust plaintiff who was an original and meaningful participant in the monopolistic or conspiratorial conduct. A late-comer like Charley's is likely to be safe from such a defense.

may take passengers to HIA from Honolulu; in fact they are required to do so by city ordinance that mandates the acceptance of all lawful fares.⁸ However, they cannot accept paying [**8] passengers for their return trip to Honolulu, thus forcing them to "deadhead" back to the city, even if there are deplaning HIA passengers in need of taxi service.

Discussion

The state defendants and SIDA contend that their conduct in entering into an exclusive contract, if anticompetitive, is exempted from federal antitrust legislation under the state action doctrine first enunciated in *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943).⁹ The state defendants assert that their mere status as the [**9] state and a state department gives them "immunity". SIDA acknowledges that [HN2](#) for its conduct to be shielded from application of federal antitrust laws the conduct must pass the two-part *Midcal* test which requires that the conduct be pursuant to a clearly articulated and affirmatively expressed state policy to displace competition and that it be actively supervised by the state itself. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980). SIDA argues that its conduct passes this test. Plaintiff contends that the conduct of all defendants must be judged by the *Midcal* test and that the challenged conduct fails to meet that test and is therefore subject to federal antitrust laws.

[**10] I agree with the state defendants that an exemption from *antitrust law*, without resort to the *Midcal* test, for the type of state conduct at issue here would be a wiser policy and would be a truer reading of *Parker* if *Parker* is read absent intervening Supreme Court and Ninth Circuit cases. The wisdom of recognizing state sovereignty in this situation is shown in Judge Pence's opinion in *Deak-Perera Hawaii, Inc. v. Department of Transportation State of Hawaii*, 553 F. Supp. 976 (D. Hawaii 1983) which involved the currency concession at HIA. Despite the substantial deference I pay to the ruling of Judge Pence,¹⁰ neither [*717] stare decisis nor judicial comity requires

⁸ (c) Responding to Calls.

The operator of a taxicab stand shall not refuse to furnish unengaged, available taxicab and driver during the business hours of such stand upon call or request from an orderly person located within one mile of such stand, by the most direct street route. No taxicab driver, while on duty and not engaged in another call, shall fail to drive an available taxicab in response to a call or request from an orderly person.

Revised Ordinance of Honolulu § 12-1.5(c)(1978)

⁹ Although most cases and commentators refer to *Parker* as the source of the state action doctrine, Judge Pence in *Deak-Perera* points out that this is actually a misconception; the doctrine always existed as part of the theory of federalism in which it is grounded. *Deak-Perera* slip op. at 5.

¹⁰ My deference to Judge Pence's ruling is all the greater because I am a visiting judge designated only temporarily to Judge Pence's district. By tradition and comity a judge in a multiple-judge district follows the prior decision of a brother judge upon the same question. *Buna v. Pacific Far East Line, Inc.*, 441 F. Supp. 1360 (N.D. Cal. 1977); *In re Carmona*, 224 F. Supp. 497 (S.D. Cal. 1963); *Rojas-Gutierrez v. Hoy*, 161 F. Supp. 448 (S.D. Cal. 1958). Even without my ruling in this case, however, there was not complete unanimity in the District of Hawaii on the state action exemption issue; Judge Weigel in *Leia*, ruled as I have, that *Midcal* applies to the state defendants and that they have not demonstrated sufficient articulation and supervision, whereas Judge Pence found that *Midcal* did not apply to the same state defendants.

Comity and tradition do not bind when a judge has a cogent reason or reasons for diverging from the ruling of his brother or brethren. *Id.* In this case I believe I have such a cogent reason. My reading of controlling Supreme Court and Ninth Circuit cases requires me to differ from the prior ruling of Judge Pence. I note that the state action question will not be the first break with judicial comity in this complex series of airport antitrust cases. In granting defendant's motions for summary judgment on the *Noerr-Pennington* question, Judge Schwarzer reconsidered and reversed the earlier ruling by Judge Renfrew on the same question in the same consolidated cases, albeit the motions were directed against a different plaintiff. In *Re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568 (N.D. Cal. 1981); 474 F. Supp. 1072 (N.D. Cal. 1979).

Further, there is one important difference between *Deak-Perera* and *Charley's* in terms of the statutory authorization upon which state defendants rely. The currency concession in *Deak-Perera* is covered by chapter 102 of the Hawaii Revised Statutes which

me to follow it. *Starbuck v. City & County of San Francisco*, 556 F.2d 450, 457 n. 13 (9th Cir. 1977); *In Re Brents-Pickell*, 12 Bankr. 352, 357 (Bkrtcy. S.D. Cal. 1981). Neither may my decision in this case be based on my opinion of the best policy. I must instead adhere to what seems to me to be the compulsion of the Supreme Court's post-Parker state action cases and to the even clearer command of recent Ninth Circuit cases on the issue. This circuit has consistently, and recently, [**11] held that the *Midcal* test is to be used in deciding whether either a state agency or a private individual may be granted "immunity" from federal antitrust law. *Miller v. Oregon Liquor Control Commission*, 688 F.2d 1222 (9th Cir. 1982); *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1982); *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374 (9th Cir. 1982); *Benson v. Arizona State Board of Dental Examiners*, 673 F.2d 272 (9th Cir. 1982); *Turf Paradise Inc. v. Arizona Downs*, 670 F.2d 813 (9th Cir. 1982). Using this test, I cannot find either the state defendants or SIDA exempt from the reach of the Sherman Act.

[**12] The *Midcal* Test Applies to State Defendants

The basis of the Supreme Court's decision in *Parker* was that federal antitrust law had not preempted state sovereignty; California could decide to dispense with competition in the marketing of raisins and institute a system of state regulation without running afoul of the Sherman Act. The Court analyzed Congressional intent and found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Parker v. Brown*, 317 U.S. at 350.

For thirty years the Supreme Court was silent on the applicability of federal antitrust law to actions of the states. Then in a spate of decisions commencing with *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975) the Court developed what is now referred to as the *Midcal* test.¹¹ The rationale for the test is that HN3[↑] competition, the "raison d'etre" of the Sherman Act, may be replaced with state regulation where the state has taken a positive and clearly enunciated stand to do so. *Parker* declared that a state could not legitimize [**13] otherwise illegal anticompetitive activity merely by authorizing it; there had to be a state policy to replace the forces of the marketplace with the benefits of state regulation. Thus the *Midcal* test requires that for conduct to be exempt first it must be based upon a state policy to displace competition that is "clearly articulated and affirmatively expressed" and second, the conduct must be "actively supervised" by the state itself. *Midcal* 445 U.S. at 105. Clear articulation with active supervision show that the state is not merely acquiescing in the anticompetitive activity of others, but is truly involved in replacing competition with adequate state regulation.

[**14] The state defendants argue that the *Midcal* test was not intended to be applied to [*718] the state as an antitrust defendant. However persuasive their argument may be from a policy standpoint, it is not the law of this circuit. Nor is it a wholly accurate portrayal of Supreme Court cases.¹² Although the State of California was not the named defendant in *Midcal*, the state had been the defendant in the case below, had chosen not to appeal the adverse state court decision, but was permitted to appear as amicus curiae in the Supreme Court. The retail liquor

mandates competitive bidding. This bespeaks greater articulation of a state policy to displace competition than does the indeterminate grant of authority embodied in chapter 261, which applies to the taxi issue.

¹¹ As the Court developed this test it also came to refer to the non-applicability of federal antitrust law to the states as an "immunity" for the states. This may well be a misnomer. *Parker* applied standard state sovereignty federal preemption analysis in the context of antitrust law; it did not create an exception or immunity for states. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982) (Rehnquist, J., dissenting); M. Handler, *Reforming the Antitrust Laws*, 82 Colum. L. Rev. 1287, 1330 (1982). Perhaps the present confusion in this area stems from the readiness with which we attach labels to concepts, which subsequently give rise to legal consequences, frequently not intended or contemplated by the labeler.

¹² In its most recent antitrust decision, *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories et al.*, 460 U.S. 150, 103 S. Ct. 1011, 74 L. Ed. 2d 882, 51 U.S.L.W. 4195 (1983), the Court adheres to its policy of applying the federal antitrust laws to state and local governmental bodies. *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978) is cited in the opinion for the proposition that cities and states are persons within the ambit of the Sherman Act. *Jefferson* continues the trend of nonexemption for the states, at least in their proprietary capacities.

562 F. Supp. 712, *718 (1983 U.S. Dist. LEXIS 18059, **14

dealers association, an intervenor below, took it upon itself to try to vindicate the state's interest in its resale price maintenance scheme for wine. Although it preceded *Midcal, New Motor Vehicle Board v. Orrin Fox Co., 439 U.S. 96, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978)* also involved a California state agency defending its conduct from antitrust attack. In that case the Court found that the anticompetitive conduct passed the precursor to the *Midcal* test.

[**15] This circuit has applied the *Midcal* test to a state bar, (*Ronwin v. State Bar of Arizona*) to state commissions (*Miller v. Oregon Liquor Control Commission* and *Knudsen v. Nevada State Dairy Commission*) and to a state board (*Benson v. Arizona State Board of Dental Examiners*); it has done so in areas, such as the licensing of professionals, that have historically been regarded as uniquely the province of the states themselves. Since *Ronwin* there can be no doubt that [HN4](#)¹⁴ even where the state has authorized or participated in the challenged anticompetitive activity, that activity must be required by a clearly articulated and affirmatively expressed state policy to displace competition with active state supervision for the state action exemption to apply:

The fact that the Committee was established by Supreme Court Rule and composed of members selected from the Bar by the Arizona Supreme Court is not, as defendants assert, dispositive in itself of the state-action question. Although the defendants in the United States Supreme Court's state-action decisions were public bodies, or subdivisions of the state, that did not end the Court's analysis. The Court still [**16] looked to see whether the challenged restraints were clearly articulated and affirmatively expressed as state policy and were actively supervised by the state acting as sovereign. Thus, for instance, it was not dispositive that the restraints challenged in *Parker*, *Orrin W. Fox*, and *Midcal* were enforced, respectively, by a state commission, a state board, and a state department. (Citations omitted) In *City of Lafayette, 435 U.S. at 408, 98 S. Ct. at 1134*, a plurality of the Court expressly rejected the argument that the state-action exemption extends to "all governmental entities, whether state agencies or subdivisions of a State . . . simply by reason of their status as such." This position has since been adopted by a majority of the Court. See *City of Boulder*, [455] U.S. at [53], [102 S. Ct. at 842 \(1982\)](#).

[Ronwin v. State Bar of Arizona, 686 F.2d at 697](#).

Although the state defendants, represented by the State Attorney General's Office, here assert that the *Midcal* test should not be applied to them, the Attorney General has previously recognized the applicability of *Midcal* to the operation of HIA.¹³ In March 1981 the Antitrust Division of [**17] the Attorney General's office analyzed proposed legislation to create two duty-free concessions [*719] at HIA. In an opinion prepared for the House Committee on Transportation, the Division concluded that the legislation "failed to meet the two-tiered test set out in . . . *Midcal* . . . , a standard necessary to immunize state regulatory schemes which violate the federal antitrust laws from legal liability". (Opinion at 4)

Clear Articulation and Affirmative Expression

Defendants¹⁴ assert that the state has clearly articulated and affirmatively expressed its policy to displace competition in the provision of taxi service at HIA in chapter 261 of the Hawaii Revised Statutes.¹⁵ I find no such

¹³ Application of the arcane analysis required by the *Parker* doctrine is surely not assisted merely because the Attorney General of Hawaii believes his legal shoulders are sufficiently broad for a bucket of water on both (or) on each one.

¹⁴ Because the state defendants base their case on the nonapplicability of the *Midcal* test to them, they do not specifically assert that the facts of this case pass muster under the test. It is defendant SIDA who applies the test to the facts here. However, I will refer only to defendants, without specifying, as I will presume that the state defendants would assert that their challenged conduct did in fact pass the *Midcal* test were they to be aware that I now hold that the test applies to them.

¹⁵ The following sections of chapter 261 are pertinent here. [Haw. Rev. Stat. § 261-4](#):

§ 261-4 Airports, general. (a) Establishment, operation, maintenance. The department of transportation may on behalf of and in the name of the State, out of appropriations and other moneys available or made available for such purposes, plan, acquire, and establish, construct, enlarge, and improve in the manner herein provided, maintain, equip, operate, regulate and protect airports and air navigation facilities, including the construction, installation, equipment, maintenance, and operation at airports of buildings and other facilities for the servicing of aircraft or for the comfort, accommodation, and convenience of air travelers, and including protection against airport hazards. For such purposes the department may, by purchase, gift, devise, lease, condemnation in accordance with chapter 101, or otherwise, acquire property, real or personal, or any interest therein, including the property, rights, estates, and interests mentioned in section 262-11. The department may acquire rights and interests in airports owned or controlled by others, for the purpose of meeting a civilian need which is within the scope of its functions, even though it does not have the exclusive control and operation of such airports. No officer, board or department of the State, or municipality, shall perform any function which is within the jurisdiction of the department without its approval, except for military purposes.

(b) Acquisition of real property. In the acquisition of real property and interests therein, the department of accounting and general services shall assist the department of transportation at its request, and assign thereto state officers and employees under its supervision for the making of surveys, abstracts, and otherwise as may be of assistance, for which services the department of transportation shall pay out of the appropriations available to it, unless the department of accounting and general services has a general fund appropriation for such services.

(c) Structures and improvements. All structures and improvements to land shall be initiated by the department of transportation and shall be constructed or made by or under the comptroller, in conformity with plans and specifications approved by the department of transportation, for which purpose the department of transportation shall make allotments of the funds under its control for expenditure by the comptroller and for services of the department of accounting and general services for which the department has no general fund appropriation.

(d) Use of state and municipal facilities and services. In carrying out this chapter, the department of transportation may use the facilities and services of other agencies of the State and of the municipalities of the State to the utmost extent possible, and the agencies and municipalities shall make available their facilities and services. This subsection shall apply to the department of accounting and general services with respect to services and facilities in addition to those specified by subsections (b) and (c). [L 1947, c 32, pt. of § 1; RL 1955, § 15-9; am L Sp 1959 2d, c 1, §§ 12, 26]

Haw. Rev. Stat. § 261-5:

§ 261-5 Disposition of airport revenue fund. (a) All moneys received by the department of transportation from rents, fees and other charges pursuant to this chapter as well as all aviation fuel taxes paid pursuant to section 243-4(a)(2) shall be paid into the airport revenue fund created by section 248-8. All such moneys paid into the airport revenue fund shall be expended by the department for the statewide systems of airports, including the construction of airports and air navigation facilities approved by the legislature, including acquisition of real property and interests therein; and for operation and maintenance of airports and air navigation facilities; and for the payment of indebtedness heretofore or hereafter incurred by the department, or its predecessor, the Hawaii aeronautics commission, for any of the purposes of this chapter. The department shall generate sufficient revenues from its airport properties to meet all of the expenditures of the statewide system of airports and to comply with section 39-59; provided that as long as sufficient revenues are generated to meet such expenditures, the director of transportation may, in his discretion, grant a rebate of the aviation fuel taxes paid into the airport revenue fund during a fiscal year pursuant to sections 243-4(a)(2) and 248-8 to any person who has paid airport use charges or landing fees during such fiscal year. Such rebate may be granted during the next succeeding fiscal year but shall not exceed one-half cent per gallon per person, and shall be computed on the total number of gallons for which the tax was paid by such person, for such fiscal year.

(b) All expenditures by the department shall be made on vouchers duly approved by the director of transportation or such other officer as may be designated by the directors." [L 1947, c 32, pt of § 1; RL 1955, § 15-10; am L Sp 1959 2d, c 1, § 26; am L 1962, c 24, §§ 2, 3; HRS § 261-5; am L 1968, c 20, § 2; am L 1969, c 10, § 6 and c 99, § 1]

Haw. Rev. Stat. § 261-7:

§ 261-7 Operation and use privileges.

(a) Under department operation. In operating an airport or air navigation facility owned or controlled by the department of transportation, or in which it has a right or interest, the department may enter into contracts, leases, licenses, and other arrangements with any person:

- (1) Granting the privilege of using or improving the airport or air navigation facility or any portion or facility thereof or space therein for commercial purposes;
- (2) Conferring the privilege of supplying goods, commodities, things, services, or facilities at the airport or air navigation facility;
- (3) Making available services, facilities, goods, commodities, or other things to be furnished by the department or its agents at the airport or air navigation facility; or
- (4) Granting the use and occupancy on a temporary basis by license or otherwise any portion of the land under its jurisdiction which for the time being may not be required by the department so that it may put the area to common use and thereby derive revenue therefrom.

All the arrangements shall contain a clause that the land may be repossessed by the department when needed for aeronautics purposes upon giving the tenant temporarily occupying the same not less than thirty days' notice in writing of intention to repossess.

Except as otherwise provided in this section, in each case mentioned in paragraphs (1), (2), (3) and (4), the department may establish the terms and conditions of the contract, lease, license, or other arrangement, and may fix the charges, rentals or fees for the privileges, services, or things granted, conferred, or made available, for the purpose of meeting the expenditures of the statewide system of airports set forth in [section 261-5\(a\)](#), which includes expenditures for capital improvement projects approved by the legislature. Such charges shall be reasonable and uniform for the same class of privilege, service, or thing.

The department shall enter into separate contracts with no more than two persons ("contractors") for the sale and delivery of in-bond merchandise at Honolulu International Airport, in the manner provided by law. Each such contract shall confer the right to operate and maintain commercial facilities within the airport for the sale of in-bond merchandise and the right to deliver to the airport in-bond merchandise for sale to departing foreign-bound passengers.

The department shall grant such contracts pursuant to the laws of this State and may take into consideration:

- (1) The payments to be made on in-bond merchandise sold at Honolulu International Airport and on in-bond merchandise displayed or sold elsewhere in the State and delivered to the airport;
- (2) The ability of the applicant to comply with all federal and state rules and regulations concerning the sale and delivery of in-bond merchandise; and
- (3) The reputation, experience, and financial capability of the applicant.

The department shall actively supervise the operation of the contractors to insure its effectiveness. The department shall develop and implement such guidelines as it may find necessary and proper to actively supervise the operations of such contractors, and shall include guidelines relating to the department's review of the reasonableness of contractors' price schedules, quality of merchandise, merchandise assortment, operations, and service to customers.

Apart from the contracts described above, during the period ending June 30, 1982, the department shall confer no right upon any person to offer to sell, or deliver in-bond merchandise at Honolulu International Airport.

(b) Under other operation. The department may, by contract, lease or other arrangement, upon a consideration fixed by it, grant to any qualified person the privilege of operating, as an agent of the State or otherwise, any airport owned or controlled by the department; provided that no such person shall be granted authority to operate the airport other than as a public airport or to enter into any contracts, leases, or other arrangements in connection with the operation of the airport which the department might not have undertaken under subsection (a) of this section.

(c) Miscellaneous fees and charges. The Department may fix and regulate, from time to time, reasonable landing fees for aircraft and other reasonable charges for the use and enjoyment of the airports and the services and facilities furnished by the department in connection therewith, including the establishment of a statewide landing fee which may vary among different classes of users such as foreign carriers, domestic carriers, inter-island carriers, air taxi operators and such other classes as may be determined by the director of transportation, for the purpose of meeting the expenditures of the statewide system of airports set forth in [section 261-5\(a\)](#), which includes expenditures for capital improvement projects approved by the legislature.

clearly articulated [***720**] state policy, but rather a [****18**] vague, unrestrained grant of authority to the Department

(d) Liens. To enforce the payment of any charges for repairs or improvements to, or storage or care of any personal property made or furnished by the department or its agent in connection with the operation of an airport or air navigation facility owned or operated by the department, the department shall have liens on the property, which shall be enforceable by it as provided by sections 507-18 to 507-22.

(e) Buildings and land areas for general aviation activities; developmental rates. The department may from time to time establish developmental rates for buildings and land areas used exclusively for general aviation activities at rates not less than fifty per cent of the fair market rentals of the buildings and land areas and may restrict the extent of buildings and land areas to be utilized. [L 1947, c 32 pt of § 1; am L 1949, c 374, § 1; am L 1953, JR 14, § 1; RL 1955, § 15-12; am L Sp 1959 2d, c 1, § 26; am L 1962, c 24, §§ 4, 5; HRS § 261-7; am L 1968, c 20, §§ 3, 4; am L 1972, c 14, § 1; am L 1976, c 235, § 2; am L 1981, c 243, § 2]

§ 261-9 Contracts, Law governing. The department of transportation may enter into any contracts necessary to the execution of the powers granted it by this chapter. All contracts made by the department shall be made pursuant to the laws of the State governing the making of like contracts; provided, that where the planning, acquisition, construction, improvement, maintenance, or operation of any airport, or air navigation facility is financed wholly or partially with federal money, the department may let contracts in the manner prescribed by the federal authorities acting under the laws of the United States and any rules or regulations made thereunder. [L 1947, c 32, pt of § 1; RL 1955, § 15-15; am L Sp 1959 2d, c 1, § 26]

Haw. Rev. Stat. § 261-10:

§ 261-10 Exclusive rights prohibited. The department of transportation shall grant no exclusive right for the use of an airway, landing area, or air navigation facility under its jurisdiction. This section shall not prevent the making of contracts, leases, and other arrangements pursuant to section 261-7. [L 1947, c 32, pt of § 1; RL 1955, § 15-16; am L Sp 1959 2d, c 1, § 26]

Haw. Rev. Stat. § 261-11:

§ 261-11 Public purpose of activities. The acquisition of any lands or interests therein pursuant to this chapter, the planning, acquisition, establishment, construction, improvement, maintenance, equipment, and operation of airports and air navigation facilities; and the exercise of any other powers granted by this chapter to the department of transportation are declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity. All lands and other property and privileges acquired and used by or on behalf of the State in the manner and for the purposes enumerated in this chapter shall and are declared to be acquired and used for public and governmental purposes and as a matter of public necessity. [L 1947, c 32, pt of § 1; RL 1955, § 15-17; am L Sp 1959 2d, c 1, § 26]

Haw. Rev. Stat. § 261-12:

§ 261-12 Rules, standards. (a) Powers to adopt. The director of transportation may perform such acts, issue and amend such orders, adopt such reasonable general or special rules and procedures, and establish such minimum standards, consistent with this chapter, as the director deems necessary to carry out this chapter and to perform the duties assigned thereunder, all commensurate with and for the purpose of protecting and insuring the general public interest and safety, the safety of persons operating, using or traveling in aircraft, and the safety of persons and property on land or water, and developing and promoting aeronautics in the State. No rule of the director shall apply to airports or air navigation facilities owned or operated by the United States.

In furtherance of the duties assigned under this chapter, the director may adopt rules relating to:

- (1) Safety measures, requirements and practices in or about the airport premises;
- (2) The licensing and regulation of persons engaged in commercial activities in or about the airport premises;
- (3) The regulation of equipment and motor vehicles operated in or about the airport operational area;
- (4) Airport security measures or requirements, and designation of sterile passenger holding areas and operational areas;
- (5) The regulation of motor vehicles and traffic;
- (6) Any other matter relating to the health, safety and welfare of the general public and persons operating, using or traveling in aircraft.

of Transportation to run the airport as it chooses, bound only by the statutory [*721] requirement to generate sufficient revenue to cover airport expenditures. HRS § 261-5(a).

[**19] The statutory scheme of chapter 261 allows the Department of Transportation to establish, operate and maintain the airport [*722] system "out of appropriations and other moneys available or made available for such purposes" § 261-4(a). In so doing the department "may enter into contracts, leases, licenses, and other arrangements with any person . . . conferring the privilege of supplying goods, commodities, things, services, or facilities at the airport. . . ." § 261-7(a)(2). Other than the requirement, in § 261-5(a), that all revenues generated from such leases and contracts be paid into the statutorily created airport revenue fund, the statute sets no limits on how, with whom and for what price the department may contract for provision of airport services. The department is free to establish the terms and conditions of the contract as it sees fit and may fix the charges or rentals, limited only by the requirement that such charges be "reasonable and uniform for the same class of privilege, service, or thing". § 261-7(a). Finally, defendants point to § 261-11 which makes the operation of Hawaii's airports a "public and governmental function".

These sections read as [**20] a whole do not evince a clear legislative intent to displace competition with state regulation in the provision of airport taxi services. Rather they show state acquiescence in how the DOT Director and his Airport Chief decide to run things. In deposition both officials, and those who had formerly held the DOT directorship, admitted that the granting of exclusive concession contracts was a department and staff preference rather than a state policy.

There is evidence that the Hawaii legislature sought to avoid rather than encourage exclusive concessions at HIA. 1982 Journal of the Senate, Act 5, § 1; 1960 Journal of the Senate, Act 14, § 1. Chapter 102 of the Hawaii Revised Statutes requires that most concessions on public property, including the HIA currency concession at issue in *Deak-Perera*, be put up for public bid. The contracts for ground transportation at HIA, including taxi service, are specifically exempted from this competitive bidding requirement. § 102-2(b)(1). Legislative history suggests that this exemption was to prevent monopolization by a single contractor:

Prior to passage of Act 245, Session Laws of Hawaii, 1959, government agencies were empowered [**21] to grant by private negotiation concessions for profit on government land to private persons. For example, the Hawaii Aeronautics Commission granted concession rights to approximately fifty ground operators (taxi operators) at the several airports . . . Act 245, Session of Laws of Hawaii 1959, by requiring that all such concessions or concession spaces be awarded by bid, deprives most of the incumbent concessionaires from having their licenses, leases or contracts renewed, however worthwhile their performances may be. Moreover *there is danger that such a system of awarding all concessions or concession spaces by bid could result in a monopoly. Such effects were not intended by the Legislature.*

1960 Journal of the Senate, Act 14 § 1 (emphasis added).

The 1960 amendment to Act 245, Session Laws of Hawaii 1959 exempted from competitive bidding lei vendors, coin operated machine vendors and all airport ground transportation except HIA taxi operators. In 1962 HIA taxicab drivers were added to the list of those concessionaires not required to competitively bid for an exclusive contract, because "especially in regards to the awarding of concessions at the new Honolulu International [*22] Airport in many instances compliance with said Act [Act 245] creates the evils which this Act was intended to avoid." 1962 Journal of the Senate Act 5, § 1. There is no evidence that the legislature meant to require an exclusive contract for the provision of taxi service, and I cannot now read this intent into the statutory scheme. I therefore find that defendants have failed to show a clear articulation and affirmative expression of state policy to displace competition for state regulation in the provision of taxi service at HIA.

Active State Supervision

To avoid application of the federal antitrust laws, defendants must also show that [*723] the clearly articulated state policy to displace competition has been replaced with active supervision of the conduct by the state itself.

This requirement ensures that the state is doing more than merely legitimizing the anticompetitive conduct of the private parties with whom it has contracted. The state must be an active partner in the conduct, regulating and overseeing as a substitute for the "economic constraints of the competitive market" P. Areeda & D. Turner, I Antitrust Law: An Analysis of Antitrust Principles and [**23] Their Application para. 213, at 73 (1978).

On this record, I cannot find that the state is an active supervisor. The state, through its Department of Transportation, signed a contract with SIDA and collects from SIDA the agreed monthly fee. However, it does nothing further to ensure adequacy of the provision of taxi service, and in fact has no control over the SIDA taxi drivers. SIDA is an association of independent owner-operators, which itself exercises no control over the activities of individual drivers. No individual driver can be ordered to the airport to pick up deplaning passengers to meet airport needs; each driver is an independent entrepreneur. SIDA runs its own dispatch service, and no one from the state monitors this. SIDA's base yard is located off HIA grounds, and no state supervision is conducted there. The rates SIDA may charge its passengers are set, like those of all Honolulu licensed taxi operators, by city ordinance and not by state regulation.¹⁶ Complaints about taxi drivers are routed to SIDA for action rather than being dealt with by the state. The evidence shows that it is SIDA cabbies and dispatchers who enforce the exclusivity of their contract; [**24] SIDA personnel intervene to prevent non-SIDA cabbies from accepting fares at HIA. In a letter to Hawaii's Governor Ariyoshi, the Director of defendant DOT, Dr. Ryokichi Higashionna, admitted that his department "has little control, if any, on SIDA's management of their service." (Letter memorandum attached as Appendix A.)

Conclusion

Defendants have failed to show that their conduct in entering into an exclusive contract is either pursuant to a clearly articulated and affirmatively expressed state policy or that the activity is actively supervised by the state itself. Defendants cannot, therefore, avail themselves of state action "immunity" from federal [**25] antitrust laws.

It Is So Ordered.

Appendix A

April 22, 1980

Memorandum

To: The Honorable George R. Ariyoshi, Governor of Hawaii

From: Director of Transportation

Subject: Taxi Service-Honolulu International Airport Governor Referral 80:186-15

Airport taxi service is an essential part of ground transportation at large and medium hub airports. Taxi service at Honolulu, Hilo, Kahului, Lihue, and Ke-ahole is under exclusive licenses issued by the Department authorizing the licensee to solicit passengers at these airports. In return for this privilege, the licensee is required to provide a minimum level of service, including standards of competence and courtesy for drivers.

It is obvious management has a difficult time enforcing standards for their personnel. Our files have many letters from passengers complaining about the attitude and service provided by taxi operators. In addition to speeding and reckless driving, drivers are known to refuse to comply with parking restrictions on the number of vehicles [*724] in loading zones and create sanitation problems in the parking areas. Unsightly chemical toilets adjacent to the public parking lot are provided [**26] simply because SIDA management is unable to assure drivers will use public facilities in the terminal building.

¹⁶ The city as licensor of all taxicab operators supervises taxicab activities through a comprehensive set of regulations, the state as airport owner-operator has nothing comparable. Chapter 12 of the Revised Ordinances of Honolulu deals with regulations for common carriers, including taxis. § 12-1.11 R.O.H. (1980) sets rates for fare and baggage charges.

562 F. Supp. 712, *724L^A 1983 U.S. Dist. LEXIS 18059, **26

Policing drivers will be [a] continuous problem. Speeding and reckless driving can be controlled as soon as we are authorized more HPD officers. If necessary, we can insist that SIDA prohibit any driver that we find too undesirable from ever serving the airport.

Jonathan Shimada has recently observed the problem and authorized additional enforcement by the HPD. Beyond that, DOT has little control, if any, on SIDA's management of their service.

Ryokichi Higashionna

End of Document

In re Mid-Atlantic Toyota Antitrust Litigation

United States District Court for the District of Maryland

April 4, 1983

Civil Action Nos. Y-80-3238, Y-81-650, Y-81-726, Y-81-805, Y-81-1880, Y-82-479, Y-81-806, Y-81-2954

Reporter

560 F. Supp. 760 *; 1983 U.S. Dist. LEXIS 17987 **; 1983-1 Trade Cas. (CCH) P65,304

IN RE: MID-ATLANTIC TOYOTA ANTITRUST LITIGATION. STATE OF MARYLAND ex rel. SACHS v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; STATE OF DELAWARE ex rel. GEBELEIN v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; STATE OF WEST VIRGINIA ex rel. BROWNING v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; DISTRICT OF COLUMBIA ex rel. ROGERS v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; COMMONWEALTH OF PENNSYLVANIA ON ITS OWN BEHALF AND AS PARENTS PATRIAE v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; COMMONWEALTH OF VIRGINIA v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; DANIEL E. GOLUB, et al. v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; WALLACE H. JOHNSTON, JR., et al. v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.

Core Terms

dealers, distributors, package, starting, vertical, conspiracy, concerted action, price fixing, manufacturer, products, antitrust, prices, summary judgment, competitors, adherence, discount, facilitating, defendants', motivation, customer, meetings, retail, horizontal, damages, Sherman Act, authorities, contracts, purchaser, anti trust law, parens patriae

LexisNexis® Headnotes

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

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

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

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

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

HN1[] Discovery, Methods of Discovery

Summary judgment is ordinarily appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, pursuant to Fed. R. Civ. P. 56(c).

560 F. Supp. 760, *7601983 U.S. Dist. LEXIS 17987, **17987

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

HN2 [] Entitlement as Matter of Law, Appropriateness

In considering the proper summary judgment standard, summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances. Neither should summary judgment be granted if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions. Summary judgment under [Fed. R. Civ. P. 56](#) should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. This is true even where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn therefrom, and the party opposing a motion for summary judgment is entitled to all favorable inferences which can be drawn from the evidence. Not merely must the historic facts be free of controversy, but also there must be no controversy as to the inferences to be drawn from them.

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

HN3 [] Summary Judgment, Entitlement as Matter of Law

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury.

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

HN4 [] Summary Judgment, Burdens of Proof

To the extent that an argument can be interpreted to suggest that [Fed. R. Civ. P. 56\(e\)](#) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support these allegations, such an argument is unsupportable. While it is important to preserve litigants' rights to a trial on their claims, those rights may not be extended to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence to support the complaint.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

HN5 [] Public Enforcement, State Civil Actions

560 F. Supp. 760, *760 (1983 U.S. Dist. LEXIS 17987, **17987

Md. Code Ann., Transp. I § 15-207(b)(2) (1977) is violated when a distributor attempts to coerce a dealer to order or accept delivery of accessories for a vehicle that is not required by law or by the dealer's franchise or that was not ordered voluntarily by the dealer.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6 [PDF] **Public Enforcement, State Civil Actions**

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.S. § 15c(a)(1), states that any attorney general of a state may bring a civil action in the name of such state, as parens patriae on behalf of natural persons residing in such state, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of these provisions.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

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

HN7 [PDF] **Private Actions, Costs & Attorney Fees**

15 U.S.C.S. § 15 provides the authority for a private plaintiff's treble damage action, declaring that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

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

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

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

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

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8 [PDF] **Antitrust & Trade Law, Sherman Act**

560 F. Supp. 760, *760LÁ1983 U.S. Dist. LEXIS 17987, **17987

To assert a cause of action under either [15 U.S.C.S. § 15](#) or the Hart-Scott-Rodino Antitrust Improvements Act of 1976, [15 U.S.C.S. § 15c\(a\)\(1\)](#), a plaintiff must assert actual injury sustained either by the plaintiff or those on whose behalf he is suing. The alleged substantive violation of the antitrust laws which must underlie either a parens patriae or treble damage action is in turn based upon the Sherman Act, [15 U.S.C.S. § 1](#), which states that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. The ordinary restraint of trade will be deemed illegal only if the actual competitive effects the restraint has upon the relevant market demonstrate it to be an unreasonable restraint of trade. There are certain exceptions to the rule of reason for agreements or practices that 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 that they have caused or the business excuse for their use.

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

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

[HN9](#) [] Per Se Rule Tests, Manifestly Anticompetitive Effects

There are two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality because they are illegal per se. In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Types of Evidence > Circumstantial Evidence

Antitrust & Trade Law > Sherman Act > General Overview

[HN10](#) [] Conspiracy to Monopolize, Sherman Act

While the Sherman Act, [15 U.S.C.S. § 1](#), speaks of "contract, combination, or conspiracy," courts read the phrase as an alliterative compound noun, roughly translated to mean concerted action. Hence, the statutory language presents a single concept about common action, not three separate ones. In determining the existence of such concerted action, proof of conspiracy need not be direct, and business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. Most importantly, explicit agreement is not a necessary part of a Sherman Act conspiracy. Instead, the crucial question is whether the defendants' conduct stemmed from independent decision or from an agreement, tacit or express.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

[HN11](#) [] Antitrust & Trade Law, Sherman Act

560 F. Supp. 760, *7601983 U.S. Dist. LEXIS 17987, **17987

It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. 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, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

[HN12](#) [L] Antitrust & Trade Law, Sherman Act

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.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

[HN13](#) [L] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

The organizer of a horizontal conspiracy may be liable as a co-conspirator even if the organizer was not one of the actual competitors and the organizer does not have to produce an actual intercompetitor agreement in order to be held to have provoked an illegal combination.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

[HN14](#) [L] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Co-conspirators do not have to have identical motives in order to conspire with each other. In other words, a plaintiff does not have to establish that the ultimate objective of each conspirator was the actual restraint of trade - it is sufficient if effectuation of the restraint is an intermediate goal sought for the facilitation of some other overriding objective. Thus, independent parties assisting a company in achieving its restraint can be co-conspirators with the company even though they will never be in a position to reap the benefits that directly flow from the restraints.

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

[HN15](#) [L] Price Fixing & Restraints of Trade, Vertical Restraints

A restraint is "vertical" if the purpose of the restraint is to promote interbrand competition. The phrase "undertaken for the purpose of promoting interbrand competition" is meant as encompassing any act which a supplier takes for the purpose of maximizing his profit in the product being restrained.

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

560 F. Supp. 760, *760 (1983 U.S. Dist. LEXIS 17987, **17987

HN16 [blue document icon] Price Fixing & Restraints of Trade, Vertical Restraints

A practice is "vertical" restraint of trade if its source is at least partially the supplier's drive for profits in the product concerned.

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

International Trade Law > General Overview

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

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

HN17 [blue document icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Price fixing is one of those practices that is illegal per se under the Sherman Act, [15 U.S.C.S. § 1](#). To be guilty of price fixing, the conspirators do not have to adopt a rigid price, substantially less has been found to be price fixing. An activity can violate the per se rule even if its effect upon prices is indirect. In essence, an interference with the market forces freely setting the prices of goods is sufficient.

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

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

An agreement among competitors on the starting price to be used in commencing negotiations with their customers falls within the forbidden category of price fixing.

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

HN19 [blue document icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The presence of a "vertical" element in a price restraint does not immunize it from per se status. Both minimum resale price maintenance and maximum resale price maintenance are illegal per se.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN20 [blue document icon] Private Actions, Remedies

There are three essential elements in every private antitrust action. They are (1) a violation of the [antitrust law](#), (2) direct injury to the plaintiff from such violations, and (3) damages sustained by the plaintiff. It follows, therefore, that a mere finding of violation does not result in liability. However, once a plaintiff has proven that some antitrust injury did in fact occur, the courts impose a much lighter burden upon him in establishing the precise extent of his

damages. While damages may not be the result of mere guesswork or speculation, quite relaxed standards govern. The rationale for this relaxation includes the inherent complexity and imprecision in calculating antitrust damages, and above all the inequity of allowing the defendant to profit from the uncertainty created by his own wrongdoing. In particular, courts are loathe to entertain defendants' pleas about the speculative nature of determining the free market conditions that would have prevailed in the absence of a restraint when the defendant's own conduct has eliminated those free market conditions.

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

HN21 [+] **Private Actions, Remedies**

In any action under section the Hart-Scott-Rodino Antitrust Improvements Act of 1976, [15 U.S.C.S. § 15c\(a\)\(1\)](#), in which there has been a determination that a defendant agreed to fix prices, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought, pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, [15 U.S.C.S. § 15d \(1976\)](#).

Counsel: [\[**1\]](#) Stephen H. Sachs, Esquire, Attorney General for the State of Maryland, Baltimore, Maryland, Charles O. Monk, II, Esquire, Assistant Attorney General, Baltimore, Maryland, and Michael F. Brockmeyer, Esquire, Assistant Attorney General, Baltimore, Maryland, liaison for the plaintiffs.

Raymond W. Bergan, Esquire, Washington, District of Columbia, Scott B. Harris, Esquire, Washington, District of Columbia, and William J. Murphy, Esquire, Washington, District of Columbia, liaison for the defendants.

Judges: Young, United States District Judge.

Opinion by: YOUNG

Opinion

[*762] MEMORANDUM OPINION AND ORDER

YOUNG, United States District Judge

The Judicial Panel on Multidistrict Litigation has consolidated the eight above-captioned actions for pretrial purposes and assigned them to this Court pursuant to [28 U.S.C. § 1407\(a\) \(1976\)](#). These lawsuits include six actions brought by the Corporation Counsel of the District of Columbia and the attorneys general of Delaware, Maryland, Pennsylvania, Virginia, and West Virginia on behalf of their respective citizenry under the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, [15 U.S.C. §§ 15c-15h \(1976\)](#),¹ [\[**3\]](#) [\[**2\]](#) and two private treble damage antitrust actions asserted pursuant to [15 U.S.C. § 15 \(Supp. V 1981\)](#).² All eight

¹ The six consolidated *parens patriae* actions are *State of Maryland ex rel. Sachs v. Mid-Atlantic Toyota Distributors, Inc., et al.*, Civil No. Y-80-3238; *State of Delaware ex rel. Gebelein v. Mid-Atlantic Toyota Distributors, Inc., et al.*, Civil No. Y-81-650; *State of West Virginia ex rel. Browning v. Mid-Atlantic Toyota Distributors, Inc., et al.*, Civil No. Y-81-726; *District of Columbia ex rel. Rogers v. Mid-Atlantic Toyota Distributors, Inc., et al.*, Civil No. Y-81-805; *Commonwealth of Pennsylvania On Its Own Behalf And As Parens Patrie v. Mid-Atlantic Toyota Distributors, Inc., et al.*, Civil No. Y-81-1880, and *Commonwealth of Virginia v. Mid-Atlantic Toyota Distributors, Inc., et al.*, Civil No. Y-82-479. As indicated above, the Commonwealth of Pennsylvania also sues on its own behalf.

actions [*763] commonly allege violations of [§ 1](#) of the Sherman Act, [15 U.S.C. § 1 \(1976\)](#), by the regional Toyota distributor for the mid-Atlantic states and various local Toyota dealers within the distributor's region.³ Plaintiffs in all actions have named three common defendants (hereafter "Weisman defendants"): the distributor, Mid-Atlantic Toyota Distributors, Inc. (hereafter "MAT"), its corporate affiliate, Carecraft Industries, Ltd. (hereafter "Carecraft"), and the controlling individual behind both entities, Frederick R. Weisman (hereafter "Weisman"). Individual dealers comprise all of the remaining defendants in each action and appear only in those suits appropriate to their respective geographic locations.

The Court currently has before it numerous defense motions for summary judgment.⁴ After a full round of briefing, [*4] the Court heard oral argument on the motions on October 28, 1982. The Court subsequently concluded that it needed certain additional information for full consideration of the issues raised, and the parties promptly provided the Court with appropriate stipulations as well as supplemental memoranda commenting on the legal significance of the submitted information. After careful consideration of the extensive record in this litigation, the Court grants the defendants' motions to a limited extent and enters partial summary judgment in their favor on all claims grounded upon the so-called "Double Value Days" program. [Fed.R.Civ.P. 56\(d\)](#). The Court denies all other portions of the defense motions, but reviews certain principles of law which will govern the remainder of this litigation. In particular, the determination of [§ 1](#) liability may proceed under a "*per se*" standard, although not in the precise manner the plaintiffs have argued for. A fuller exposition of the scope of and basis for these rulings follows.

[**5] SUMMARY JUDGMENT STANDARDS IN ANTITRUST LITIGATION

HN1 [↑] Summary judgment is ordinarily appropriate when:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[*764] [Fed.R.Civ.P. 56\(c\)](#). **HN2** [↑] The Fourth Circuit has amply elaborated upon this standard in an opinion which merits quotation at length:

² The two private actions are *Golub, et al. v. Mid-Atlantic Toyota Distributors, Inc., et al.*, Civil No. Y-81-806, and *Johnston, et al. v. Mid-Atlantic Toyota Distributors, Inc., et al.*, Civil No. Y-81-2954. The Court previously denied motions for class certification under [Fed.R.Civ.P. 23](#) in both of these actions, [In re Mid-Atlantic Toyota Antitrust Litigation, 93 F.R.D. 485 \(D. Md. 1982\)](#), and the cases have remained relatively dormant since that time.

³ Both private actions and the Pennsylvania and Virginia *parens actiones* also assert "tying" claims pursuant to § 3 of the Clayton Act, [15 U.S.C. § 14 \(1976\)](#). In a pretrial conference on October 28, 1982, the Court declared all current issues about the validity of the tying counts to have been mooted by the parties. Consequently, the present opinion will only address the plaintiff's [§ 1](#) claims, with the Court deferring any ruling on the tying counts until such time as the parties decide to raise the issue again.

⁴ The following defendants have filed formal motions: Mid-Atlantic Toyota Distributors, Inc., Frederick R. Weisman, and Carecraft Industries, Ltd., MDL-456, Pleading No. 116; Schaefer & Strominger, Inc., MDL-456, Pleading No. 142; Washington Area Dealer defendants, MDL-456, Pleading No. 143; Castle Toyota, Inc., Civil No. Y-80-3238, Pleading No. 169; Jones Plymouth, Inc., Civil No. Y-80-3238, Pleading No. 170; Torrey, Inc., Civil No. Y-80-3238, Pleading No. 172; R&H Motor Cars, Inc., Civil No. Y-80-3238, Pleading No. 173; Russel Motor Cars, Inc., Civil No. Y-80-3238, Pleading No. 173; Younger Toyota, Inc., Civil No. Y-80-3238, Pleading No. 174; Laurel Toyota, Inc., Civil No. Y-80-3238, Pleading No. 175; Delaware dealer defendants, Civil No. Y-81-650, Pleading No. 44; Certain Pennsylvania dealer defendants, Civil No. Y-81-1880, Pleading No. 302; and Southern Virginia dealer defendants, Civil No. Y-82-479, Pleading No. 179. While certain defendants originally styled their motions as a motion for judgment on the pleadings pursuant to [Fed.R.Civ.P. 12\(c\)](#), the Court ruled during a pretrial conference on June 25, 1982, that all motions for judgment on the pleadings would be treated as [Fed.R.Civ.P. 56](#) motions for summary judgment. The Court notes that certain defendants have filed formal motions while others have only submitted supportive or reply memoranda "joining in" other defendants' formal motions. To avoid confusion and needless balkanization, the Court will treat all defendants as having appropriately moved in all actions for summary judgment upon the general *factual* grounds which the states have had an opportunity to respond to in their two memoranda.

It is well settled that summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances. [sic] Neither should summary judgment be granted if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions. 3 Barron & Holtzoff, Federal Practice & Procedure § 1234 (Rules ed. 1958). Burden [sic] is upon party moving for summary judgment to demonstrate clearly that there is no genuine issue of fact, and any doubt as to the existence of such [**6] an issue is resolved against him. 3 Barron & Holtzoff, Federal Practice & Procedure § 1235 (Rules ed. 1958).

In *Kirkpatrick v. Consolidated Underwriters*, 227 F.2d 228 (4th Cir. 1955), this court repeated its holding in *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir. 1951), that summary judgment under *Rule 56* should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. This is true even where there is no dispute as to the evidentiary facts but only as to the conclusions or inferences to be drawn therefrom, and the "party opposing a motion for summary judgment is entitled to all favorable inferences which can be drawn from the evidence." *Cram v. Sun Ins. Office, Ltd.*, 375 F.2d 670, 674 (4th Cir. 1967).

As we stated in *American Fid. & Cas. Co. v. London & Edinburgh Ins. Co.*, 354 F.2d 214, 216 (4th Cir. 1965):

"Not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences to be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree [**7] as to the inferences which may properly be drawn. Under such circumstances the case is not one to be denied on a motion for summary judgment."

Phoenix Savings and Loan, Inc. v. Aetna Casualty & Surety Co., 381 F.2d 245, 249 (4th Cir. 1967).

In light of this strict standard, it is not surprising that some courts have traditionally demonstrated a marked reluctance towards summary disposition of complex antitrust cases. See, e.g., *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704, 22 L. Ed. 2d 658, 89 S. Ct. 1391 (1969); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962); *Morrison v. Nissan Motor Co., Ltd.*, 601 F.2d 139, 141-42 (4th Cir. 1979). See generally 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2732.1 at 313-31 (2nd Ed. 1983). As Justice Clark said for the majority in *Poller*:

HN3[] summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses [**8] are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury. *

* *

Poller, 368 U.S. at 473. On the other hand, the Supreme Court has indicated that some limits exist upon this judicial reluctance:

HN4[] To the extent that petitioner's argument can be interpreted to suggest that *Rule 56(e)* should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support these allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint [*765] setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence to support the complaint.

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90, 20 L. Ed. 2d 569, [**9] 88 S. Ct. 1575 (1968). Accord National Electrical Contractors Association, Inc. v. National Constructors Association, 678 F.2d 492, 497 (4th Cir. 1982). See generally 2 P. Areeda & D. Turner, Antitrust Law para. 316 (1978) (suggesting broader appropriateness of summary judgment). Nevertheless, summary disposition remains a highly elusive goal in cases such as the present one which contain allegations of § 1 conspiracy dependent upon divination of subjective intent. Neel v. Waldrop, 639 F.2d 1080, 1084 (4th Cir. 1981).

REVIEW OF THE UNDISPUTED FACTS AND DISPUTED ALLEGATIONS⁵

[10]** This case centers around the antitrust implications of two sets of multiple individual agreements between MAT and its dealers regarding a package of accessories for 1980 model Toyotas. Featuring "Polyglycoat" brand sealant products, the package of accessories (hereafter "protective package") included rustproof shielding, paint sealant, interior (textile or vinyl) sealant, soundshielding (undercoating), and membership in the "Cross Country Motor Club."⁶

The parties do not dispute the facial elements of the individual contracts within each set of agreements. In the first group of agreements, solicited by MAT under its "Total Concept Protective Program" (hereafter "Total **[**11]** Concept Program"), each dealer individually contracted with MAT to have the protective package applied to all of the 1980 Toyotas the dealer ordered, at a cost to the dealer of \$113.90.⁷ The protective package on cars furnished under the Total Concept Program had a suggested retail price of \$533.90 listed on the "sticker" which the Monroney Act, 15 U.S.C. §§ 1231-1233 (1976), requires automobile manufacturers and distributors to attach to all new vehicles.

In the second set of agreements, entered into as part of the distributor's "Double Value Days" program, many dealers individually contracted with the distributor to reduce the price on all Toyotas containing the protective package by the full suggested retail price of \$533.90. In consideration, the distributor would rebate to the dealer the entire wholesale price of \$113.90. This **[**12]** retail discount did not actually appear on the Monroney sticker. Instead, the participating dealer agreed to inform the customer of the \$533.90 discount at the time the dealer initially showed the customer the car (*i.e.*, the dealer agreed not to wait and see if perhaps the customer would take the car without the discount).

While these bare contractual terms appear to be conceded by all parties, the import of these individual agreements when **[*766]** cumulated is hotly disputed. Asserting that far more exists to these two aggregations of contracts than meets the eye, the plaintiffs allege that defendants used these agreements as the convenient vehicle for a massive price-fixing conspiracy. The defendants counter that these agreements were discrete, atomized, and designed to promote interbrand competition in the retail automobile market. To consider fully these divergent contentions, let alone attempt to resolve them, one must first appreciate the independent interest the Weisman defendants had in promoting the sale of the components of the protective package.

⁵ In determining the existence of a genuine issue of material fact, a court views the record in the light most favorable to the non-moving party. Poller, 368 U.S. at 473; Neel, 639 F.2d at 1082; 2 P. Areeda & D. Turner, *supra*, at 58. Exhuming legitimate disputes which might not otherwise be noticed, this principle particularly applies when conflicting inferences may be drawn "from the subsidiary facts contained in the affidavits, attached exhibits, and depositions. . . .", United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962). Consequently, the following discussion primarily focuses upon the evidence in the record supporting the plaintiffs' allegations. The Court recognizes that the record contains significant contrary evidence and obviously does not attempt to sit as the trier of fact at this early stage of the litigation. However, for purposes of economy in a regrettably lengthy opinion, the Court will not dwell upon the defendants' contrary factual allegations.

⁶ Some indication exists that on occasion not all of the five accessories were actually applied to a given car. However, as the parties appear to be in accord that all five components usually came together, the Court will follow the parties practice and assume for the sake of convenience that all five accessories were consistently applied.

⁷ The Court recognizes that the wholesale cost to the dealer as well as other relevant price figures varied over time.

The Court will ignore all such minor monetary fluctuations.

The Weisman Defendants: Structure and Interests

Counsel for the Weisman defendants have stipulated to the [**13] relevant facts concerning both the interrelationships among the Weisman defendants and their financial interest in the sale of the Polyglycoat products. For the entire time period relevant to this litigation, individual defendant Frederick R. Weisman owned and controlled numerous corporate entities through the Frederick Weisman Holding Company.⁸ [**14] The corporate subsidiaries of the holding company included both distributor defendant MAT⁹ and defendant Carecraft's stipulated predecessor in interest Crown Atlantic Corporation (hereafter "Crown Atlantic"). Mr. Weisman served as president of both entities.

Crown Atlantic was MAT's "port handling agent" in Baltimore, accepting the 1980 Toyotas off the ships from Japan and preparing them for distribution to the various local dealers. In particular, Crown Atlantic actually applied the Polyglycoat sealant products to the vehicles covered by the contracts in question. Crown Atlantic itself owned CPC Distributors, Inc. (hereafter "CPC"), a franchised distributor of Polyglycoat Corporation automotive products.¹⁰

In summary, Weisman's companies possessed distributional franchises for both Polyglycoat products and Toyotas. CPC exercised its Polyglycoat distributorship [**15] on a consignment basis, paying the Polyglycoat Corporation \$42.00 for every vehicle equipped with the protective package.¹¹ CPC in turn sold the package for a profit to Crown Atlantic, which applied the sealant components of the package and billed MAT \$78.00 for product and labor. As previously mentioned, MAT would charge its dealers \$113.00 per covered vehicle. When these transactions are consolidated, it becomes evident that Weisman, through his companies, received a 260% markup between the price paid Polyglycoat Corporation and the price charged the local Toyota dealers for the protective package.

Defendants' Potential Motivations for Entering Into the Agreements

With the Weisman defendants' Polyglycoat interests plainly in view, one can more readily appreciate the multiple potential incentives which may have prompted the contracts in question. As will be elaborated [**16] upon later, the incentives actually motivating the defendants to bargain together will play a crucial role in several liability issues. The Court of course does not presently rule [*767] on which motivations actually controlled, but merely review the possibilities open to the ultimate trier of fact.

Three alternative incentives may have motivated the Weisman defendants.¹² The plaintiffs assert that the driving force behind the Weisman defendants' initiation of these programs was a desire to sell more Toyotas. It does not

⁸ The Frederick Weisman Holding Company later changed its name to the Frederick Weisman Company. Weisman apparently did not own stock in the holding company directly but instead controlled it through the "Weisman Group," which in turn consisted of the Frederick R. Weisman Family Trust, Richard L. Weisman (Weisman's son), and Lerand, Inc. (an investment firm in which Frederick R. Weisman held a 5% equity interest and in which he and Richard L. Weisman each held 50% of the voting shares). The parties have simplified matters by stipulating that "during all relevant times, Frederick R. Weisman directly, through members of his immediate family, or through corporate interests was a majority shareholder of relevant corporate entities."

⁹ Weisman interests never possessed 100% ownership of MAT but instead "substantially owned" the distributor through control of more than 80% of the outstanding shares.

¹⁰ Between January, 1979 and September, 1979, CPC was controlled not by Crown Atlantic but by Crown Pacific Corporation, another Weisman company.

¹¹ The Polyglycoat Corporation sold CPC the rights to the Cross Country Motor Club membership along with its own sealant products.

¹² In accordance with the admonition that a court entertaining a summary judgment motion must view the record in the light most favorable to the non-moving party, the Court treats the Weisman defendants as a single economic unit for the purposes of this motion. It is true that the Supreme Court has frequently invoked an "intra enterprise conspiracy doctrine" and declared commonly owned corporate entities to be legally distinct actors capable of conspiring together in violation of § 1. United States

appear to be disputed that MAT had had a relatively poor market penetration vis-a-vis other Toyota regional distributors during the late 1970's. As MAT received a constant profit margin per wholesale sale regardless of the ultimate retail price, its revenues were almost completely dependent upon the *volume* of retail sales as opposed to the price obtained in those sales. According to a market study performed for MAT in 1979 by the management consulting firm Harbridge House, MAT had become trapped in a "vicious cycle" of declining regional sales volume:

1. The regional dealers extracted too high a profit per car sold and hence depressed total **[**17]** retail sales;
2. The national Toyota importer employed a formula for allocating the available imports among the various regional distributors which penalized distributors with slower turnover rates and higher inventories;
3. The proportionately fewer imports allocated to MAT under this formula reduced dealer confidence that MAT could satisfy their needs should they switch to a high volume, low profit per car strategy; and
4. The dealers therefore saw no reason to switch from their low volume, high profit per car approach.

The Harbridge House report recommended that MAT attempt to reduce the dealer profit per car, but recognized that the individual dealers would probably take a dim view of this proposal unless MAT provided them with credible assurances that it could actually fill the increased orders that such an approach would produce.

[18]** The States assert that the protective package provided MAT with an opportunity to break out of this "vicious cycle." Central to their argument is the assumption that automobile consumers base their purchasing decisions as much on the perceived "deal" or **[*768]** "bargain" they are getting as on the absolute price they actually pay. By adding a set of accessories to a Toyota with a wholesale price of \$133.00 but with a suggested retail price on the Monroney sticker of \$533.00, MAT supposedly gave its dealers \$420.00 worth of room to "bargain" with. The dealer could discount from the suggested retail price and increase the "deal" a buyer perceived he was receiving without reducing the dealer's original profit margin on the car. The defendants generally agree with plaintiffs' assertion that the programs were designed to increase Toyota sales. However, defendants prefer to stress the alleged intrinsic value of the protective package itself ¹³ as the means by which the protective package could generate those sales.

[19]** In addition to the plaintiffs' position, the record reveals two alternative possible motivations for the Weisman defendants. One is that the Weisman defendants were motivated not by a desire to sell more Toyotas to the public but by a desire to sell more Polyglycoat products to the Toyota dealers. The record reveals potential evidence that:

1. Weisman had attempted for several years to get the dealers to order Polyglycoat products;
2. The chief executive officer of MAT consistently opposed programs involving Polyglycoat products but Weisman regularly overruled him;

v. *Citizens & Southern National Bank*, 422 U.S. 86, 116, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975) (dicta); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968); *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 215, 95 L. Ed. 219, 71 S. Ct. 259 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947). But cf. *Sunkist v. Winckler & Smith Co.*, 370 U.S. 19, 8 L. Ed. 2d 305, 82 S. Ct. 1130 (1962)

(farmer's combination itself permissible under Capper-Volstead Act not distinct from its subsidiaries). However, the Supreme Court has never fully elaborated on the parameters of this doctrine, and the Circuit Courts, no doubt prompted by criticism of the doctrine by learned commentators, see, e.g., P. Areeda, *Antitrust Analysis* para. 334 (3rd ed. 1981), have developed numerous exceptions to the general rule. See generally authorities collected in *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455-56 n. 8 (9th Cir. 1979). In particular, a "one man show" exception has recently evolved in the Ninth Circuit: corporate entities controlled by a single individual are treated as a single business unit when that individual made the relevant decisions. *Thomsen v. Western Electric Co., Inc.*, 680 F.2d 1263, 1266 (9th Cir. 1982); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614 (9th Cir. 1979); *Harvey*, 589 F.2d at 457; *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976) (alternative holding). The Court finds these authorities to be well reasoned and rules that as a matter of law a "one man show" exception exists to the general rule of intra-enterprise conspiracy. However, as the parties have not had an opportunity to marshall the facts in light of these principles, the Court will not definitively apply them to the particulars of this case at the present time. The Court also reserves ruling on the disputed issue of whether the applicability of the intra-corporate conspiracy rule or its exception is itself a question of fact or law. See generally discussion of authorities in *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 588 (8th Cir. 1981).

¹³ The defendants allege that the price of the protective package was lower than the sum of the retail prices of its constituent components.

3. Weisman assumed greater personal control of MAT at the time the protective package programs were initiated;
4. After meeting with his subordinates, Weisman personally initiated the protective package programs at issue here; and
5. After institution of the program, MAT continued to be reluctant to implement it as fully as Crown Atlantic's representative desired.

Such evidence might support an inference that Weisman had decided that the potential increased profits for his Polyglycoat distributorship would outweigh any potential losses feared by his Toyota distributorship and that **[**20]** hence the program should go forward despite the misgivings of MAT itself.

The third and perhaps most plausible alternative motivation for the Weisman defendants was that they hoped to increase both Toyota and Polyglycoat sales. Significant documentary evidence in the record exists to this effect.

Alternatives also exist as to what financial considerations allegedly impelled the individual dealers to join the Total Concept program.¹⁴ A dealer might have been tempted to use the higher suggested retail price as a device to maximize per car profits even further. Conversely, a dealer might have concurred in MAT's assessment of the need to increase sales volume and utilize the full opportunity for discounting which the accessory profit spread would provide. The dealers themselves intimate that the protective package afforded them an opportunity for what would be in effect price discrimination: they could charge the uncomplaining buyer the full \$533.00 but use the discount potential to secure the wavering buyer who balked at the full price. In this manner, they could perhaps increase both per car profits and sales volume.

[21] The Alleged Barrier to Utilizing Polyglycoat Products: Dealer Atomization**

In spite of the potential incentives reviewed above, relatively few Toyotas were sold with Polyglycoat products in the years **[*769]** preceding the initiation of the protective package programs in September, 1979.¹⁵ Plaintiffs assert, and defendants vigorously dispute, that the dealers were previously reluctant to order cars with the sealants because consumers did not like the products and other Toyota dealers selling cars without the sealants would be able to undercut them. The record does contain documents expressly stating that certain dealers did not care for the Polyglycoat products because of "competitive" reasons. As a Vice-President of Rosenthal Toyota, Inc., wrote to MAT, "We are in a very competitive market in the Greater Washington area and these port installed options will not allow us to be able to compete with the other Toyota dealers." The record also contains potential evidence that MAT incurred its dealers' wrath by attempting to force Polyglycoat products upon them. Supposedly prompting complaints to the national importer, these "coercive" tactics also allegedly provoked a **[**22]** charge by the Maryland Motor Vehicle Administration that MAT had violated the express language of [HN5](#) Md. Trans. Code Ann. [§ 15-207\(b\)\(2\)](#) (Michie 1977), by attempting to "coerce [a] dealer to order or accept delivery of . . . accessories for a vehicle . . . that is not required by law or by the dealer's franchise or that was not ordered voluntarily by the dealer."

¹⁴ As a dealer joining the Double Value Days program was by the terms of the individual agreement relinquishing the possibility of additional per car profit, the only rational motivation which could be inferred from his participation in the program would be a desire to increase sales volume by "giving away" the protective package. Similarly, the Weisman defendants could have only sought to stimulate Toyota sales by establishing the Double Value Days program, since they were contractually relinquishing the profit they had garnered on the sale of the protective packages to the dealers.

¹⁵ While the parties disagree and the record is not clear on exactly how many Toyotas were equipped with Polyglycoat products before September, 1979, it appears beyond dispute that markedly fewer cars were equipped with the sealant before the program than were equipped during the program.

Defendants strongly claim that fears of competitive disadvantage did not prompt the dealers to reject Polyglycoat products, and point to significant deposition testimony to that effect.¹⁶ However, this only raises the genuine issue of fact which a court cannot resolve on summary judgment. For purposes of the present motion, it is sufficient that the record suggests **[**23]** that evidence might well be introduced at trial which would allow the trier of fact to conclude that the dealers had largely avoided Polyglycoat products before September, 1979 because of competitive concerns.

Overcoming The Atomization: The Total Concept Program

Supposedly unable to overcome this individualized dealer reluctance by forcing the Polyglycoat products on them, the Weisman defendants allegedly decided to attack the dealer's underlying competitive concerns directly by facilitating an interdealer conspiracy. In the late summer of 1979, MAT announced the "Total Concept Protective Program" and urged its dealers to order all of their 1980 models with the sealant pre-applied. MAT convened a series of subregional dealer meetings which both Weisman and substantially all of the **[**24]** dealers attended.¹⁷ Hearing a report by a Harbridge House representative similar to the economic analysis summarized earlier,¹⁸ the dealers then received a direct appeal from William Abbott, MAT Vice-President for marketing, in support of the program. Abbott allegedly stressed the flexibility the protective package afforded the dealers, with the dealer keeping the full additional profit unless the customer balked.¹⁹ The additional profit margin attached to the package would then allow the dealer to "close the deal" without harming his original profit margin.

[25] [**770]** Controversy swirls over what happened after Abbott's presentation. The plaintiffs allege that the dealers "milled around," hovering over sign-up sheets which stated "Yes, we want to participate in the Polyglycoat Total Concept Program" and discussing unrevealed subjects. It appears to be undisputed that significant numbers of dealers did in fact sign up at the meetings, that MAT conducted at least some follow-up on those dealers who did not sign up at the time, and that by January, 1980 all but three dealers either had signed up or were ordering the protective package on their vehicles. Conceding this widespread dealer participation with the program, defendants proffer numerous dealer depositions indicating that each dealer signed up for the program solely for independent business reasons.²⁰ Plaintiffs counter that the meetings, sign-up sheets, and follow-ups provide strong circumstantial evidence that the dealers instead conspired with each other uniformly to incorporate the protective package into all Toyotas sold in the region and raise the suggested retail price of all Toyotas by \$533.00.

[26]** Plaintiffs also submit affidavits asserting that Polyglycoat-free Toyotas became almost impossible to obtain after the Total Concept Program took force. One consumer states that dealers told him they would have to wait for up to eight months to obtain a vehicle without the accessories. Having so far operated on the assumption that this is a *per se* case, plaintiffs have not submitted any evidence on what actual effect the Total Concept Program had upon retail prices. Defendants point to some assertions that most dealers "gave the protective package away" by discounting the retail price by the full amount of the accessory profit margin. The dealers also contend that only

¹⁶ For example, one dealer claims that he did not order the Polyglycoat because Crown Atlantic did a very sloppy job of applying the sealants at the port, necessitating a significant cleaning effort on the dealer's part.

¹⁷ MAT did not convene the meetings solely to promote the Total Concept Program. Defendants allege that the Program was only one among many promotional efforts pushed at the meetings.

¹⁸ The parties dispute the extent to which the Harbridge House representatives stressed the need for "joint" action by the dealers to break out of the "vicious cycle."

¹⁹ The Court notes some inconsistency between the Harbridge representative's stress on lower per car profits and Abbott's claims of the potential for increased profits per car. This inconsistency might be resolved if one assumes that the price discrimination available with the protective package would equal a flat automatic discount in economic results.

²⁰ Some deposition testimony also indicate that the dealers desired uniform adherence to the Program in order to (1) increase the efficiency of the port operation and hence speed the delivery of the cars to the dealers and (2) improve the possibility of interdealer exchanges of inventory to assist a dealer who had closed an unexpectedly large number of sales.

60% of the 1980 Toyotas actually had the protective package applied to them. Finally, some documents before the Court indicate that regional Toyota sales climbed dramatically in the months after the institution of the program.

Overcoming the Atomization: The Double Value Days Program

From January, 1980 to March, 1980, MAT supplemented the Total Concept Program with the Double Value Days Program: those dealers who discounted the entire \$533.00 suggested retail price to the consumer would themselves [**27] receive a \$113.00 rebate from MAT. The defendants do not contest the existence of this program, but question how it could possibly injure an automobile purchaser who was essentially getting something for nothing. Plaintiffs have responded that they are not sure that the dealers adhered to the agreement and actually provided the full discount to the purchasers.

STATUTORY OVERVIEW: THE THREE BASIC ISSUES

The *parens patriae* plaintiffs sue under [HN6](#)[] [15 U.S.C. § 15c\(a\)\(1\)](#), which states in relevant part:

Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section *for injury sustained* by such natural persons to their property by reason of any violation of [Sections 1 to 7](#) of this title [emphasis supplied].

[HN7](#)[] [15 U.S.C. § 15](#) provides the authority for the private plaintiff's treble damage action:

Any person *who shall be injured* in his business or property by reason of anything forbidden in the antitrust laws may sue therefor [**28] 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 [emphasis supplied].

[*771] [HN8](#)[] To assert a cause of action under either statute, a plaintiff must, as indicated by the phrases highlighted in the above quotations, assert actual injury sustained either by the plaintiff or those on whose behalf he is suing.

The alleged substantive violation of the antitrust laws which must underlie either a *parens patriae* or treble damage action is in turn based upon [§ 1](#) of the Sherman Act:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

[15 U.S.C. § 1 \(1976\)](#). While the language of [§ 1](#) appears on its face to condemn all contracts "in restraint of trade," the Supreme Court has long ruled that "it cannot mean what it says." [National Society of Professional Engineers v. United States, 435 U.S. 1](#)[*29] [679, 687, 55 L. Ed. 2d 637, 98 S. Ct. 1355 \(1978\)](#). Instead, the ordinary restraint of trade will be deemed illegal only if the actual competitive effects the restraint has upon the relevant market demonstrate it to be an *unreasonable restraint of trade*. [*Id. at 690*](#). As the Court knows from experience, a case tried under this "Rule of Reason" standard of liability frequently involves almost overwhelming factual complexity. In response to this practical problem, the Supreme Court has carved out certain exceptions to the Rule of Reason for "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 that they have caused or the business excuse for their use." [Northern Pacific Railroad Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). Accord [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 7-8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 \(1979\)](#). Courts describe such agreements as "*illegal per se*" and do not require demonstration of actual competitive impact in the [**30] particular case. [*Id.*](#) As Justice Stevens has recently summarized,

HN9 There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal per se." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

Engineers, 435 U.S. at 692.

In attempting to apply these basic authorities, the parties have raised three separate issues:

First, does the present record contain sufficient evidence to create a genuine issue as to the existence of a § 1 "contract, combination or conspiracy" among the defendants?

Second, if one assumes that such a combination existed, is the determination as to whether the combination was "in restraint of trade" governed by a *per se* or a Rule of Reason standard?

Third, if one assumes that a combination in restraint of trade existed, have the plaintiffs alleged §§ 15, 15c "injury" [**31] to the Toyota purchasers?

The Court will address these issues *seriatim*.

LIABILITY UNDER § 1: CONTRACT, COMBINATION OR CONSPIRACY?

No one disputes that the Total Concept Program involved individual "contracts" between MAT and its dealers. Taken alone, such an individual contract plainly did not create antitrust problems.²¹ However, the [*772] plaintiffs base their claim of § 1 concerted action upon an additional agreement among the dealers themselves and between the dealers as a group and the Weisman defendants. To clarify the analysis of this issue, the Court first examines the possibility of concerted action among the dealers alone. As it finds that sufficient potential evidence exists to raise a genuine issue about interdealer concerted action, the Court then assumes the existence of an interdealer conspiracy and evaluates whether the Weisman defendants can be added on as additional co-conspirators with the dealers.

[**32] Concerted Action Among the Dealers

HN10 While § 1 speaks of "contract, combination, or conspiracy," courts have read the phrase "as an alliterative compound noun, roughly translated to mean 'concerted action.'" *Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 111 (3d Cir. 1980)* (quoting *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 445-46 (3rd Cir. 1977)*, cert. denied, 434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978)). Hence, "the statutory language presents a single concept about common action, not three separate ones." *Sweeney & Sons, 637 F.2d at 111*. In determining the existence of such concerted action, "proof of § 1 conspiracy need not be direct," *United States v. Foley, 598 F.2d 1323, 1331 (4th Cir. 1979)*, and "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540, 98 L. Ed. 273, 74 S.*

²¹ A dealer might have attempted to contend that the contract was a "tie" in violation of § 3 of the Clayton Act, *15 U.S.C. § 14 (1976)*. However, the dealer would have had to establish that MAT coerced him into taking the tied product along with the tying product. *Ogden Food Service Corp. v. Mitchell, 614 F.2d 1001, 1002 (5th Cir. 1980); Capital Temporaries, Inc. of Hartford v. Olsten Corp., 506 F.2d 658, 661-63 (2nd Cir. 1974)*. In the present case, the dealers plainly had the option of purchasing their 1980 models without the protective package.

While the individual Total Concept Program contracts posed no antitrust concerns, each individual Double Value Days contract did in fact create a vertical price fixing agreement, as discussed at page 783, *infra*. Plaintiffs do not appear to allege that the Double Value Days contracts taken collectively constituted an additional restraint of trade, and the Court will not consider that issue.

Ct. 257 (1954). Most importantly, "it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy." United States v. General Motors, 384 U.S. 127, 142-43, 16 L. Ed. 2d 415, 86 S. Ct. 1**331 1321 (1966). Accord Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226, 83 L. Ed. 610, 59 S. Ct. 467 (1939). Instead, "the crucial question is whether . . . [the defendants'] conduct stemmed from independent decision or from an agreement, *tacit* or express [emphasis supplied]." Theatre Enterprises, 346 U.S. at 540. Some examination of the elements of a § 1 "tacit" agreement is merited.

It is clear that proof of consciously parallel business behavior without more does not entitle a plaintiff to a directed verdict in his favor. Theatre Enterprises, 346 U.S. at 541-42. While the Supreme Court in Norfolk Monument, 394 U.S. 700, 89 S. Ct. 1391, 22 L. Ed. 2d 658, reversed a directed verdict for defendants where the record contained only evidence of similar business practices by the defendants, many Circuit Courts have construed Theatre Enterprises to authorize summary judgment or a directed verdict for defendants when the exclusive evidence is of parallel behavior. See, e.g., Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971). However, additional indicia of concerted action above and beyond mere parallelism ordinarily will allow a case [**34] to reach the jury. See generally Areeda, *supra*, at P 325 (reviewing most common "plus factors"). Professor Areeda calls one such category of additional evidence "actions facilitating oligopolistic collaboration." Id. at 379.

The two Supreme Court decisions establishing the doctrine of "tacit agreement" provide apt examples of "facilitating actions." In Interstate Circuit, 306 U.S. at 208, two powerful first run motion picture exhibitors faced competition from certain second run exhibitors who charged a markedly lower admission price for the same film. Thwarting such competition indirectly, the first run houses obtained separate agreements from each of the eight major movie distributors that each distributor would sell to the second run [*773] houses only on the condition that the second run houses raise their admission prices. To enlist the distributors' assistance in this plan, the first run houses sent a letter jointly addressed to all distributors informing them that the first runs would not deal with an individual distributor unless that distributor agreed to impose the restraints upon the second runs. The first runs then followed up the letter with a [**35] series of separate meetings with each distributor at which they obtained each individual distributor's agreement.

The Supreme Court held that sufficient circumstantial evidence existed to support a finding of express agreement among the distributors. Noting that the distributors failed to produce any witness who would have had personal knowledge of whether an interdistributor agreement existed or not, Justice Stone also commented in part:

The O'Donnell letter named on its face as addressees the eight local representatives of the distributors, and so from the beginning each of the distributors knew that the proposals were under consideration by the others. Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits. There was, therefore, strong motive for concerted action, full advantage of which was taken by Interstate and Consolidated in presenting their demands to all in a single document.

Interstate [**36] Circuit, 306 U.S. at 222. More importantly, Justice Stone then described why the evidence permitted a finding of concerted action *without* an express agreement:

While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. *It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.* Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, and knowing it, all participated in the plan. The evidence is persuasive that each distributor early became aware that the others had joined. With that knowledge they renewed the arrangement and carried it into effect for the two successive years.

HN11 [↑] It is elementary that an unlawful conspiracy may be and often is formed without simultaneous [**37] action or agreement on the part of the conspirators. . . Acceptance by competitors, without previous

560 F. Supp. 760, *773L^A 1983 U.S. Dist. LEXIS 17987, **37

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 [emphasis added].

Interstate Circuit, 306 U.S. at 226-27.

The Supreme Court reaffirmed its doctrine of "tacit agreement" in United States v. Masonite Corporation, 316 U.S. 265, 86 L. Ed. 1461, 62 S. Ct. 1070 (1942). Masonite entered into a series of "agency" agreements with its competitors which Justice Douglas ultimately found to constitute a subterfuge for intra-industry price fixing. While Masonite secured each competitor's agreement separately, each competitor knew that Masonite was entering into similar agreements with the other firms. The Supreme Court ruled that these facts alone could support a finding of concerted action:

there can be no doubt that this is a price-fixing combination which is illegal *per se* under the Sherman Act. That is true enough though the District Court found that, in negotiating and entering into the first [**38] agreements, each appellee, other [*774] than Masonite, acted independently of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others. It is not clear at what precise point of time each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that, as the arrangement continued, each became familiar with its purpose and scope. Here, as in Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226, 83 L. Ed. 610, 59 S. Ct. 467, "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. [citations omitted].

Masonite, 316 U.S. at 274-75.

A recent Fourth Circuit decision demonstrates that *Interstate Circuit* and *Masonite* are far from anachronisms. In United States v. Foley, 598 F.2d at 1323, real estate brokers in Montgomery County, Maryland faced [**39] severely declining revenues. When one broker attempted unilaterally to raise his commission percentage, competition forced him back down. Another broker then held a dinner for his competitors and announced that, regardless of what the others did, he was raising his commission. Evidence conflicted over what was discussed at the dinner following the announcement, but all attendees subsequently did raise many of their commissions. Essentially following the *Interstate Circuit* language of "acceptance of an invitation," the Fourth Circuit affirmed the defendants' felony convictions.

Application of these authorities leaves no doubt that plaintiffs have raised an issue of whether the Total Concept Program constituted concerted action by the defendants to raise the starting price for 1980 Toyotas.²² [**44] The record contains potential evidence that:

²² The plaintiffs have alleged a conspiracy to raise the suggested retail price. However, the coexistence of the Monroney and Sherman Acts require that S.1 liability can attach only for a tacit agreement to increase the starting point in dealer/customer negotiations by the amount of the suggested retail price of the accessories. In other words, the dealers had to have impliedly agreed that each would not unilaterally discount the price of the Toyota before commencing negotiations with the customer. Such a unilateral reduction is what the Weisman defendants requested in the Double Value Days Program but is precisely the opposite of what Abbott urged each dealer to do in the initial Total Concept Program. Abbott allegedly told the dealers that they could charge the full \$533.00 and keep the resulting \$420.00 unless the customer balked. A tacit agreement among the dealers that each would do exactly what Abbott was suggesting would, as will be explained *infra*, create problems under the antitrust laws.

The Court also notes that defendants assume that plaintiffs have alleged (1) an agreement among the dealers to order all of their Toyotas with the protective package with (2) the [agreed] purpose of raising the suggested price. Defendants base many of their arguments about the proper definition of price fixing upon this characterization of plaintiffs' position. The Court has carefully examined plaintiffs' submissions and believes that plaintiffs' position could also be characterized as: (1) an agreement among

[*775] 1.) As in *Interstate Circuit*, raising the starting price contained profit potential (because the starting price would become the actual price unless the purchaser balked), but unilateral action posed competitive peril (since other Toyota dealers would be offering cars that were both "cleaner and cheaper").

2. The [**40] Weisman defendants assembled groups of dealers and invited them to join in the program, specifically telling each gathering of the profit potential that pocketing the starting price promised. Abbott raised the core element of the agreement -- keeping the suggested price as the starting price -- in a collective gathering of precisely those people who had the anti-competitive financial incentive to adopt it as a joint course of action. While meetings among competitors without more are not *per se* illegal, it certainly is not rank speculation to observe that a meeting provides an ideal device for facilitating horizontal agreements once the anti-competitive idea is jointly planted in the minds of those competitors present at the meetings.

3. The Weisman defendants then facilitated the dealers' adherence to the scheme by circulating sign up sheets. The use of these sheets allowed each dealer to observe which other dealers were joining the program. While the sign up sheets specifically dealt with ordering the protective package, and hence certainly are competent circumstantial evidence of a tacit agreement for uniform ordering, they also could have served as a facilitating mechanism [**41] for an agreement to raise the starting price, especially when viewed in the light of Abbott's comments about profit potential immediately prior to their circulation.

4. MAT representative had follow-up meetings with those dealers who attended the meeting, but did not sign up, to pressure them to join. *Masonite* indicates that these individual meetings alone could suffice if each dealer knew, as indeed each must have known by attending the group meetings, that others were participating in the same program.

5. At least one dealer has testified in his deposition that the suggested price usually was the starting price. If true, this standard practice provided an additional facilitating mechanism for raising the starting price -- dealers had less cause to doubt mutual adherence to their joint course of action if such action was an adjunct to ordinary procedures. While the dealers had a right and duty under the Monroney Act to display a uniform suggested price set by the manufacturer, they had neither a duty nor a right jointly to utilize that suggested price as a starting point in price negotiations.²³

6. A marked change in dealer purchasing patterns occurred between [**42] August, 1979 and January, 1980. If the previously mentioned congruence between suggested price and starting price as a standard business practice is also established, then one rational inference from the uniform ordering of the protective package would be that starting prices also rose over that period. The fact that the Weisman defendants had to institute the Double Value Days Program, which as previously mentioned automatically eliminated any increase in the starting price, also supports the inference that the dealers were utilizing the suggested price as the starting point and were in fact not discounting as often as Mr. Weisman had hoped. While any such parallel dealer behavior taken alone might not suffice under *Theatre Enterprises*, it certainly can serve as partial circumstantial evidence of conspiracy when viewed together with the "invitation" and "facilitators" outlined above.

the defendants to raise the suggested price (2) via the facilitating mechanism of uniform application of the protective package. Defendants do not squarely address this alternative position of plaintiffs and, when combined with their certainly justifiable failure to anticipate the Court's current ruling on the suggested/starting price distinction, appear understandably to assume as the premise of their price fixing argument that plaintiffs have not marshalled sufficient circumstantial evidence to raise a genuine issue about a tacit interdealer agreement to raise the starting price (as opposed to an interdealer agreement to order all of their Toyotas with the protective package). As will be intimated later, many of defendants' arguments on the *per se* issue may have some merit if one assumes that the agreement in question is an agreement for uniform ordering of the protective package. However, before one determines the standard that must be employed to ascertain whether a tacit agreement is in restraint of trade, one must first determine what that tacit agreement is. As the Court finds sufficient circumstantial evidence to raise an issue about a tacit agreement to raise the starting price, the Court will approach the *per se* issue with that agreement in mind. Plaintiffs of course should amend their pleadings to allege concerted action by a tacit agreement to raise the starting price.

²³ For a more detailed explanation of this point, see page 783 *infra*.

[*776] In summary, plaintiffs could establish evidence of: (1) dealer motivation to raise the starting price collectively, (2) an understanding that an effective raising of the starting price could in fact only be done collectively, (3) an invitation, in a collective setting, to raise [*43] the starting price, (4) mechanism for facilitating the collective acceptance of that invitation, and (5) subsequent action consistent with a collective acceptance of that invitation. If established, such evidence could allow a trier of fact to find concerted dealer action to raise the starting price within the principles of *Interstate Circuit*. Defendants proffer numerous depositions in which the various dealers assert that no concerted action of any kind occurred. However, this only crystallizes the factual issue which the Court cannot resolve on a summary judgment motion. n23A

The Weisman Defendants as Co-Conspirators

The Weisman defendants stress their "vertical" relationship with the dealers.²⁴ While this may have some relevance in determining whether a case proceeds under a *per se* or Rule of Reason standard, it poses no barrier to the trier of fact on the threshold issue of concerted action between the dealers as a group and the Weisman defendants.

The traditional Supreme Court cases on "vertical" concerted action [*45] deal with the existence of a manufacturer/dealer combination for maintenance of the resale prices of the manufacturer's products.²⁵ In the seminal case, Justice McReynolds held that a manufacturer could announce the resale prices it wished its retailers to charge and then unilaterally refuse to sell to those retailers who did not adhere to his suggestions. *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*. Later decisions refused to construe *Colgate* as requiring that a finding of an actual "agreement" was a prerequisite for a price maintenance combination:

Thus, whatever uncertainty previously existed as to the scope of the *Colgate* doctrine, *Bausch & Lomb* and *Beech-Nut* plainly fashioned its dimensions as meaning no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. In other words, *HN12* [↑] 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 [*46] 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 (1960). In *Parke, Davis*, the drug manufacturing company went beyond merely announcing that it would not deal with retailers who did not adhere to its suggested resale price schedule. Justice Brennan found that *Parke, Davis* also enlisted its wholesalers' assistance in enforcing the retailers' price schedules and approached individual retailers to "remind" them of its policy. Always telling each retailer that it was similarly warning the other retailers to adhere to its policy, *Parke, Davis* at one stage even served as a relay mechanism among dealers to transmit messages to the effect that "an individual dealer would adhere to the policy if the other dealers did." *Id. at 35-36*. Justice Brennan found the manufacturer to be not only a full participant in illegal concerted action but in fact the actual ringleader:

When the manufacturer's actions, as here, go beyond mere announcement of [*777] his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, [*47] he has *put together* a combination in violation of the Sherman Act . . . It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies his competitors will also. But if a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price

²⁴ As will be described *infra*, "vertical restraints" frequently occur among firms operating at different levels of the production and distribution chain of a given product.

²⁵ Express contracts of minimum resale price maintenance violate § 1 under *Dr. Miles Medical Co. v. John D. Park & Sons, Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*.

competition, and takes affirmative action to achieve uniform adherence by inducing each customer 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 product then comes packaged in a competition-free wrapping -- a valuable feature in itself -- by virtue of concerted action induced by the manufacturer. *The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act.* [emphasis supplied].

Parke, Davis, 362 U.S. at 44, 46-47. Parke, Davis indicates both: (1) that [HN13](#) the organizer of a horizontal conspiracy may be liable as a co-conspirator even [**48](#) if the organizer was not one of the actual competitors and (2) that the organizer did not have to produce an actual intercompetitor agreement in order to be held to have provoked an illegal combination.

The subsequent Supreme Court decision of [Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 \(1968\)](#), established that [HN14](#) co-conspirators do not have to have identical motives in order to conspire with each other. In other words, a plaintiff does not have to establish that the ultimate objective of each conspirator was the actual restraint of trade -- it is sufficient if effectuation of the restraint is an intermediate goal sought for the facilitation of some other overriding objective. Thus, the Supreme Court has indicated that independent parties assisting a company in achieving its restraint can be co-conspirators [**49](#) with the company even though they will never be in a position to reap the benefits that directly flow from the restraints. [Albrecht, 390 U.S. at 150](#) (man hired by newspaper to solicit customers away from one of newspaper's delivery men); [Poller, 368 U.S. at 470](#) ("special agent" who received commission for facilitating condemned transaction). Lower courts, concerned about the *Albrecht*'s potential to sweep mere "pawns" of large corporations within the reach of [§ 1](#),²⁶ have attempted to narrow its reach. See, e.g., [Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025, 1031-32 \(2nd Cir. 1979\)](#) (knowing and active participation in competitive scheme required); [Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068, 1072-75 \(3rd Cir. 1978\)](#) (pawn's agreement must itself restrain trade). However, none of the Circuit Court decisions dislodge the fundamental import of *Albrecht* and require perfect symmetry of the co-conspirators' motivation. Immunization of the pawn "just doing his job" does not imply immunization of the intentional orchestrator of a restraint.

[\[**50\]](#) Moving to the instant facts, the Court finds that a genuine issue exists as to whether the Weisman defendants joined as co-conspirators in an interdealer combination to raise the starting price of 1980 Toyotas. A canvassing of the current record reveals potential evidence that:

1. Weisman strongly desired to have the dealers accept Polyglycoat accessories on the cars. He may have had an ultimate motivation of selling more sealants, selling more cars, or selling more of both.
2. Communications from the dealers before 1979 informed Weisman that competitive concerns prevented the dealers from acceding to Weisman's wishes.

[\[*778\]](#) 3. At meetings which Weisman attended, Abbott specifically informed the dealers of the very act -- charging the starting price unless the customer balked -- which if collectively pursued would violate [§ 1](#).

4. The Weisman defendants provided all of the previously discussed "facilitators": common meetings, galvanizing speeches, circulating sign up sheets, and vigorous individual follow-ups.

It is hardly rank speculation to combine the above and infer that Weisman purposefully organized concerted dealer action to raise [\[**51\]](#) the starting price in order to give the dealers incentive to order Polyglycoat products. That Weisman's ultimate motivation was not to raise the starting price, and that raising the starting price may in fact have been somewhat inconsistent with the Harbridge House recommendations of reducing dealer profit per car,²⁷

²⁶ Professor Areeda shares this concern over the inclusion of "pawns" as [§ 1](#) conspirators and queries whether the telephone company could be held to be a co-conspirator if competitors reached agreements on a restraint of trade over the telephone. Areeda, *supra*, at P 528.

²⁷ The extent of this inconsistency revolves around the effectiveness of the Total Concept Program's "discount only if the customer balks" approach in approximating the sales results obtained if the dealer unilaterally reduced the price before the commencement of the customer negotiations.

perhaps weaken but do not eliminate this inference. One could review the prior dealer complaints filed with the national importer and the Maryland Motor Vehicle Administration and conclude that Weisman deliberately decided to accomplish by conspiracy what he could not accomplish by coercion. He was present, after all, when his employee repeatedly stressed the potential profits available from using the suggested price as the starting price. As the above authorities indicate, it is irrelevant that: (1) the Weisman defendants were not competitors of the dealers, (2) the Weisman defendants did not provoke actual express agreements and (3) the conspiracy was but a means to their end rather than the end itself.

[52] LIABILITY UNDER § 1: PER SE OR RULE OF REASON?**

Application of a *per se* or Rule of Reason standard usually revolves around the characterization of a given transaction. In arguing for their respective positions, the parties apply distinctly different nomenclature to categorize the programs at issue. Plaintiffs contend the program constituted "classic horizontal price fixing" while defendants assert that they were mere "vertical non price restraints." Before specifically addressing these respective positions, the Court reviews the distinctions among "horizontal," "vertical," "price," and "non price" restraints.

Review of The Authorities: The Horizontal/Vertical Distinction

In economists' terms, "vertical" restraints are restraints among firms operating at different levels of the production and distribution chain of a product while "horizontal" restraints occur among firms competing on the same level of several production and distribution chains. In 1977, the Supreme Court ruled that all non price vertical restraints were governed by the Rule of Reason. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977).²⁸ Justice [**53] Powell found a *per se* approach inappropriate because one could not say that non price vertical restraints lacked redeeming virtue. He observed: "The market impact of [non price] vertical restraints is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."²⁹ *Id. at 51-52*. Specifically, "vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Id. at 54*.

[**54] After *Sylvania*, dispute has arisen over precisely what constitutes the legal definition [*779] of a "vertical" restraint, as the Supreme Court did not actually define the term itself. Courts have long condemned restrictions originating among the dealers but including the manufacturer as illegal *per se*. See, e.g., *United States v. General Motors*, 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 743 (7th Cir. 1982) (Posner, J.). The *Sylvania* court specifically indicated that such arrangements remained both "horizontal" and illegal *per se*. *Sylvania*, 433 U.S. at 58, n.28. The Fifth Circuit of Appeals has seized upon this affirmation of the traditional rule that restraints originating among the dealers were illegal *per se* to assert the converse: restraints originating with the manufacturer are automatically "vertical" and subject to the Rule of Reason. See, e.g., *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 295 (5th Cir. 1981); *H & B Equipment Co., Inc. v. International Harvester Co.*, 577 F.2d 239, 245-46 (5th Cir. 1978); cf. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967) (language intimating a "source" test). Based primarily upon the language of *Schwinn*, the Court has also followed the "source" rule and held that the potentially "horizontal" aspects of a restraint in which the manufacturer also competes with its distributors should be analyzed within the general Rule of Reason construct. *Donald B. Rice Tire Co., Inc. v. Michelin Tire Corp.*, 483 F. Supp. 750, 754 (D. Md. 1980). However, the Fourth Circuit on appeal disagreed with the Court's invocation of the source rule, stating "we must reject, however, any implication arising from the district court's discussion of *Schwinn* that a restraint may always be regarded as vertical if it is imposed by the manufacturer." *Donald B. Rice Tire Co. v.*

²⁸ An example of a non price vertical restraint is the "location clause" found in *Sylvania*: a term in a manufacturer-retailer franchise agreement prohibiting the retailer from selling franchised products from locations other than those specified in the agreement.

²⁹ Implicit in much of the Supreme Court's reasoning in *Sylvania* is the eminently reasonable assumption that interbrand competition should be the true focus of the antitrust laws in a non-monopolistic market.

Michelin Tire Corp., 638 F.2d 15, 16 (4th Cir. 1981) (per curiam). The Fourth Circuit then implied that a "functional analysis" would be preferable, although it was willing within the facts of that particular case to accept the Court's Rule of Reason analysis as an effective surrogate for the "functional analysis" because the Court's Rule of Reason opinion "clearly indicated that the restraints [**56] were for the purpose of promoting interbrand competition [Emphasis supplied]." *Id. at 16-17.*

In light of the dictates of *Rice*,³⁰ the Court adopts a "functional analysis" for characterizing a restraint as "horizontal" or "vertical." Specifically, the Court follows the implications of *Rice* that [HN15](#) a restraint is "vertical" if the purpose of the restraint is to promote interbrand competition. The Court amplifies the phrase "undertaken for the purpose of promoting interbrand competition" as encompassing any act which a supplier³¹ takes for the purpose of maximizing his profit in the product being restrained. Such a definition fully incorporates all of the potentially pro competitive practices stressed by Justice Powell in *Sylvania*.³² [\[**58\]](#) For example, acts designed to achieve distributional efficiencies automatically qualify, as they are directed towards profit maximization by attempting to reduce [\[*780\]](#) costs.³³ [\[**59\]](#) Profit maximization in that product need not be the exclusive purpose of the supplier; a court cannot say with assurance that a practice lacks all redeeming virtue if even one of its purposes is to maximize the supplier's profits in the product being [\[**57\]](#) restrained. Cf. *Northern Pacific, 356 U.S. at 5* (per se practice must lack any redeeming virtue). Hence, the Court adopts what might best be described as a "qualified source rule:" [HN16](#) a practice is "vertical" if its source was at least partially the supplier's drive for profits in the product concerned.³⁴

³⁰ Defendants urge the Court to disregard the *dicta* of the Fourth Circuit in *Rice* as poorly reasoned and inconsistent with *Sylvania, 433 U.S. at 36*. However, the Court will not ignore the explicit directions of its reviewing tribunal, even if the comments of that tribunal were not inevitably required by the decision. Furthermore, the Court regards the "functional analysis" adopted in the present case as fully consistent with and logically implied by *Sylvania*.

³¹ For purposes of convenience, the Court employs the term "supplier" to designate the entity on which is higher on the distribution scale than its co-conspirators, whether that entity be a manufacturer or, as here, a distributor.

³² As the Third Circuit observed in construing *Sylvania*, "When a manufacturer acts on its own, *pursuing its own market strategy*, it is seeking to compete with other manufacturers by imposing what may be defined as reasonable vertical restraints. This would appear to be the rationale of the *GTE Sylvania* decision [emphasis added]." *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (3rd Cir. 1979)*. The Court's definition would encompass any act related to a supplier "pursuing its own market strategy" in a product.

³³ The definition also encompasses certain categories of cases which defendants argue would be in effect overruled by a variation from the source rule. For example, defendants point to those cases where the manufacturer initiating a restraint also competes with his distributors at the distribution level. See, e.g., *H & B Equipment Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978)*. Such decisions uniformly retain a "vertical" characterization of the restraint. *Id.* However, these decisions are fully consistent with the Court's formulation: a manufacturer acting to maximize profits by a restriction of intrabrand competition in the distribution of his product is still attempting to maximize his profits from that product. A manufacturer might believe that greater efficiencies could be obtained by distributing more of his product directly; hence a court may not condemn out of hand a manufacturer's attempts to ensure that he retains certain distributional advantages for himself.

Similarly, defendants' concern that a variation from a rigid source rule would "eliminate tying doctrine" is also misplaced. While the Court's definition if rigorously applied would characterize a manufacturer-dealer "tie" as "horizontal" (since the manufacturer's acts with regard to the "tying" product are motivated by a desire for profits in the "tied" product), such a characterization has relevance only on the level of abstract theory. The "horizontal"/"vertical" distinction has traditionally been made only in the areas of mergers and "restricted distribution" arrangements; tying constitutes a completely separate category of **antitrust law** with its own specific rules.

³⁴ Additional support of this formulation may be found in the reasoning of those courts upholding the traditional *per se* treatment of restraints originating among the dealers. See, e.g., *Cernuto, 595 F.2d at 168*. The Third Circuit observed there: ". . . both the purpose and effect of . . . [the particular dealer-instigated restraint] was to eliminate competition at the retail level and not as in *GTE Sylvania*, to promote competition at the manufacturing level. Accordingly, the pro competitive virtues so critical in *GTE Sylvania* may not be presented here." *Id.* The definition adopted here would carry this rationale to its logical conclusion and

Review of The Authorities: The Definition of Price Fixing

All parties acknowledge the *per se* illegality of price fixing. See, e.g., [Arizona v. Maricopa County Medical Society, 50 U.S.L.W. 4687, 457 U.S. 332, \[*60\] 102 S. Ct. 2466, 73 L. Ed. 2d 48 \(1982\)](#). However, counsel have argued at length over what transactions may be categorized as "price fixing." Defendants contend that only those agreements which "on their face apply to price terms" qualify as price fixing. Envisioning a broader definition, plaintiffs assert that price fixing also encompasses those restraints which do not apply to price terms on their face but which nevertheless have the "purpose and effect" of raising prices. In light of the Court's determination that sufficient circumstantial evidence exists to raise a genuine issue about a tacit agreement among defendants to raise the starting price, this debate becomes superfluous, as plaintiffs would be alleging a restraint which *does* apply to price terms on its face.³⁵ Hence, the Court [[*781](#)] will canvass the authorities without specific reference to this interesting but now irrelevant issue.

[**61] Stemming from Justice Douglas' opinion in [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 \(1940\)](#), the traditional definition of quite price fixing is quite broad, as recently reaffirmed by the Fourth Circuit:

[**HN17**](#) [↑] price fixing is one of those practices that the Court has held to be illegal *per se* under the Sherman Act. [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 \(1940\)](#). The Court stated at 223, [60 S. Ct. at 844](#) [sic] "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*." To be guilty of price fixing, the conspirators do not have to adopt a rigid price, substantially less has been found to be price fixing. An activity can violate the *per se* rule even if its effect upon prices is indirect. [United States v. General Motors, 384 U.S. 127, 147, 86 S. Ct. 1321, 1331, 16 L. Ed. 2d 415 \(1966\)](#). In essence, an interference with the market forces freely setting the prices of goods is sufficient. *In Re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, [[**62](#)] 1137 (5th Cir.), cert. denied, 433 U.S. 910, 97 S. Ct. 2976, 53 L. Ed. 2d 1094 (1977).

[National Electrical Contractors Association, Inc. v. National Constructors Association, 678 F.2d 492, 500 \(4th Cir. 1982\)](#). The continuing vitality of Socony as the leading case on price fixing is indicated by the great reliance the Supreme Court placed on Socony in its two most recent price fixing decisions. [Maricopa, 50 U.S.L.W. at 4690; Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 64 L. Ed. 2d 580, 100 S. Ct. 1925 \(1980\)](#). Given the breadth of Socony, it is indeed not surprising that courts have categorized a wide variety of practices as price fixing. The Fourth Circuit recently summarized a sampling of those varied practices:

[Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580 \(1980\)](#), elimination of interest free short term credit; [United States v. Container Corp. of America, 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 \(1969\)](#), exchange of price information as stabilizing although lowering prices; [United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505 \(1960\)](#), setting [[**63](#)] minimum prices; [Kiefer-](#)

exclude from "vertical" characterization all those practices not directed at "promoting competition at the manufacturers level" and hence lacking "the pro competitive virtues so critical in *GTE Sylvania*."

³⁵ If plaintiffs proceed with an alternative theory that the defendants "conspired to order collectively all of their cars with the protective package with the purpose and effect of raising the starting price," then the issue will have to be addressed. At this stage, it appears that horizontal restraints with the purpose and effect of raising prices are *per se* illegal, see, e.g., [Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 64 L. Ed. 2d 580, 100 S. Ct. 1925 \(1980\); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 84 L. Ed. 1129, 60 S. Ct. 811 \(1940\)](#), but also that blind application of the "purpose and effect" doctrine in the vertical context would eviscerate settled Supreme Court doctrine in such areas as restricted distribution, [Sylvania, 433 U.S. 36, 97 S. Ct. 2549](#), and tying, [United States Steel Corp. v. Fortner Enterprises, 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 \(1977\)](#). However, the Court avoids any definitive exposition unless the parties subsequently make an actual decision necessary.

560 F. Supp. 760, *781 (1983 U.S. Dist. LEXIS 17987, **63

Stewart Co. v. Seagram & Sons, 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951), setting maximum prices; *United States v. Socony-Vacuum Oil*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940), buying surplus gasoline to stabilize prices; *Plymouth Dealers Assoc. of Northern Cal. v. United States*, 279 F.2d 128 (9th Cir. 1960), establishing price list from which negotiations began.

National Electrical Contractors, 678 F.2d at 500, n.12.³⁶ [**65]

[*782] In particular, as noted by the Fourth Circuit in the above quotation, [HN18](#) an agreement among competitors on the starting price to be used in commencing negotiations with their customers falls within the forbidden category. *Plymouth Dealers' Association of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960); *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131 (E.D. N.Y. 1978). The Ninth Circuit observed:

The test is not what the actual effect is on prices, but whether such agreements interfere with "the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, supra*, [*64] 340 U.S. at page 213, 71 S. Ct. at page 260. The competition between the Plymouth dealers and the fact that the dealers used the fixed uniform list price in most instances only as a starting point, is of no consequence. It was an agreed starting point; it had been agreed upon between competitors; it was in some instances in the record respected and followed; it had to do with, and had its effect upon, price.

The fact that there existed competition of other kinds between the various Plymouth dealers, or that they cut prices in bidding against each other, is irrelevant.

Plymouth Dealers, 279 F.2d at 132.³⁷

³⁶ Defendants understandably rely on *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979), in arguing that a narrower scope is appropriate for price fixing doctrine. *Broadcast Music* asserts that a particular practice may not be condemned as price fixing, even if it "literally" sets prices, unless prior experience has convinced a court that that particular practice is plainly anticompetitive and very likely without redeeming virtue. *Broadcast Music*, 441 U.S. at 9-10. If the Supreme Court's pronouncement is itself taken "literally," then *Socony* and its progeny are effectively eliminated. Almost any able antitrust defense attorney would be able to characterize the particular actions of his clients as "unique" or "unfamiliar," thereby plunging a court into the very detailed competitive analysis that *per se* rules were designed to avoid. Perhaps recognizing the severe practical effects of *Broadcast Music*, the Supreme Court has not seen fit to follow the literal implications of the opinion in its subsequent price fixing decisions. *Maricopa*, 50 U.S.L.W. at 4687, *Catalano*, 446 U.S. at 643. In particular, the *Maricopa* court condemned as illegal *per se* a very complicated and innovative health care plan allegedly designed to reduce health care costs. Justice Powell in dissent strongly argued that this innovative arrangement presented just the sort of "novel" practice to which "the *per se* label should not be assigned without carefully considering substantial benefits and pro competitive justifications." *Maricopa*, 50 U.S.L.W. at 4695 (Powell, J., dissenting). Justice Powell later concluded that "the court's effort to distinguish *Broadcast Music* thus is unconvincing." *Id.* Given this apparent retreat from *Broadcast Music*, the Court has no alternative but to follow the traditional *Socony-Maricopa* line of cases until the Supreme Court clearly indicates the contrary.

³⁷ A copiously annotated opinion by the United States District Court for the Southern District of New York provides further indication as to why an agreement to raise the starting price is properly within the reach of *Socony*. *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876 (S.D. N.Y. 1968) (Mansfield, J.). In *Checker*, the plaintiff taxicab manufacturing company alleged that its manufacturing competitor Chrysler had conspired with Chrysler dealers to fix the retail price of Chrysler taxis. The sole basis for this allegation was Chrysler's policy of providing direct rebates from Chrysler itself to purchasers of Chrysler's taxis. Denying plaintiff's motion for summary judgment, Judge Mansfield distinguished *Plymouth Dealers* and stated:

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. . . ., *Plymouth Dealers Assn. of Northern Cal. v. United States*, 279 F.2d 128 (9th Cir. 1960) (agreements on starting price for bargaining and trade-in allowances). 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

[**66] [HN19](#)[↑] The presence of a "vertical" element in a price restraint does not immunize it from *per se* status. Both minimum resale price maintenance, [Parke, Davis, 362 U.S. at 47](#); cf. [Dr. Miles Medical Company v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 \(1911\)](#) (seminal decision antedating *per se* doctrine and declaring minimum resale price maintenance contracts unlawful), and maximum resale price maintenance, [Albrecht, 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998](#) are illegal *per se*. These decisions have come under severe scholarly criticism,³⁸ but Justice Powell specifically reaffirmed the *per se* illegality of vertical price restraints in [Sylvania, 1*7831 433 U.S. at 51, n.18](#). Cf. [Maricopa, 50 U.S.L.W. at 4690-91](#) (quoting from *Albrecht* in condemning maximum price fixing). The presence of a manufacturer in a scheme to raise the starting price of motor homes did not alter its *per se* status in [Theophil, 446 F. Supp. at 131](#), and the Court perceives no judicial, as opposed to scholarly, authority to do so here.

[**67] Application of The Authorities: The Total Concept Program

Plaintiffs assert that the Weisman defendants initiated the restraint at issue in order to raise the suggested/starting price of 1980 Toyotas and thereby enhance the possibility for substantial "discounting" or "packing." Plaintiffs in fact repeatedly assert that the Weisman defendants sought to sell more Toyotas. Under the Court's "qualified source rule," such a theory of the case would clearly establish a vertical restriction. Indeed, plaintiffs may only establish a horizontal restriction if they successfully prove that the Weisman defendants' exclusive motivation was to sell more Polyglycoat products. Only then could it be said that the Weisman defendants' acts had no relation to Toyota profit maximization and hence no potential for enhancing interbrand competition in Toyotas.

However, regardless of the classification of the Total Concept Program as "horizontal" or "vertical," its potential price fixing implications will not permit the Court to rule as a matter of law that its legality will be determined solely under a Rule of Reason standard. As previously described, a genuine issue exists as to whether or [**68] not the defendants entered into a tacit agreement to raise the starting price of the 1980 Toyotas. If the jury in fact finds that such an agreement occurred, then the concerted action clearly qualifies as price fixing illegal *per se* under [Plymouth Dealers, 279 F.2d at 128](#) and [Theophil, 446 F. Supp. at 131. Parke, Davis, 362 U.S. at 47](#), and [Albrecht, 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998](#) indicate that any "vertical" aspect of the Total Concept Program will not alter this result.

The existence of the Monroney Act, while certainly removing MAT's setting of the suggested retail price from antitrust scrutiny, in no way immunizes any of the defendants from the consequences of an agreement to utilize the suggested price as an actual starting point in negotiations. ". . . There is a plain distinction between the lawful right to publish prices and terms of sale on the one hand, and an agreement among competitors limiting action with respect to the published prices, on the other." [Catalano, 446 U.S. at 649-50](#). Cf. [Sugar Institute v. United States, 297 U.S. 553, 80 L. Ed. 859, 56 S. Ct. 629 \(1936\)](#) (agreement to adhere to previously announced prices held

"cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." ([Kiefer-Stewart Co. v. Joseph Seagram & Sons, Inc., 340 U.S. 211, 213, 71 S. Ct. 259, 260, 95 L. Ed. 219 \(1951\)](#)).

Conduct or agreements not restricting a competitor's price independence, on the other hand, falls [sic] short of illegal price fixing . . . 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. 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*.

[Id. at 882-83](#). A starting price conspiracy, on the other hand, does contain a "surrender, express or implied, of some measure of pricing discretion," and properly qualifies for *per se* treatment.

³⁸ *Albrecht* has fared particularly poorly in the eyes of learned commentators. See, e.g., Areeda, *supra*, at P 506.

unlawful). **[**69]** In *dicta*, the *Plymouth Dealers* court specifically applied this distinction to the potential impact of the Monroney Act:

Suffice it to say that it is one thing for Congress to say each manufacturer must, acting alone, set a suggested retail list price for his product, and another thing to say that competing dealers may so agree. Many unilateral acts are completely lawful but become violative of **antitrust law** when performed pursuant to an agreement between competitors. Further, the purpose of the Monroney Bill was to prevent misbranding, abuse of caravan car prices and the "packing" which were appellant's primary objective here.

Plymouth Dealers, 279 F.2d at 134. In summary, plaintiffs will have established a *per se* violation of the Sherman Act if they prove that the defendants tacitly agreed to raise the starting price of 1980 Toyotas through the facilitating mechanism of the Total Concept Program.

The Authorities Applied: The Double Value Days Program

The status of the Double Value Days Program requires far less elaboration. It was manifestly a program initiated by the Weisman defendants in order to deepen their penetration into the regional **[**70]** Toyota market by increasing "discounting." As **[*784]** such, it is a classic vertical restraint. However, as it involves explicit contracts between a manufacturer and its dealers about lowering the resale price of the manufacturer's product, it is also a form of maximum vertical price fixing arrangement illegal *per se* under *Albrecht, 390 U.S. 145*. The Court acknowledges the trenchant economic critiques of *Albrecht*, but as a lower federal court has no authority to effectuate them.³⁹

[71] CAUSE OF ACTION UNDER §§ 15, 15c: "INJURY SUSTAINED"?**

As mentioned earlier, both the *parens patriae* and private action statutes require that a plaintiff demonstrate "injury." The *parens patriae* statute is of quite recent origin and has been construed by relatively few decisions. However, since Congress enacted the *parens patriae* statute in response to *State of Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*, a Supreme Court decision prohibiting *parens patriae* suits from being brought under the private action statute, see 15 J. von Kalinowski, *Antitrust Laws and Trade Regulations* § 115.05 [1] at 115-43, n.2 (1982), the Court assumes in the absence of Congressional language to the contrary that Congress intended for *parens* actions largely to parallel treble damage suits. Hence, the Court combines the issues of "injury" under the respective statutes and accepts decisions construing the private action "injury" requirement as authoritative on the parameters of *parens* "injury" as well.

The private antitrust action requires significantly more than mere proof of a substantive violation of the antitrust **[**72]** laws:

HN20  there are three essential elements in every private anti-trust action: They are (1) a violation of the **antitrust law**, (2) direct injury to the plaintiff from such violations, and (3) damages sustained by the plaintiff. It follows, therefore, that a mere finding of violation does not result in liability. The statute gives a right of action only to the extent that one has been "injured in his business or property by reason of anything forbidden in the

³⁹ In another case involving the application of the same protective package to 1980 (and 1979) Toyotas, the United States District Court for the Northern District of Alabama has ruled that the legality of alleged restraints initiated by the Toyota distributor for the southeastern United States would be tried under a Rule of Reason standard. *Moore v. Southeast Toyota Distributors, Inc.*, Civil 81-P-0491-S (N.D. Ala. June 22, 1982). As the *Moore* court provided no memorandum along with its order, one cannot ascertain what authorities Judge Pointer relied upon in reaching his decision. In addition, the precise restraint Judge Pointer was reviewing and its potential similarity to the present facts remain unclear. In a previous order denying class certification, Judge Pointer indicated that the Toyota distributor for a significant period of time had actually discounted the entire price of the protective package *on the Monroney sticker*. *Moore v. Southeast Toyota Distributors*, 1982-2 Trade Cas. para. 64,743 (N.D. Ala. 1982). Besides causing no harm to the consumer, see *infra*, such an act without more appears to support an inference of unilateral distributor behavior beyond the scope of *§ 1*. Given such significant factual variances, the Court does not believe that *Moore* permits it to part company with the authorities reviewed above.

anti-trust laws." The gravamen of the complaint is not the conspiracy; the crux of the action is injury, individual injury.

Windham v. American Brands, 565 F.2d 59, 65-66 (4th Cir. 1977). In addition, "plaintiffs must prove antitrust injury, which is to say injury of the type of antitrust laws were intended to prevent and flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 Accord J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981). However, once plaintiff has proven that some antitrust injury did in fact occur, the courts impose a much lighter burden [**73] upon him in establishing the precise extent of his damages. Story Parchment Co. v. Paterson Co., 282 U.S. 555, 562-63, 75 L. Ed. 544, 51 S. Ct. 248 (1931); Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 867, n.1 (10th Cir. 1981); Malcolm v. Marathon Oil Co., 642 F.2d 845, 858 (5th Cir. 1981); cf. J. Truett, 451 U.S. at *785 567, n.5 (recognizing distinction). While damages may not be the result of mere guesswork or speculation, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574 (1946); Story Parchment, 282 U.S. at 563; but cf. Malcolm, 642 F.2d at 858 ("proof of losses which border on the speculative is allowed"); Jewel Tea Co. v. Local Unions, 274 F.2d 217, 224 (7th Cir. 1960) (speculation as to amount of damages won't prevent recovery once fact of actual damages proven), quite relaxed standards govern, see generally Malcolm, 642 F.2d at 858 (detailed listing of various damage rules). The rationale for this relaxation includes the inherent complexity and imprecision in calculating antitrust damages, J. Truett, 451 U.S. at 566; Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, **741 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969), and above all the inequity of allowing the defendant to profit from the uncertainty created by his own wrongdoing, J. Truett, 451 U.S. at 566-69; Bigelow, 327 U.S. at 264-66; Story Parchment, 282 U.S. at 563. In particular, courts appear to be loathe to entertain defendants' pleas about the speculative nature of determining the free market conditions which would have prevailed in the absence of a restraint when the defendant's own conduct has eliminated those free market conditions. *Id.*

In a price fixing case, the essential inquiry after liability has been established is the amount of any overcharge created by the defendant's conduct. Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390, 396, 51 L. Ed. 241, 27 S. Ct. 65 (1906) (Holmes, J.); State of Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 263, 31 L. Ed. 2d 184, 92 S. Ct. 885 n.14 (1972) (*dicta*); Ohio Valley Electric Corp. v. General Electric Co., 244 F. Supp. 914, 933 (S.D. N.Y. 1965). "[Injury] and damages are coextensive; the overcharge constitutes the plaintiff's injury (impact) as well as the measure of his damage (damages) [**75] and is the difference between the price actually paid and the price he would have paid absent the conspiracy." Ohio Valley, 244 F. Supp. at 933. In addition, Congress has provided *parens patriae* plaintiffs with a significant easing of their evidentiary burden in price fixing cases by eliminating the necessity for proof of individual damage:

HN21[] In any action under section 15c (a) (1) of this title, in which there has been a determination that a defendant agreed to fix prices in violation of the sections 1 to 7 of this title, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

15 U.S.C. § 15d (1976).

The above authorities may be readily applied to the present facts. If the Total Concept Program did in fact involve a price fixing combination, then each individual Toyota consumer was "overcharged" by the difference between (1) the amount he actually [**76] paid for the 1980 Toyotas with the protective package and (2) the amount he would have paid for the 1980 Toyota with the protective package if the dealers had not agreed to raise the starting price. This "overcharge" varies with the individual purchaser. If the purchaser bargained the dealer down from the full \$533.00, then the purchaser's individual overcharge was correspondingly reduced. If, on the other hand, the purchaser bought at the full \$533.00 and the dealer would have unilaterally discounted the \$533.00 suggested price down to the \$113.00 cost in the absence of the conspiracy to raise the starting price, then the purchaser suffered an overcharge of \$420.00. Obviously may other potential scenarios exist.

The summation of these overcharges represents the transfer of wealth from consumers to sellers as a result of the sellers' interference with the free workings of [*786] the marketplace and constitutes the quintessential "antitrust injury." While plaintiffs' proof of "injury in fact" and "extent of injury" must await trial, they certainly have alleged actual injury. The Court cannot assume that all defendants' pricing behavior would have remained precisely the same [**77] in the absence of their concerted action, for such an assumption would ignore the very economic tenets of free market behavior which underlie our antitrust laws.⁴⁰

On the other hand, the record clearly establishes that the Double Value Days Program by its very terms inflicted no injury upon the consumer. The program required the dealer to discount the entire suggested [**78] list price for the protective package from the starting price of the car and essentially gave the consumer something for nothing. The Court cannot assume that a car was physically worse off with the protective package than without it.⁴¹

For the foregoing reasons, it is this day of April, 1983, by the United States District Court for the District of Maryland, ORDERED:

1. That defendants' motions for partial summary judgment on the Double Value Days Program BE, and the same ARE, hereby GRANTED;
2. That the remainder of defendants' motions for summary judgment BE, and the same ARE, hereby DENIED;
3. That the rulings of law made herein shall govern the remainder [**79] of this action; and
4. That plaintiffs have leave to amend their pleadings to bring them into conformity with the rulings herein.

End of Document

⁴⁰ Defendants argue that plaintiffs must show that each consumer was "coerced" into buying the protective package in order to establish injury. However, the consumers' injury arises not from an "unwanted" purchase of the Toyota with the protective package but in paying more for the Toyota with the protective package than they would have paid for the Toyota with the protective package in the absence of the conspiracy. Defendants contend that the fact that the purchaser received something of at least some value as part of the transaction is being ignored, but the Court explicitly incorporates this inherent "off-set" into the damage formula.

⁴¹ Plaintiffs claim that they do not know for certain that the dealers actually adhered to their end of the deal and unilaterally discounted the suggested price. However, to the extent this occurred, it would indicate that the consumer was "injured" not as a result of any concerted action but because the dealer/distributor contract was *breached*.



Dart Industries, Inc. v. Plunkett Co. of Oklahoma, Inc.

United States Court of Appeals for the Tenth Circuit

April 8, 1983

Nos. 81-1404, 81-1454

Reporter

704 F.2d 496 *; 1983 U.S. App. LEXIS 29000 **; 1983-1 Trade Cas. (CCH) P65,314

DART INDUSTRIES, INC., RALPH WILSON PLASTICS DIVISION, Plaintiff-Appellee and Cross-Appellant, v. THE PLUNKETT COMPANY OF OKLAHOMA, INC., an Oklahoma Corporation, Defendant-Appellant and Cross-Appellee

Subsequent History: [**1] As Amended.

Prior History: Appeal from the United States District Court For the Northern District of Oklahoma.

Disposition: AFFIRMED.

Core Terms

distributor, termination, summary judgment, antitrust, adhesives, prices, territorial, reflects

LexisNexis® Headnotes

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

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

HN1[] Robinson-Patman Act, Claims

A party resisting a motion for summary judgment must do more than make conclusory allegations, it must set forth specific facts showing that there is a genuine issue for trial. [Fed. R. Civ. P. 56\(e\)](#).

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

HN2[] Price Fixing & Restraints of Trade, Vertical Restraints

704 F.2d 496, *496L^A 1983 U.S. App. LEXIS 29000, **1

Even rigid vertical territorial divisions are not per se illegal under federal antitrust laws.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN3 Price Fixing & Restraints of Trade, Horizontal Market Allocation

In an antitrust context, an "area of primary responsibility" scheme is generally lawful.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

HN4 Robinson-Patman Act, Claims

Illegal price discrimination requires that the same product be sold at different prices to competitors.

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

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

HN5 Private Actions, Remedies

Summary judgment in an antitrust case is the exception rather than the rule.

Counsel: Philip R. Russ, Amarillo, Texas, (Douglas L. Boyd, Tulsa, Oklahoma, with him on the brief), for The Plunkett Company of Oklahoma, Inc.

James H. Bellingham of McClelland, Collins, Bailey, Bailey & Manchester, Oklahoma City, Oklahoma, for Dart Industries, Inc., Ralph Wilson Plastics Division.

Judges: McWilliams, Doyle, and Logan, Circuit Judges.

Opinion by: LOGAN

Opinion

[*498] LOGAN, Circuit Judge.

These appeals arise out of Dart Industries, Inc.'s termination of The Plunkett Company of Oklahoma, Inc. as its Tulsa area distributor of the laminates and adhesives it manufactures. Dart sued Plunkett for monies owed on Plunkett's purchases, after having given credit for returned inventory. Plunkett counterclaimed, alleging antitrust violations.

At trial, the only item in dispute on the accounting issue was the amount of credit to be given for cut sheets of plastic Dart repossessed with the other inventory. Dart gave no credit for these materials. The jury award gave Plunkett credit at the same value per square foot as that given for uncut sheets. Dart appeals [**2] this determination. The only question is whether the record contains sufficient evidence to support the verdict. We find there is substantial evidence to support the verdict and therefore affirm the judgment entered on the jury verdict on that accounting.

Plunkett's counterclaim alleged Sherman Act § 1, Clayton Act, and Robinson-Patman Act violations. In the alternative, Plunkett sought damages for breach of contract. A month before trial Plunkett sought to amend its pleadings and add a Sherman Act § 2 claim. This motion was denied. Upon cross motions for summary judgment the court granted summary judgment in favor of Dart and dismissed Plunkett's antitrust claims. Plunkett appeals, asserting that summary judgment was improper in this case because there exist genuine issues as to material facts. We have examined Plunkett's contentions and affirm the trial court's judgment. The situation here involves no more than a manufacturer terminating a distributor with whom it is unhappy and substituting another distributor in its place, sanctioned by [United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#). See also [Joseph E. Seagram & Sons, Inc. v. \[**3\] Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 78 \(9th Cir. 1969\)](#), cert. denied, 396 U.S. 1062, 24 L. Ed. 2d 755, 90 S. Ct. 752 (1970).

Plunkett alleged that the termination was unlawful because it was motivated by anticompetitive purpose or accompanied by anticompetitive effect. Specifically, Plunkett alleged that the termination implicates (1) price fixing, (2) vertical and horizontal territorial allocations, (3) concerted refusals to deal, (4) Robinson-Patman Act violations, and (5) tying arrangements. [HN1](#) [↑] A party resisting a motion for summary judgment must do more than make conclusory allegations, it "must set forth specific facts showing that there is a genuine issue for trial." [Fed. R. Civ. P. 56\(e\); First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-90, 20 L. Ed. 2d 569, 88 S. Ct. 1575 \(1968\)](#). This Plunkett did not do. In support of its contention that Dart engaged in price fixing, Plunkett cites three facts: (1) Dart constantly urged Plunkett to lower its prices; (2) on one occasion Dart pressured Plunkett to reduce its prices to a customer; and (3) Dart published a rebate list establishing the amount of rebate Dart would give at particular prices. [**4] Neither these facts nor any inferences to be drawn therefrom support the allegation of price fixing. Plunkett retained complete discretion over its pricing policies.

Plunkett also argues that Dart's practices of selling directly to large accounts in Plunkett's area or of "taking over" the accounts when the market price drops below that shown on the rebate list constitutes a horizontal customer allocation. This argument is without merit. There is no evidence of a horizontal agreement to [**499] allocate customers. Dart's selling directly to certain large accounts reflects a dual distribution system that standing alone, is perfectly lawful; Dart is simply ensuring a continued presence in the market. Dart's taking over particular accounts from its distributor reflects that there is a certain price level below which Dart will not automatically subsidize a distributor's operation, but rather will determine directly, on a case by case basis, whether to lower its price to meet competition. Plunkett asserts that Dart's refusal to "drop-ship" on behalf of Plunkett into areas serviced by other distributors constitutes an illegal vertical territorial arrangement. This too is without [**5] merit. [HN2](#) [↑] Even rigid vertical territorial divisions are not per se illegal, [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#), and the record reflects no injury to competition that is a predicate to illegality under the rule of reason. Furthermore, the Dart policy is not a rigid territorial division; rather, it resembles [HN3](#) [↑] an "area of primary responsibility" scheme, which is generally lawful. [White Motor Co. v. United States, 372 U.S. 253, 270-72 & n.12, 9 L. Ed. 2d 738, 83 S. Ct. 696 \(1963\)](#) (Brennan, J., concurring); [Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637, 639-40](#) (10th Cir.), cert. denied, 411 U.S. 987, 36 L. Ed. 2d 965, 93 S. Ct. 2274 (1973); ABA Section of [Antitrust Law](#), *Vertical Restrictions Limiting Intrabrand Competition* 20-25 & n.62 (ABA Monograph No. 2, 1977). In the instant case Dart allows distributors to sell outside their territories; Dart merely refuses to facilitate such sales by direct shipment from the factory. This refusal does not constitute an antitrust violation.

In its counterclaim Plunkett alleged that Dart "contacted numerous accounts of Plunkett and its suppliers, directly [**6] or indirectly, in an attempt to cause others to refuse to deal and/or boycott Plunkett." However, in its answers to interrogatories and in its deposition testimony Plunkett admitted that the only fact on which it based this allegation was Plunkett's termination as Dart's distributor. The termination alone does not raise an issue as to any

material fact relating to a concerted refusal to deal. Neither can the fact that Central Floor Distributors, Inc. and Dart agreed prior to Plunkett's termination that Central Floor would supplant Plunkett support a boycott allegation.

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

Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1249 (5th Cir. 1975). To hold otherwise would require a manufacturer to permit a gap in its product distribution system and would not serve the procompetitive aims of the antitrust [**7] laws. Replacing one exclusive distributor with another impairs neither inter nor intrabrand competition. The record reflects that in the instant case the effect on interbrand competition was procompetitive: after losing the Wilsonart line Plunkett became the Tulsa area distributor for Nevamar, which previously had not been represented in the area. Nor is there any evidence of anticompetitive intent in the termination. Plunkett's allegations regarding concerted refusals to deal were properly resolved on summary judgment.

Plunkett's argument that Dart violated the Robinson-Patman Act was also properly resolved on summary judgment. The difference in the prices charged to Plunkett and those charged to direct accounts such as Oklahoma Fixtures do not constitute a Robinson-Patman violation. See American Oil Co. v. McMullin, 508 F.2d 1345, 1352-53 (10th Cir. 1975). HN4 [**8] Illegal price discrimination requires that the same product be sold at different prices to competitors. *Id.* There is no evidence that Oklahoma Fixtures and the other direct accounts were in competition with Plunkett. Furthermore, the record reflects that the lower prices were occasioned by competitive [*500] [**8] pressures and may well have been within the statutory "meeting competition" defense. See 15 U.S.C. § 13(b). That Central Floor received lower prices than had previously been charged Plunkett also fails to support a Robinson-Patman claim. Plunkett and Central Floors were not in competition for the purchase of Dart products. The price break given Central Floors represents an effort by Dart to subsidize start-up costs. It does not violate the antitrust laws.

Plunkett asserts that the termination implicates the prohibition against tying arrangements because it was motivated by Plunkett's failure to adequately promote Wilsonart adhesives. This contention is based on an incident in which, after securing an account for the use of Wilsonart adhesives, Dart discovered that Plunkett had suggested a different brand to the customer. See Brief of Appellant at 29. Dart's reaction does not reflect an attempt to tie adhesives to laminates.

"James [Plunkett], I appreciate your right to sell other brands, but we ask that you support our efforts when we set up an account. If you feel you cannot, we must reserve the right to sell those accounts on a direct basis."

[**9] Letter from Lou Maspero to James Plunkett (October 4, 1977), R. XI, Defendant's Exhibit 44. There is no other evidence in the record to support an allegation of tying, and this incident, standing alone, is too attenuated to provide such support. Nor does this case fit within the rule of Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972). There, a franchisor insisted that the franchisees purchase its equipment, food, and packaging requirements exclusively from the franchisor. Here, Dart never required Plunkett to forego merchandising other laminates and adhesives. We do not consider the trademark "Wilsonart" to be a product separate from Wilsonart adhesives and laminates. See Redd v. Shell Oil Co., 524 F.2d 1054, 1057 (10th Cir. 1975), cert. denied, 425 U.S. 912, 47 L. Ed. 2d 762, 96 S. Ct. 1508 (1976); Principe v. McDonald's Corp., 631 F.2d 303, 308-09 (4th Cir. 1980), cert. denied, 451 U.S. 970, 68 L. Ed. 2d 349, 101 S. Ct. 2047 (1981). Consequently, Plunkett's tying allegations were properly dismissed on summary judgment.

Although HN5 [**10] summary judgment in an antitrust case is the exception rather than the rule, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962), we believe that it

was proper in this case. The record was significantly developed; it contains nearly 900 pages of deposition testimony of all the principal actors and over 700 pages of pleadings, motions, and exhibits. Our review of the record reveals no factual disputes which, if resolved in Plunkett's favor, would support its antitrust allegations.

The district court's grant of summary judgment on the breach of contract claim was also proper. Plunkett's sole complaint in this regard is that reasonable notice of termination was not given. See Brief of Appellant at 32-33. There was no written distribution agreement and Plunkett was given three months notice before the date of termination. Instead of continuing to merchandise Dart products during the three months, Plunkett became a distributor for one of Dart's competitors. Under these circumstances, the notice of termination was reasonable as a matter of law.

Finally, the court did not abuse its discretion in refusing to permit Plunkett to amend its counterclaim to allege a Sherman [**11] Act § 2 violation. Discovery had been essentially completed. The case was ready to go to trial. The amendment would have changed the entire complexion of the case. Plunkett made no showing that the amendment could not have been made earlier. Rather, it stated that the § 2 claim was based on the same facts alleged from the beginning. See Brief of Appellant at 38. In this situation it was not error to refuse the proffered amendment. See Landon v. Northern Natural Gas Co., 338 F.2d 17, 20 (10th Cir. 1964), cert. denied, 381 U.S. 914, 14 L. Ed. 2d 435, 85 S. Ct. 1529 (1965); Layfield v. Bill Heard Chevrolet Co., 607 F.2d 1097, 1099 (5th Cir. 1979), cert. denied, 446 U.S. 939, 64 L. Ed. 2d 793, 100 S. Ct. 2161 (1980).

AFFIRMED.

End of Document



Schacht v. Brown

United States Court of Appeals for the Seventh Circuit

December 10, 1982, Argued ; April 8, 1983, Decided

Nos. 82-2088, 82-2089, 82-2090

Reporter

711 F.2d 1343 *; 1983 U.S. App. LEXIS 28988 **; Fed. Sec. L. Rep. (CCH) P99,160

JAMES W. SCHACT [SCHACHT], the Acting Director of Insurance of the State of Illinois and Liquidator of Reserve Insurance Company, Plaintiff-Appellee, v. ISADORE BROWN, et al., Defendants-Appellants

Subsequent History: [\[**1\]](#) As Amended; Rehearing and Rehearing En Banc Denied July 1, 1983. Certiorari denied November 28, 1983. *464 U.S. 1002, 104 S. Ct. 508, 78 L. Ed. 2d 698.*

Prior History: Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 81 C 1475 -- THOMAS R. McMILLEN, Judge.

Disposition: Affirmed.

Core Terms

insolvency, alleges, organized crime, defendants', enterprise, fraudulent, mail fraud, damages, pattern of racketeering activity, shareholders, officers and directors, courts, accounting firm, prolongation, violations, anti trust law, stemmed, district court, racketeering, treble damages, artificially, reinsurance, provisions, predicate offense, civil damages, policyholders, Liquidator, imputation, indirectly, wrongdoing

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Insurance Law > Insurer Insolvency > General Overview

[**HN1**](#) **[Supplemental Jurisdiction, Pendent Claims**

Under Ill. Rev. Stat. ch. 73 § 799 et seq. the Director of Insurance is designated as the liquidator of an insolvent insurance company. Under that statute, the Director is vested with all rights of action belonging to the insolvent insurance company. Ill. Rev. Stat. ch. 73 § 805 (1981).

Insurance Law > Insurer Insolvency > Liquidations & Rehabilitations

Insurance Law > Insurer Insolvency > General Overview

711 F.2d 1343, *1343LÁ1983 U.S. App. LEXIS 28988, **1

[**HN2**\[\] Insurer Insolvency, Liquidations & Rehabilitations](#)

An state insurance director, as liquidator of an insolvent insurance company, shall be vested by operation of law with the title to all property, contracts and rights of action of the company as of the date of the order directing liquidation. Ill. Rev. Stat., ch. 73, § 803.

Business & Corporate Law > ... > Dissolution & Receivership > Receiverships > General Overview

Insurance Law > Insurer Insolvency > General Overview

[**HN3**\[\] Dissolution & Receivership, Receiverships](#)

Where a receiver is appointed for the purpose of taking charge of the property and assets of a corporation, he is, for the purpose of determining the nature and extent of his title, regarded as representing only the corporate body itself, and not its creditors or shareholders. He takes only the rights of the corporation such as could be asserted in its own name, and that upon that basis, only, can he litigate for the benefit of other shareholders or creditors.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

[**HN4**\[\] Shareholder Actions, Actions Against Corporations](#)

Fraud on behalf of a corporation is not the same theory as fraud against it. Fraud against the corporation usually hurts just the corporation; the stockholders are the principal if not only victims. But the stockholders of a corporation whose officers commit fraud for the benefit of the corporation are beneficiaries of the fraud.

Insurance Law > Insurer Insolvency > Liquidations & Rehabilitations

Insurance Law > Insurer Insolvency > General Overview

[**HN5**\[\] Insurer Insolvency, Liquidations & Rehabilitations](#)

Under the distribution provisions of the governing liquidation statute, it is the policyholders and creditors who have first claim (after administrative costs and wages owed) to the assets of the estate. Ill. Rev. Stat. ch. 73, § 817 (1981). Thus, the claims of these entirely innocent parties must be satisfied in full before the insolvent insurance company's shareholders, last in line for recovery, receive anything.

Insurance Law > Insurer Insolvency > General Overview

[**HN6**\[\] Insurance Law, Insurer Insolvency](#)

A corporation may not sue to recover damages resulting from the fraudulent prolongation of its life past insolvency.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

711 F.2d 1343, *1343LÁ1983 U.S. App. LEXIS 28988, **1

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN7 [down arrow] **Racketeer Influenced & Corrupt Organizations, Remedies**

The civil damage provision of Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1964\(c\)](#), creates a private right of action with treble damage recovery for any person injured in his business or property by reason of a violation of [18 U.S.C.S. § 1962](#).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN8 [down arrow] **Private Actions, Racketeer Influenced & Corrupt Organizations**

[18 U.S.C.S. § 1962\(a\)](#) makes it unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or establishment or operation of, any enterprise which touches interstate commerce.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN9 [down arrow] **Private Actions, Racketeer Influenced & Corrupt Organizations**

[18 U.S.C.S. § 1962\(c\)](#) makes it unlawful for any person employed by or associated with any enterprise engaged in interstate commerce to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[**HN10**](#) [down] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeering Influenced and Corrupt Organizations Act, [18 U.S.C.S. §1961](#) defines a "pattern of racketeering activity" as at least two occurrences within 10 years of any of several predicate offenses, including mail fraud.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

[**HN11**](#) [down] **Amendment of Pleadings, Leave of Court**

In examining a complaint, a court is guided by the principle that the liberal pleading policy of the Federal Rules of Civil Procedure prevents dismissal of a meritorious action for purely formal or technical reasons and that the court is to construe the pleadings in the plaintiff's favor. Moreover, a court may grant leave to amend the complaint to correct even substantive errors in the pleadings where this would facilitate a decision on the merits and no prejudice would ensue to the defendants.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

[**HN12**](#) [down] **Motions to Dismiss, Failure to State Claim**

When it does not appear beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief, a court cannot dismiss the complaint on the basis of that deficiency.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

[**HN13**](#) [down] **Claims, Fraud**

The civil sanctions provided under the Racketeer Influenced and Corrupt Organizations Act are dramatic, and have a vast impact upon the federal-state division of substantive responsibility for redressing illegal conduct, but, such dramatic consequences are necessary incidents of the deliberately broad swath Congress chose to cut in order to reach the evil it sought; the court is therefore without authority to restrict the application of the statute.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN14 [blue document icon] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Application of [18 U.S.C.S. § 1962\(c\)](#) is not restricted to members of organized crime.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN15 [blue document icon] **Remedies, Damages**

To the extent that **antitrust law** and policy are increasingly concerned primarily with market efficiency rather than the deleterious effects of concentrated market power itself, analogies to that body of law become increasingly irrelevant, since the exercise of social power by organized crime is thought to be malum in se.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN16 [blue document icon] **Racketeer Influenced & Corrupt Organizations Act, Elements**

The substantive proscriptions of the Racketeer Influenced and Corrupt Organizations statute apply to insiders and outsiders--those merely associated with an enterprise--who participate directly and indirectly in the enterprise's affairs through a pattern of racketeering activity. Defendants who are not managers or employees in the colloquial sense are nevertheless reached by [18 U.S.C.S. § 1962\(c\)](#).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN17 [blue document icon] **Private Actions, Racketeer Influenced & Corrupt Organizations**

[18 U.S.C.S. § 1961\(3\)](#) plainly states that a violating "person" may be any individual or entity capable of holding a legal or beneficial interest in property.

Counsel: Edward J. Burke, Burke & Smith, Chicago, Illinois, Ellen G. Robinson, Burke & Smith, Chicago, Illinois, for Plaintiff.

David M. Spector, Isham, Lincoln & Beale, Chicago, Illinois,.

Donald R. Harris, Jenner & Block, Chicago, Illinois,.

Charles W. Board, Wilson & McIlvaine, Chicago, Illinois, for Defendant.

Judges: Cummings, Chief Judge, Wood, Circuit Judge, and Hoffman, Senior District Judge. *

* The Honorable Walter Hoffman, Senior District Judge of the Eastern District of Virginia, is sitting by designation.

Opinion by: WOOD

Opinion

[*1344] WOOD, Circuit Judge.

This is an interlocutory appeal from the district court's order denying defendants' motion to dismiss the complaint; it was certified to this court for resolution of controlling questions of law, pursuant to [28 U.S.C. § 1292\(b\)](#). While the district court did not limit its certification to a [*2] particular question, it stated that it viewed the "controlling question" to be whether the plaintiff may sue for the type of injury he alleges here under the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C. §§ 1961-1968](#) (hereinafter, RICO). In order to reach this jurisdictional issue, however, we find it first necessary to determine the standing of the plaintiff, the Director of Insurance of the State of Illinois (Director), who is the statutory liquidator of Reserve Insurance Company (Reserve), to maintain [*1345] the action, and to determine the sufficiency of the complaint. We conclude that the Director has standing, that his complaint is sufficient, and that it alleges an injury which may be redressed by a civil action under RICO.

I. *Factual Background*

Although the alleged events giving rise to this action are complex, they may be outlined briefly for the purposes of this appeal. The main focus of the allegations is that, as a result of the fraudulent actions of the various defendants, Reserve's corporate parent was caused to continue Reserve in business even though the latter was insolvent, and was caused to saddle Reserve with additional liabilities [*3] and drive deeper into insolvency, all of which consequences resulted in damage to Reserve, as well as its policyholders and creditors, exceeding \$ 100,000,000.

The complaint recites that, as of December 31, 1974, Reserve was insolvent as a result of its policy of accepting extraordinarily high-risk insurance business and underreserving and maintaining insufficient surplus for potential claims. In late 1974, the Director alleges, the Illinois Department of Insurance became concerned about the diminution of Reserve's surplus, and initiated negotiations with the officers and directors of Reserve and American Reserve Corporation (ARC), Reserve's corporate parent, to rectify the problem. While these negotiations were proceeding, however, the officers and directors of Reserve and ARC caused their companies to enter into an agreement with defendants Societe Commerciale De Reassurance (SCOR), a deal brokered by SCOR Reinsurance Company (SCOR Re). Under the terms of this agreement, Reserve ceded to SCOR most of its more profitable and least risky business (in return for SCOR's payments of commissions to Reserve), most of which business SCOR in turn secretly retroceded to another ARC subsidiary, [*4] Guarantee Reserve Co., Ltd. (GRC). Also, because the capitalization of GRC was insufficient to cover the potential losses involved in this retrocession, the Director alleges, ARC's officers and Directors secretly agreed to guarantee GRC's obligations to SCOR. The purpose of these agreements, the Director charges, was to enable Reserve to report on paper a smaller volume of business and an increase in surplus and thus a lower liability-to-surplus ratio, a fraudulent result which concealed and exacerbated Reserve's actual insolvency.

By concealing Reserve's continued liability for the retroceded business and hence Reserve's continued insolvency, the Director alleges, the defendant directors and officers were able to fraudulently obtain approval of the Illinois Department of Insurance for the cession agreements and were able to reach a consent agreement with the Department in April, 1975 which enabled Reserve to continue operations if certain surplus requirements were met. In addition, the subsequent continuation of these concealments effected through the SCOR agreements enabled Reserve's officers to violate the explicit surplus maintenance requirements of the consent agreement, the [*5] Director avers, while the SCOR agreements had the further cumulative effect of draining away from Reserve its more profitable and less risky business and over \$ 3,000,000 in income. If the Department had at any time known of Reserve's actual insolvency, the complaint charges, it would not have permitted Reserve to continue to write insurance and suffer further dissipation of its assets, but would have caused Reserve to stop writing insurance pursuant to Ill. Rev. Stat., ch. 73, § 756.1 (1981). The complaint alleges that defendants SCOR and SCOR Re were aware of the fraudulent purposes (and the further crippling impact upon Reserve) of the underlying agreements which they entered into and brokered. The director further alleges that the defendant accounting firms,

Coopers and Lybrand, Alexander Grant and Co., and Arthur Andersen and Co., knew of Reserve's insolvency and of the further impairing effect of the SCOR agreements and Reserve's continued operations, but that, despite this knowledge, each of them prepared unqualified opinion letters as to ARC's consolidated financial statements in 1974, 1975, 1976 and 1977, even though those statements failed to disclose that the SCOR agreement [**6] was entered into to conceal Reserve's insolvency, that the SCOR agreement did not remove any substantial risk of loss from Reserve and ARC, that the SCOR arrangement had been used to evade the consent agreement, that Reserve was at all times insolvent, and that the SCOR arrangement resulted in the multiplication of Reserve's high risk business while draining it of its least risky and most profitable business. In short, the Director claims that SCOR, SCOR Re and the accounting firm defendants joined with ARC and Reserve's officers and directors in [*1346] a multifaceted, fraudulent scheme which kept Reserve operating long past insolvency in a manner which resulted in enormous losses to the latter company.

In 1979, Reserve was finally adjudicated insolvent and the Director was designated as the Liquidator of Reserve pursuant to Ill. Rev. Stat., ch. 73, §§ 799 et seq. (1981). [HN1](#)[] Under that statute, the Director is vested with all rights of action belonging to Reserve. Ill. Rev. Stat., ch. 73 §§ 805 (1981). Pursuant to that mandate, the Director filed this action in district court in 1981, seeking relief for damages sustained by Reserve as a result of the alleged fraudulent [**7] scheme under RICO and a variety of Illinois statutory and common law theories. In January, 1982, the district court granted the defendants' motion to dismiss fifteen pendent state law claims, but denied their motion to dismiss Counts II and IV, seeking relief under RICO, and Counts I and III, alleging and seeking relief for damages resulting from a criminal conspiracy under Illinois law.

After discovery had commenced, the district court denied defendants' motion to reconsider, but certified its order to this court for an interlocutory appeal; we thereafter granted defendants' petition for interlocutory appeal. The defendants' chief contention on appeal is that the district court lacks jurisdiction over the present matter because Reserve's injuries as alleged in Count II and Count IV of the Director's complaint are not actionable under RICO's civil damage provision, [18 U.S.C. § 1964\(c\)](#), but some of the defendants also argue that, even assuming that RICO applies, the Director still lacks standing to maintain the present action, and that in any event the Director's complaint insufficiently invokes the formal elements of a RICO claim. We first address the defendant's standing arguments, [**8] and then consider defendants' RICO-related contentions.

II. *The Director's Standing: Capacity and Equitable Estoppel*

RICO considerations aside, defendants Grant, Coopers and Lybrand, Arthur Andersen, and SCOR and SCOR Re argue that the Director either lacks standing *ab initio* to maintain the present action or is estopped from doing so.¹ Their main argument proceeds in two stages. First, they note, the Director as Liquidator acquires only those rights of action that would accrue to Reserve itself; the Director may not assert the legal claims of Reserve's policyholders or creditors. As the next step, they argue that since the Director admits that Reserve's officers and directors instigated the illegal conduct here, the Director, standing in the shoes of Reserve, is estopped² from proceeding against the extra-corporate confederate defendants under our decision in [Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449 \(7th Cir. 1982\)](#). SCOR and SCOR Re argue additionally that, Cenco considerations aside, prevailing law does not permit an insurance liquidator to pursue on behalf of the corporation he represents claims for losses stemming from the artificially and fraudulently [**9] prolonged life of the corporation and its consequent dissipation of assets.

¹ The other defendants, directors and officers of Reserve and ARC, do not challenge in their brief on appeal the Director's right to proceed against them on any basis other than RICO.

² Some defendants have also characterized this procedural bar as a substantive one, arguing that the complaint must fail because its facts demonstrate that the Director will be unable to demonstrate *causation* of fraud, given the corporation's imputed knowledge. Because both characterizations raise the same issue, both will be dealt with under the "estoppel" heading.

Even accepting the first step of the defendants' argument,³ i.e., that the Director [*1347] may prosecute only those legal actions available to the corporate body, we disagree with the defendants' contention that *Cenco* applies to the instant case, or that, even if it does apply, its underlying policy forbids the Director from maintaining the present action on behalf [**10] of Reserve. In addition, we reject SCOR and SCOR Re's fallback position that Reserve lacks standing to sue, either derivatively or through a receiver, to recover damages resulting from the fraudulently extended life of the corporation and its concomitant dissipation of assets.

[**11] Our reasons for finding *Cenco* inapplicable to the estoppel issue in the present case are twofold. First, the main controverted claim in *Cenco* arose under Illinois common law, and therefore this court's analysis of circumstances under which the knowledge of fraud on the part of the plaintiff's directors be imputed to the plaintiff corporation were merely an attempt to divine how Illinois courts would decide that issue. *Cenco*, 868 F.2d at 455. By contrast, the cause of action here arises under RICO, a federal statute; we therefore write on a clean slate and may bring to bear federal policies in deciding the estoppel question.

Second, even if the estoppel holding in *Cenco* were relevant to a RICO claim, an important prerequisite for its invocation in the present case is lacking. The *Cenco* court limited its estoppel analysis to cases where "the managers are not stealing from the company . . . but instead are turning the company into an engine of theft against outsiders." *Cenco*, 686 F.2d at 454. As the court explained,

HN4[↑] Fraud on behalf of a corporation is not the same theory as fraud against it. Fraud against the corporation usually hurts just the corporation; [**12] the stockholders are the principal if not only victims But the stockholders of a corporation whose officers commit fraud for the benefit of the corporation are beneficiaries of the fraud.

Id. at 456. In *Cenco*, this court found that the fraudulent inflation of the corporation's inventories and hence stock prices clearly benefited the corporation to the detriment of outside creditors, stock purchasers and insurers; this fact, in the court's view, made the case ripe for an analysis of whether the directors' knowledge of the fraud should

³ Although we need not reach the question for the purpose of this appeal, we note our agreement with the proposition that the Director may pursue no action which could not have been asserted directly by Reserve before liquidation. This conclusion is supported first by the plain text of the statute which provides that **HN2**[↑] the Director as Liquidator "shall be vested by operation of law with the title to all property, contracts and *rights of action of the company* as of the date of the order . . . directing liquidation." Ill. Rev. Stat., ch. 73, § 803 (emphasis added).

Second, a century of interpretation of this and its predecessor provisions has established the basic rule that **HN3**[↑] "where a receiver is appointed for the purpose of taking charge of the property and assets of a corporation, he is, for the purpose of determining the nature and extent of his title, regarded as representing only the corporate body itself, and not its creditors or shareholders He takes only the rights of the corporation such as could be asserted in its own name, and that upon that basis, only, can he litigate for the benefit of other shareholders or creditors." *Republic Life Insurance Co. v. Swigert*, 135 Ill. 150, 167, 25 N.E. 680 (1890); *People ex rel. Barret v. Bank of Peoria*, 295 Ill. App. 543, 549, 15 N.E.2d 333, 335-36 (1938); *Sangamon Loan & Trust Co. v. People's Savings Bank & Trust Co.*, 204 Ill.App. 7, 14 (1917); *Golden v. Cervenka*, 278 Ill. 409, 437, 116 N.E. 273, 284 (1917) see also 19 Appleman, *Insurance Law and Practice*, § 10682 at 122, 123 (1982); 2 Couch on Insurance 2d, § 22:48 (1959). A narrow exception to this rule has been permitted where, unlike here, the receiver sues to recover on behalf of a plaintiff's creditors a specific asset from a defendant who has, with the knowledge of the plaintiff's corporate officials, misrepresented its existence. *Sangamon*, 204 Ill.App. at 14; *Golden*, 278 Ill. at 427; see also *Wheeler v. American National Bank*, 347 S.W. 2d 918, 925, 165 Tex. 502 (Tex. 1961); *Magnusson v. American Allied Insurance Co.*, 290 Minn. 465, 189 N.W.2d 28, 33 (1971). *Bonhiver v. Graff*, 311 Minn. 111, 248 N.W.2d 291 (1976) and *McTamany v. Day*, 23 Idaho 95, 128 P.563 (1912), cited by the Director, are distinguishable. The statute involved in *Bonhiver*, Minn.Stat.Ann. § 60 B. 25 (13), authorized the liquidator to assert claims of creditors and policyholders, while in *McTamany*, the court held only that the receiver could proceed on behalf of creditors and policyholders against the insolvent company's directors, not extracorporate parties. *McTamany*, 128 P. at 565. In any event, to the extent that either of these cases can be read to authorize an insurance liquidator to pursue claims more extensive than those accruing to the corporation itself, they conflict with the clear rule fashioned by the Illinois courts and the leading authorities. It is therefore incumbent upon this court not to effect innovation in what appears to be settled state law. *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 355 (7th Cir. 1982).

be imputed to the benefited corporation. By contrast, the complaint in the instant case alleges a far-reaching scheme in which, as a consequence of the illegal activities of Reserve's directors and the outside defendants, Reserve was, *inter alia*, [*1348] fraudulently continued in business past its point of insolvency and systematically looted of its most profitable and least risky business and more than \$ 3,000,000 in income -- all actions which aggravated Reserve's insolvency. In no way can these results be described as beneficial to Reserve.⁴ Compare *Security America Corp. v. Schact*, No. 82-C-2132, slip op. at [**13] 3, 4 (N.D. Ill. Jan. 31, 1983) ("particular fact pattern" established that plaintiff corporation had been created solely to carry out fraudulent scheme and thus had no other purpose than to be "engine of theft" against outsiders under *Cenco*).

[**14] Defendants argue nonetheless that since the alleged fraudulent scheme had the effect of continuing Reserve's active corporate existence past the point of insolvency to the detriment of outside creditors and policyholders, Reserve was *pro tanto* benefited. But the fact that Reserve's existence may have been artificially prolonged pales in comparison with the real damage allegedly inflicted by the diminution of its assets and income. Under such circumstances, the prolonged artificial insolvency of Reserve benefited only Reserve's managers and the other alleged conspirators, not the corporation. See *In re Investor's Funding Corp.*, [1980] Fed. Sec. L. Rep. (CCH) P97,696 at 98,655 (1980). More colloquially put, if defendants' position were accepted, the possession of such "friends" as Reserve had would certainly obviate the need for enemies. We do not believe that such a Pyrrhic "benefit" to Reserve is sufficient to even trigger the *Cenco* analysis which seeks to determine the propriety of imputing to the corporation the directors' knowledge of fraud.

Even if a *Cenco* - type analysis were applied to the instant case, however, it would not yield the result that defendants [**15] urge, i.e., estoppel of the Director based on the imputation to Reserve of the directors' knowledge of fraud. In *Cenco*, we undertook a two-pronged analysis to determine whether such imputation should occur: whether a judgment in favor of the plaintiff corporation would properly compensate the victims of the wrongdoing, and whether such recovery would deter future wrongdoing. *Cenco*, 686 F.2d at 455. We find that, if warranted by the proof at trial, recovery by the Director on behalf of Reserve would do both.

First, any recovery by the Director from the instant suit will inure to Reserve's estate. And [HN5](#) under the distribution provisions of the governing liquidation statute, it is the policyholders and creditors who have first claim (after administrative costs and wages owed) to the assets of the estate. Ill. Rev. Stat., ch. 73, § 817 (1981). Thus, the claims of these entirely innocent parties must be satisfied in full before Reserve's shareholders, last in line for recovery, receive anything.

Moreover, there is no indication here that the Director's success entails the likelihood of the kind of "perverse" compensation pattern which we declined to permit in *Cenco* [**16]. In *Cenco*, the court was troubled first by the fact that among the shareholders benefiting from a successful recovery were the corrupt officers themselves, *Cenco*, 686 F.2d at 455; here, the defendants do not claim that the wrongdoing officers or directors hold equity positions in Reserve entitling them to recover from the instant suit. We [*1349] were also troubled in *Cenco* by the prospect of double recovery by the shareholders via the plaintiff corporation in view of the previous successful recovery of damages by these same shareholders in a direct suit against the defendants. In this case, by contrast, the other actions noted to this court based on these alleged events have yet to result in any recovery. Of course, if the Director recovers successfully in the instant suit, the defendants in these actions will be able to assert the

⁴These defendants argue that, since Reserve was a wholly-owned subsidiary of ARC, the owners of Reserve, i.e. ARC shareholders, automatically benefited from the direct draining of Reserve and the fraudulent prolongation of Reserve's life. This argument founders on both logic and fact. First, it defies common sense to suggest that a parent corporation's shareholders are not injured when their directors fraudulently prop up, drain, and thereby deepen the insolvency of a subsidiary for whose liabilities the shareholders will eventually be liable. The damage resulting to the parent corporation's shareholders is as real as if the management had impaired a valuable working asset or sold it for a meager sum far less than its present value. Second, as a factual matter, the complaint alleges that not all of the proceeds resulting from the crippling of Reserve redounded to the benefit of ARC and ARC's shareholders. According to the allegations, as a result of the SCOR agreements, ARC was secretly exposed to increased liability for GRC's performance; also as part of these agreements, SCOR allegedly received additional payments from ARC in excess of \$ 2,500,000 for its assistance in furthering the scheme.

previous satisfaction of the claims of the shareholders, policyholders and creditors of Reserve as a bar to subsequent recovery.

Second, from the standpoint of deterrence, this court in *Cenco* based its refusal to permit the plaintiff to recover unimpeded by the directors' knowledge in large part on two circumstances not present [**17] here: 1) that the directors, as shareholders, would recover directly from the suit, and 2) that there existed large corporate shareholders in a position to police the plaintiff's corrupt officers, an activity that would be discouraged by allowing the shifting of corruption-caused loss to outside defendants. *Cenco*, 686 F.2d at 456. By contrast, here, as noted earlier, there is no evidence that the wrongdoing officers of Reserve would benefit directly from the instant suit. There is also no evidence here of the existence of large corporate shareholders capable of conducting an independent audit, as in *Cenco*, and whose lack of investigatory zeal would be rewarded by a decision favorable to the Director.

The court in *Cenco* also expressed reluctance to permit even innocent, atomized shareholders to recover damages for wrongdoing in which their officers were implicated, but that concern must be viewed against the background of the recovery of many of those same shareholders in an earlier action, and the fact that, suing directly, the full recovery in the later suit would injure to them. Significantly, due to the operation of the liquidation statute here, Reserve's shareholders [**18] are last in line for recovery from Reserve's estate and will receive only a residual recovery from the instant suit, if successful after trial, after all of the policyholders and creditors are compensated in full. Thus, unlike the situation in *Cenco*, permitting recovery in this case would not send unqualified signals to shareholders that they need not be alert to managerial fraud since they may later recover full indemnification for that fraud from third party participants.⁵ In sum, we believe not only that *Cenco* is not applicable to the present case, but also that even if it were, application of its compensation and deterrent principles would not inhibit the right of the Director to proceed against the defendants here.

[**19] We turn finally to SCOR and SCOR Re's fallback argument that, even if the Director were not barred from proceeding under *Cenco*, the Director still lacks standing to sue on behalf of Reserve. Citing *Bergeson v. Life Insurance Corp.*, 265 F.2d 227 (10th Cir. 1959), cert. denied, 360 U.S. 932, 3 L. Ed. 2d 1545, 79 S. Ct. 1452 (1959); *Kinter v. Connolly*, 233 Pa. 5, 81 A.2d 905 (1911); *Patterson I**13501 v. *Franklin*, 176 Pa. 612, 35 A. 205 (1896); *Kelly v. Overseas Investors, Inc.*, 18 N.Y.2d 622, 219 N.E.2d 288, 272 N.Y.S.2d 773 (1966); and *Cotten v. Republic National Bank*, 395 S.W.2d 930 (Tex. Civ. App. 1965), these defendants argue that a corporation may never sue to recover damages alleged to have resulted from the artificial prolongation of an insolvent corporation's life. Next, they argue, since Count II and Count IV of the instant complaint assert that "Reserve continued to write insurance" as a result of the underlying mail fraud, and "Reserve's assets were dissipated notwithstanding that Reserve was at all times insolvent," the sole thrust of the Director's complaint is that the damages to Reserve occurred only because Reserve continued to do business [**20] past its point of insolvency. Therefore, they conclude, the Director's claim in this case is barred by the general rule prohibiting a corporation from suing for damages caused by the artificial prolongation of its life.

⁵ The defendants have argued that, due to the statutory authorization of treble damages in RICO civil actions, Reserve's shareholders will experience an enormous windfall recovery to the extent of the full damage increment exceeding single damages. This is not necessarily the case, however, for under the controlling statute, the shareholders will receive only the last residual of Reserve's estate, not a share of each recovery before it is added to that estate. As noted, there are other prior claims on that estate which must be satisfied first, including wages, administration costs, and the claims of policyholders and creditors which may well exceed the amount, or even triple the amount, asserted to have arisen from the damages to the corporation claimed in the present action. Without knowledge of the size of each of these prior claims, evidence of which has not been presented at this stage, we decline to speculate on the existence or relative size of any recovery to Reserve's shareholders.

Moreover, since the deterrence policy of *Cenco* is a forward-looking one, we should apply it with the normal case in mind and not be overly swayed by the fortuity of a treble damage provision which may in some cases result in a large recovery to a plaintiff's shareholders. This is especially so where to hold otherwise, as here, would do immense damage to the policy underlying the statutory liquidation process: the protection of the interests of policyholders, shareholders and creditors jointly by the Director.

We reject both premises of this argument. First, in the underlying allegations here, the Director charges that the damage to Reserve stemmed not only from the mere extension of the normal business operation of Reserve, but from specific actions crippling Reserve which were taken as an integral part of that extension. *Inter alia*, the Director alleges that with the smoke screen of the underlying mail fraud, Reserve's directors and other defendants were able to drain Reserve of over \$ 3,000,000 of income, and to drain Reserve of its most profitable and least risky business, thereby deepening Reserve's insolvency. Thus, the "asset dissipation" alleged was not only that which resulted from the normal operation of the business, as in the cases cited by the defendants,⁶ but also that which resulted from the bleeding of Reserve which was a part of the underlying scheme to defraud.

[**21] Alternatively, to the extent that the cited cases suggest that [HN6](#) a corporation may not sue to recover damages resulting from the fraudulent prolongation of its life past insolvency, we decline to speculate that the Illinois courts would accept this restriction on the Director's freedom of action. For each of these cases rests upon a seriously flawed assumption, *i.e.*, that the fraudulent prolongation of a corporation's life beyond insolvency is automatically to be considered a benefit to the corporation's interests. See, e.g., [Bergeson](#), 265 F.2d at 232; [Kinter](#), 81 A. at 905; [Patterson](#), 35 A. at 206. This premise collides with common sense, for the corporate body is ineluctably damaged by the deepening of its insolvency, through increased exposure to creditor liability. See *In Re Investor's Funding Corp.*, [1980] Fed. Sec. L. Rep. (CCH) P97,696, at 98,655 (S.D.N.Y. 1980). Indeed, in most cases, it would be crucial that the insolvency of the corporation be disclosed, so that shareholders may exercise their right to dissolve the corporation in order to cut their losses. See Ill. Rev. Stat., ch. 32, §§ 157.75, 157.76 (1981). Thus, acceptance of a rule which would [**22] bar a corporation from recovering damages due to the hiding of information concerning its insolvency would create perverse incentives for wrong-doing officers and directors to conceal the true financial condition of the corporation from the corporate body as long as possible. We are not prepared to conclude that the Illinois courts would adopt such a regime.

III. The Applicability of RICO

We turn now to defendants' contentions that the injury to Reserve which the Director alleges is not compensable under RICO. [HN7](#) The civil damage provision of RICO, 18 U.S.C. [§ 1964\(c\)](#), creates a private right of action with treble damage recovery for "any person injured in his business or property by reason of a violation of [§ 1962](#)." [Section 1962](#) enumerates two violations relevant to the instant case: [§ 1962\(a\)](#) [HN8](#) makes it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in [*1351] acquisition of any interest in, or establishment or operation of, any enterprise" which touches interstate commerce; and [§ 1962\(c\)](#) [**23] [HN9](#) makes it "unlawful for any person employed by or associated with any enterprise [engaged in interstate commerce] to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." [HN10](#) Finally, RICO [§ 1961](#) defines a "pattern of racketeering activity" as at least two occurrences within ten years of any of several predicate offenses, including mail fraud.

In his complaint, the Director alleges that injury to Reserve stemmed from the violation by the defendants of both [§ 1962\(a\)](#) and [§ 1962\(c\)](#). The underlying "pattern of racketeering activity" alleged consists of the mail fraud which occurred in connection with the mailing of the fraudulent financial statements of Reserve which all defendants knew did not disclose Reserve's insolvency or the purpose and effects of the SCOR deal. Count II of the complaint alleges that the officers and directors, SCOR and SCOR Re used income derived from the pattern of racketeering activity in the operation of their businesses in violation of [§ 1962\(a\)](#), and that the same defendants conducted the affairs of ARC, SCOR, and SCOR Re through the underlying pattern of racketeering [**24] activity, in violation of [§ 1962\(c\)](#). Count IV alleges that the officers and directors and the three defendant accounting firms used income derived from the racketeering activity in the operation of ARC and the accounting firms in violation of [§ 1962\(a\)](#), and that the officers and directors and the accounting firms conducted the affairs of ARC and the accounting firms through a pattern of racketeering activity in violation of [§ 1962\(c\)](#).

⁶ In [Kinter v. Connolly](#), 233 Pa. 5, 81 A. 905 (1911), for example, the lower court noted specifically that in "the bill before us . . . there is no averment that any act or omission of the defendants . . . caused loss or injury to the company." [81 A. at 905](#).

Because each of the described violations amount to alternative characterizations of the same conduct, *i.e.*, the cooperation of the defendants in a scheme which impaired Reserve, we can find that RICO applies if any one of the Director's theories is sufficient to invoke the statute. Indeed, we find, after careful consideration, an adequate description of a compensable civil RICO claim in the portions of Counts II and IV of the complaint which allege injury to Reserve as a result of the defendants' direct or indirect participation in the conduct of ARC's affairs through the alleged mail fraud in such a manner as to artificially prolong Reserve's existence and worsen its insolvency and losses.

The defendants contend that numerous fatal defects [**25] inhere in these portions of the Director's complaint. First, they argue that the complaint itself is technically insufficient on its face by failing to explicitly allege that all of the defendants participated in the conduct of ARC and by failing to allege that Reserve's injury occurred as a result of the *operation of ARC* through the underlying mail fraud. Second, and more generally, they argue that Congress did not intend that the civil provisions of RICO would be applicable to the general universe of business fraud encompassing the acts alleged here. Third, the defendants argue that the proper causational predicates for the invocation of [§ 1964\(c\)](#) are not present here; recovery, they aver, may only follow a showing that the plaintiff suffered "competitive" rather than "direct" injury from the defendants' actions, and, in any case, they maintain, there is a failure to allege that *any* injury to Reserve stemmed from the operation of ARC through the mail fraud. Finally, the accounting firm defendants, SCOR and SCOR Re argue several miscellaneous theoretical insufficiencies in the Director's complaint: no recovery is possible by Reserve, the "perpetrator" of the fraud, against [**26] Reserve's "unwitting tools," under our decision in [Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449 \(7th Cir. 1982\)](#); the accountants, SCOR and SCOR Re were not sufficiently "employed by or associated with" ARC; and SCOR and SCOR Re could not have been culpable of the alleged underlying mail fraud. We shall consider each of these arguments *seriatim*.

A. Technical Sufficiency of the Complaint

The defendants first insist that, even were the theoretical hurdles to RICO coverage [*1352] cleared, the Director's complaint does not recite coherently an underlying violation of [§ 1962\(c\)](#) or injury stemming therefrom. We find that these arguable technical insufficiencies inhere only in the cumulative and summary portions of the complaint, and that the Director's basic theory is supported by the complaint's full factual allegations. [HN11](#) In examining the complaint, we are guided by the principle that the "liberal pleading policy of the [Federal Rules of Civil Procedure] prevents dismissal of a meritorious action for purely formal or technical reasons," [Murphy v. White Hen Pantry Co., 691 F.2d 350, 353 \(7th Cir. 1982\)](#), and that we are to construe the pleadings in the plaintiff's [**27] favor, [Schnell v. City of Chicago, 407 F.2d 1084, 1086 \(7th Cir. 1969\)](#).⁷ Moreover, this court may grant leave to amend the complaint to correct even substantive errors in the pleadings where this would facilitate a decision on the merits and

⁷The defendants argue that there is no place in the instant appeal for application of the liberal pleading policy embodied in [Murphy v. White Hen Pantry Co. and Conley v. Gibson, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1955\)](#), because the basic question to be decided here concerns the alleged absence of federal jurisdiction, and not a 12(b)(6) -- related challenge to the sufficiency of the complaint. However, the liberal construction policy of [Fed. R. Civ. P. 8\(f\)](#) is not limited to the context of 12(b)(6) motions. Moreover, although this case is not formally an appeal of denial of a 12(b)(6) motion, the defendants' assault on the technical adequacy of the complaint raises the identical issue involved in such an appeal; we therefore find it appropriate to seek guidance from precedents addressing that procedure.

The defendants argue that liberal construction and amendment of the Director's complaint is especially inappropriate here because the latter was admonished in proceedings below to make sure that its pleadings were sufficient before the appeal was certified. The Director declined to do so, but only in the face of statements by some of the defendants that they would object to such an attempt to amend the complaint, and that, in any case, their primary challenge to the Director's complaint was that no set of facts describing the alleged events, however arranged, could support the invocation of RICO. We also take note of the extraordinary conceptual disarray and schism even among district courts in this circuit, discussed *infra*, as to the proper elements of a RICO pleading. Under these circumstances, we decline to penalize the Director for failing to state the summary portions of his RICO allegation with technical precision, especially where his preceding factual allegations amply support on their face a proper RICO claim.

no prejudice would ensue to the defendants. 3 J. Moore, *Moore's Fed. Practice* PP15.08, 15.10 (2d ed. 1976); Wright and Miller, *Federal Practice and Procedure*, §§ 1474, 1487 (1977).

[**28] The first arguable technical deficiency in the complaint concerns the statements in paragraphs 81 and 98 that Reserve was damaged "as a direct result of the intentional scheme to defraud, the use of the United States mails in its furtherance and the above described pattern of racketeering activity. . ." This statement, defendants argue, fails to meet the requirement that RICO damages must be alleged to have occurred "by reason of" the conduct of an *enterprise* through a pattern of racketeering activity, not by reason of the underlying racketeering activity itself. But a natural, let alone liberal, reading of the complaint reveals it to be in full conformance with RICO's requirements. For the "intentional scheme to defraud" (the source of the injury) is defined at paragraphs 73 and 90 precisely as the above "conspiracy" set forth in the extensive prefatory factual allegations; that "conspiracy" describes precisely those aspects of the *operation* of ARC and Reserve's affairs made possible "through" the SCOR agreement and the cover-up of Reserve's insolvency. Indeed, it is ARC's operation in such a manner as to artificially prolong the operation of Reserve, not the mail [**29] fraud itself, which is separately underscored by the Director as the gravamen of the complaint. See paragraphs 41, 43, 44, 57 (realleged at P72 (Count II) and P89 (Count IV)). Thus, we find that the causal nexus as alleged easily satisfies the requirements of [§ 1964\(c\)](#). However, to clarify the complaint and eliminate any possible misunderstanding, the district court may grant leave to amend the complaint to meet the problems discussed above.

The second technical deficiency in the complaint is the phrasing of the paragraphs [*1353] in Count II and Count IV charging a violation of [§ 1962\(c\)](#):

The officers and directors, SCOR, SCOR Reinsurance . . . [Anderson, Coopers and Grant] conducted the affairs of ARC, SCOR, SCOR Reinsurance . . . [Anderson, Coopers and Grant] respectively, through the pattern of racketeering activity . . . in violation of [18 U.S.C. § 1962\(c\)](#). (emphasis added).

While it is true that these cumulative paragraphs, taken in themselves, state that only the *officers and directors* conducted the affairs of ARC, there are ample factual allegations, realleged in Counts II and IV, describing the participation of SCOR, SCOR Re and the [**30] accountant defendants in the conduct of ARC. See paragraphs 29, 30, 33, 34, 37, 42, 44, 49, 49.1, 52, 53, 54. Whether these allegations are sufficient to allege a RICO violation as a policy matter is discussed *infra*, but here we note only that a reading of the full face of the complaint, rather than just the technically insufficient cumulative paragraph, discloses that the Director has alleged conduct which will at least arguably satisfy [§ 1962\(c\)](#). Since it therefore does not appear [HN12](#)↑ "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," [Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)](#) (footnote omitted), we cannot dismiss the complaint on the basis of this deficiency. However, to help clarify the complaint, the district court may grant leave to amend paragraphs 79 and 96 in Counts II and IV to specify the participation of *all* of the defendants in the conduct of ARC's affairs, in conformance with the numerous preceding allegations.⁸

[**31] B. *The Application of RICO to Business Fraud*

The defendants' main line of attack upon the Director's complaint is that, while it alleges conduct to which RICO might literally apply, Congress did not intend that the statute would reach so far. To allow the Director's complaint to proceed, they argue, would be to unreasonably federalize the common law of "garden variety" business fraud, and eclipse the federal securities laws, providing treble damage actions for all securities-related mail fraud. We agree that [HN13](#)↑ the civil sanctions provided under RICO are dramatic, and will have a vast impact upon the federal-state division of substantive responsibility for redressing illegal conduct, but, like most courts who have

⁸ Not only did the existence of these numerous paragraphs detailing the defendants' participation in ARC's affairs give notice to the defendants of the Director's [§ 1962](#) theory, but also any arguable prejudice resulting from an amendment would be minimal in view of the preliminary status of the case at present. Wright and Miller, *Federal Practice and Procedure*, § 1487 (1971).

considered this issue, we believe that such dramatic consequences are necessary incidents of the deliberately broad swath Congress chose to cut in order to reach the evil it sought; we are therefore without authority to restrict the application of the statute. *United States v. Turkette*, 452 U.S. 576, 587, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981); *United States v. Aleman*, 609 F.2d 298, 303-04 (7th Cir. 1979); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. [**32] 1982), pet. for reh. en banc granted, Sept. 17, 1982.

We begin our analysis with the plain language of the statute, which provides that "any person" may be liable for a violation of § 1962(c). "Person" is defined at § 1961(3) as "any individual or entity capable of holding a legal or beneficial interest in property. . . ." It does not appear that any of the defendants seriously argue that we should impose a further gloss on that definition requiring that the "person" be affiliated with "organized crime." Such an argument would, of course, be unavailing in light of the clear decisions of this and other courts that HN14[↑] application of § 1962(c) "is not restricted to members of organized crime." *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 557 (7th Cir. 1982); *United States v. Aleman*, 609 F.2d 298, 303 (7th Cir. 1979); *Bennett v. Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982), pet. for reh. en banc granted, Sept. 17, 1982; *Hanna v. Norcen Energy Resources Ltd.* [Current] Fed. Sec. L. Rep. [*1354] (CCH) P98,742 at 93,738 (N.D. Ohio 1982); *Lode v. Leonardo*, 557 F. Supp. 675 (N.D. Ill. 1982); *D'lorio v. Adonizio*, 554 F. Supp. 222 (M.D. Pa. 1982); *Hellenic* [**33] *Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 247 (S.D.N.Y. 1981); *Engl v. Berg*, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981); *Parnes v. Heinold Commodities*, 487 F. Supp. 645, 646 (N.D. Ill. 1980); *United States v. Gibson*, 486 F. Supp. 1230, 1240-41 (S.D. Ohio 1980); *United States v. Chovanec*, 467 F. Supp. 41, 44-45 (S.D.N.Y. 1979). See also Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 Am. Crim. L. Rev. 655, 665-88 (1982). Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1106-09 (1982); Comment, *Reading the "Enterprise" Element Back into RICO Sections 1962 and 1964(c)*, 76 N.W. U.L. Rev. 100, 100-01 & n.4 (1982). But see *Moss v. Morgan Stanley, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) P99,045 at 94,982 (S.D.N.Y. 1983); *Wagner v. Bear, Stearns and Co., Inc.*, [Current] Fed. Sec. L. Rep. (CCH) P99,032 at 94,913 (N.D. Ill. 1982); *Adair v. Hunt International Resources Corp.*, 526 F. Supp. 736, 746-48 (N.D. Ill. 1981); *Waterman Steamship Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. [**34] 1975). Nonetheless, defendants argue, the use of civil RICO suits against business fraud, such as that alleged here, would duplicate existing state law and federal securities law remedies, would not further the purposes of the Act, and was not within the contemplation of Congress.

The chief problem with this argument is that Congress was well aware of the range of application authorized by RICO's capacious statutory language.⁹ HN36 But Congress was equally adamant that the fight against organized criminal social exploitation not be impeded by an overly narrow definition of actionable conduct.¹⁰ Congressman Poff, a sponsor of the bill, defended the broad reach of the act by noting,

The curious objection has been raised to [RICO's provisions] that that they are not somehow limited to organized crime -- as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course, it is a functional concept like white-collar or street crime serving simply as a

⁹ As Representative Mikva noted in House debate,

My objection to the bill in toto is that whatever its motives to begin with, we will end up with cases involving all kinds of things not intended to be covered, and a potpourri of language by which you can parade all kinds of horrors of overreach . . . under the definition if five or more of [my colleagues] engage in . . . a game of poker and it lasts past midnight . . . thus continuing for a period of two days, then [they] have been running an organized gambling business and [they] can get 20 years, and the Federal Government can grab off the pot besides.

¹⁰ 116 Cong. Rec. at 35,204 (1970).

Similar objections were voiced by civil liberties groups, fearing overbroad application. See *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292*, before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. at 475 (1969).

¹⁰ See, e.g., 116 Cong. Rec. 601 (1970) (statement by Sen. Hruska, outlining problem in demonstrating connections between abhorred activity and formal criminal syndicates).

shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.¹¹

And as Senator McClellan conceded, "Of course, **[**35]** it is true that Title X will have some application to individuals who are not themselves members of La Cosa Nostra or otherwise engaged in organized crime. However, that is not a reason to cut back its scope. . ." ¹² Later, he noted that "the Senate report does not claim . . . that the listed offenses are committed *primarily* by members of organized crime, only that these offenses are characteristic of organized crime."¹³ In short, Congress chose to provide civil remedies for an enormous variety of conduct, balancing the need to redress a broad social ill against the virtues of **[*1355]** tight, but possibly overly astringent, legislative draftsmanship. It is not for this court to reassess the balance struck.

That deference to the conscious assessment of Congress should be our guiding principle is made especially clear upon examination of the defendants' specific objection that our reading of RICO will unreasonably eclipse existing federal civil remedies for securities law violations by providing a treble damage action where two acts of mail fraud accompany the disputed sale or purchase of securities. Defendants' contention proves too much, for such a result is to a degree *explicitly* accomplished, even without the simultaneous presence of mail fraud, by the designation in [§ 1961](#) of "fraud in the sale of securities" as a predicate offense giving rise to a civil damage action where an enterprise is operated **[**37]** through such fraud; clearly, such an outcome is not the result of a strained interpretation of RICO, but rather is explicitly mandated. Defendants' objection that our interpretation will unreasonably bring into the federal ambit regulation of common law fraud likewise proves too much, for such a realignment of the federal-state role has already been accomplished in the criminal sphere through the existence of the mail fraud statute itself. Moreover, the defendants, in raising the spectre of the opening of the litigation floodgates, overlook the fact that neither common law fraud nor securities law violates will, by themselves, be automatically eligible for redress through a civil RICO action; there is the additional requirement under [§ 1964\(c\)](#), discussed *infra*, that an interstate enterprise be conducted "through" a pattern of such activity.

In sum, defendants' profession of alarm at the expansion of federal jurisdiction over business fraud through RICO amounts to nothing less than a dispute with the very design, and not the mere application, of the statute. As the Supreme Court has noted in the criminal context,

The language of the statute and its legislative history **[**38]** indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure. Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions. That Congress included within the definition of racketeering activities a number of state crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present. As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would "mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm." [citations omitted] . . . In the face of these objections, Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are **[**39]** also crimes under state law. There is no argument that Congress acted beyond its power in so doing. That being the case, the courts are without authority to restrict the application of the statute.

[United States v. Turkette, 452 U.S. at 586, 587 \(1981\).](#)

¹¹ 116 Cong. Rec. at 35,344.

¹² 116 Cong. Rec. at 18, 945 (1970).

¹³ McClellan, *The Organized Crime Act or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Law Rev. 55, 142 (1970).

In view of this legislative history, it is not surprising that most courts in this and other circuits have had little trouble in entertaining RICO civil actions for damages flowing from the operation by otherwise "legitimate" business people of enterprises through a pattern of mail fraud and securities law violations. See, e.g., [Bennett v. Berg, 685 F.2d 1053 \(8th Cir. 1982\)](#), *pet. for reh. en banc granted*, Sept. 17, 1982 (upholding finding that defendant mortgage lender, insurance company, developer, accountants, attorneys and corporate directors caused compensable RICO damages through operation of retirement community through, *inter alia*, mail fraud); [USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94 \(6th Cir. 1982\)](#) (upholding injunction in [*1356] civil RICO action founded on corporate promoter's breach of fiduciary duty); [Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645 \(N.D. Ill. 1980\)](#) (**40) (RICO action stemming from mail fraud in commodities trading); [Heinold Commodities, Inc. v. McCarty, 513 F. Supp. 311 \(N.D. Ill. 1979\)](#) (commodities fraud); [Hanna v. Norcen Energy Resources, Ltd.](#), [Current]Fed. Sec. L. Rep. (CCH) P98,742 (N.D. Ohio 1982) (RICO action against corporation and its investment banking firm upheld); [Engl v. Berg, 511 F. Supp. 1146 \(E.D. Pa. 1981\)](#) (upholding action against mortgage company in securities fraud RICO claim); [Spencer Companies v. Agency Rent-A-Car, Inc.](#), [1981]Fed. Sec. L. Rep. (CCH) P98,361 (D. Mass. 1981) (alleged fraud in misleading public statement in corporate takeover actionable under RICO); [Computer Terminal Systems, Inc. v. Gross, 1982-1 Trade Cas. \(CCH\) P64,531 \(E.D.N.Y. 1981\)](#) (action against company officers involving kickback scheme). But see [Wagner v. Bear, Stearns and Co., Inc.](#), [Current]Fed. Sec. L. Rep. (CCH) P94,032 at 94,913 (N.D. Ill. 1982); [Moss v. Morgan Stanley, Inc.](#), [Current]Fed. Sec. L. Rep. (CCH) P99,045 at 94,982 (S.D.N.Y. 1983); [Adair v. Hunt International Resources Corp., 526 F. Supp. 736 \(N.D. Ill. 1981\)](#); [Waterman Steamship Corp. v. Avondale Shipyards, Inc., 527 F. Supp. 256 \(E.D. La. 1981\)](#); [Barr v. WUI/TAS, Inc., 66 F.R.D. 109 \(S.D.N.Y. 1975\)](#).

Another major problem with the sort of judicial pruning of RICO's civil provisions, advocated by defendants, where business fraud is alleged is that there is simply no legitimate principled criterion through which to accomplish this distinction. Presumably, the infiltration of a corporation by an organized crime syndicate and the subsequent commission of fraud which results in the looting of the corporation's assets for the syndicate's benefit would and should form the basis for a legitimate RICO action. But the only way in which to distinguish this case from the commission of "garden variety" fraud by "legitimate" corporate directors and outside corporations and auditors, as here alleged, is the presence of an "organized crime" nexus in the first case. Indeed, most courts have squarely exempted "normal" business or securities fraud-related claims from RICO's coverage have been forced to rely on the already discredited "organized crime" limitation. See, e.g., [Wagner v. Bear Stearns and Co., Inc.](#), [Current]Fed. Sec. L. Rep. (CCH) P94,032 at 94,913 (N.D. Ill. 1982); [Moss v. Morgan Stanley, Inc.](#), [Current]Fed. Sec. L. Rep. (CCH) P99,045 at 94,982-43; [Adair v. Hunt International Resources Corp., 526 F. Supp. 736, 747 \(N.D. Ill. 1981\)](#); [Waterman Steamship Corp. v. Avondale Shipyards, Inc., 527 F. Supp. 256, 259 \(E.D. La. 1981\)](#); [Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 112-13 \(S.D.N.Y. 1975\)](#). Obviously, having already rejected the "organized crime" limitation, [United States v. Aleman, 609 F.2d at 303](#); [Cenco, Inc., 686 F.2d at 557](#), this court does not wish that limitation to be revived under the guise of determining the kinds of activity covered by RICO.

In short, while we are mindful of the jurisprudential maxim that statutes are not to be interpreted woodenly and without regard to their aim, we do not see how any legitimate or principled tailoring of RICO could be effected without impairing the broad strategy embodied in the act. If Congress wishes to avoid the inclusion under RICO's umbrella of "garden variety" fraud claims involving the operation of enterprises through mail and securities fraud, it may easily do so through removing mail and securities fraud from the list of predicate acts enumerated in § 1961. That is not, however, a program which [*43] may be undertaken by this court. [United States v. Turkette, 452 U.S. 576, 586-87, 69 L. Ed. 2d 246, 101 S. Ct. 2524 \(1981\)](#).

C. The Requirement of "Competitive" or "Indirect" Injury

The defendants' next line of attack on the Director's complaint recites that the allegations point to no "competitive injury" to Reserve from the operation of ARC. Citing Congress' concern with the impact of organized crime infiltration upon free competition and the structural similarity of the RICO treble damage provisions to those available under the antitrust laws, the defendants argue that the civil remedy provided [*1357] in § 1964 to "any person injured in his business or property" is not available to those who have suffered *directly* through the operation

of a business through a pattern of racketeering, but only to those injured as competitors. Since Reserve is not a competitor of ARC, defendants conclude, the former may not invoke [§ 1964\(c\)](#).

We note at the outset that the defendants' construction has been accepted by some district courts. See [North Barrington Development, Inc. v. Fanslow, 547 F. Supp. 207 \(N.D. Ill. 1980\)](#); [Van Schaick v. Church of Scientology of California, Inc., 535 F. Supp. 1125 \(D. Mass. 1982\)](#); [Erlbaum v. Erlbaum \[Current\] Fed. Sec. L. Rep. P98,772 at 93,922-23 \(E.D. Pa. 1982\)](#); [Landmark Savings and Loan v. Rhoades, 527 F. Supp. 206 \(E.D. Mich. 1981\)](#). But it has been rejected by the greater number of courts and commentators. See, e.g., [Bennett v. Berg, 685 F.2d at 1059](#), pet. for reh. en banc granted, Sept. 17, 1982; [D'Iorio v. Adonizio, C.A., 554 F. Supp. 222 \(M.D. Pa. 1982\)](#); [Prudential Lines, Inc. v. McKeon, No. 80 Civ. 5853 \(S.D.N.Y. April 21, 1982\)](#); [Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645 \(N.D. Ill. 1980\)](#); [Heinold Commodities v. McCarty, 513 F. Supp. 311, 313 \(N.D. Ill. 1979\)](#); [Hanna Mining Co. v. Norcen Energy Resources, Ltd., \[Current\] Fed. Sec. L. Rep. \(CCH\) P98,742 at 93,737 \(N.D. Ohio 1982\)](#); [Engl v. Berg, 511 F. Supp. 1146 \(E.D. Pa. 1981\)](#); [Hellenic Lines, Inc. v. O'Hearn, 523 F. Supp. 244, 248 \(S.D.N.Y. 1981\)](#) ("RICO does not countenance racketeering activity so long as it is done uniformly across competing concerns"); [Spencer Companies, Inc. v. Agency Rent-A-Car, Inc., \[1981\] F. Sec. L. Rep. \(CCH\) P98,361 \(D. Mass. 1981\)](#); Strafer, Massumi & Skolnick, [Civil \[*45\] RICO in the Public Interest](#), *supra*, at 689-707; Blakely and Gettings, [Racketeer Influenced and Corrupt Organizations \(RICO\): Basic Concepts -- Civil and Criminal Remedies](#), 53 Temple L.Q. 1009, 1040-43 (1983); Note, [Civil RICO: The Temptation and Impropriety of Judicial Restriction](#), *supra*, at 1109-1114; *But see Comment, Reading the "Enterprise" Element Back into RICO*, *supra*, at 125-26 (1981). And, we think, rightly so, for such a crabbed interpretation as the defendants offer does not fully credit Congressional intent or fulfill the purposes of RICO.

First, while in enacting RICO Congress expressed its concern that organized crime "interfere[s] with free enterprise," and noted its desire to protect those injured competitively by businesses infused with the gains of racketeering,¹⁴ it also indicated its concern that "organized crime activities in the United States weaken the stability of the Nation's economic system, *harm innocent investors* and competing organizations . . . and undermine the general welfare of the Nation and its citizens."¹⁵ (emphasis added). Rejecting an alternative legislative course which would have involved simply amending the antitrust [\[*46\]](#) laws to provide remedies for competitive harm caused by racketeering infiltration,¹⁶ Congress instead enacted RICO as a separate tool in the fight against organized crime. As noted by the Antitrust Section of the American Bar Association in committee hearings on RICO, the latter course possessed precisely the advantage of allowing for the effectuation of purposes beyond the protection of competition:

[Some] activities of organized crime in legitimate business may or may not be subject to the antitrust laws. Thus, some extortion tactics and business takeovers by organized crime might not be reached under the antitrust laws, particularly if they affected only the victimized business rather than resulted in a lessening of competition in an entire line of commerce.¹⁷

In short, RICO was broadly aimed at "striking . . . a mortal blow against the property [\[*1358\]](#) interests of organized crime." 116 Cong. Rec. 602 (1970) (statement of Senator Hruska). This court is reluctant to undermine that broad mission of RICO by engraving onto its civil provisions a competitive injury requirement. See [Bennett v. Berg, 685 F.2d at 1059](#) ("In a RICO context, there are few [\[*47\]](#) countervailing reasons to lessen the impact of RICO remedies by imputing the limitations on standing which apply to [antitrust law](#).").

¹⁴ OCCA Publ. L. No. 91-452, 84 Stat. 922, 923 (1970) (Statement of Findings and Purpose); 116 Cong. Rec. 602 (1970) (statement of Senator Hruska).

¹⁵ Publ. L. No. 91-452, Sec. 1(4), 84 Stat. 922 (1970).

¹⁶ S. 2048, 90th Cong., 1st Sess. (1967), extending the Sherman Act to coverage of organized criminal activity, was left dormant in committee.

¹⁷ 1969 Hearings, Note 6, [supra, at 556, 557](#).

The structural similarity of the RICO civil damages apparatus to that contained in the antitrust laws does not persuade us otherwise. An examination of the relevant Congressional debate reveals that the references to **antitrust law** and precedent were attempts to justify the extraordinary treble damage action as a device to deter organized crime; the notion that the objectives of RICO and the Sherman Act were identical was discounted.¹⁸ Moreover, HN15↑ to the extent that **antitrust** [**48] **law** and policy are increasingly concerned primarily with market efficiency rather than the deleterious effects of concentrated market power itself,¹⁹ analogies to that body of law become increasingly irrelevant, since the exercise of social power by organized crime is thought to be *malum in se*.²⁰

Finally, Congress' specific refusal to expand the Sherman [**49] Act to authorize RICO-type recoveries is not without significance. As the President of the American Bar Association noted in testifying on behalf of a separate RICO statute,

The use of the antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent -- appropriate in a purely antitrust context -- setting strict requirements on questions such as "standing to sue" and "proximate cause."²¹ In short, we believe, like most other courts, that the erection of a "competitive" or "indirect" injury barrier to RICO recovery comports with neither the plain language nor the central goal of the statute.

D. Injury "By Reason Of" A **§ 1962(c)** [**50] Violation

Defendants' next argument is that, even if a RICO plaintiff need not allege a "competitive injury," he must plead injury "by reason of" a **§ 1962(c)** violation, *i.e.*, by reason of the *operation* of an enterprise through the underlying pattern of racketeering activity, not by reason of the predicate offense itself. And the Director's complaint, they argue, alleges no such injury from the operation of ARC but rather only from the underlying mail fraud. Further, defendants maintain that **§ 1964(c)** requires that plaintiffs must allege injury caused indirectly by a racketeering enterprise separate from the plaintiff itself. While we believe this latter argument to be without merit in view of our determination in III. C. *supra* that RICO was designed to protect *direct*, and not just second-order, victims of organized crime infiltration, we need not reach it here, for the Director's complaint, as construed in III A. *supra*, does allege an injury to Reserve by reason of the operation of a separate enterprise, ARC, through a pattern of racketeering activity. We also cannot accept the defendants' contention that the Director's complaint does not allege injury [**51] to Reserve by reason of the [*1359] operation of ARC through the underlying fraud.

As noted in III A. *supra*, the whole thrust of the Director's complaint is that Reserve was a victim of the dishonest *operation* of ARC through a pattern of sham reinsurance, falsification of financial statements, and fraudulent dealings with state insurance regulators which allowed ARC to prolong Reserve's life beyond insolvency and thus exacerbate its financial woes. The Director does not allege that the predicate fraudulent acts were aimed directly at Reserve, as was the case with the plaintiffs in *Johnsen v. Rogers*, 551 F. Supp. 281 (C.D. Cal., 1982); *Bays v. Hunter Savings Association*, 539 F. Supp. 1020, 1024 (S.D. Ohio 1982); *Harper v. New Japan Securities*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982); and *Erlbaum v. Erlbaum*, [Current]Fed. Sec. L. Rep. (CCH) P98,722 (E.D. Pa. 1982), cited by defendants.

¹⁸ Senator Hruska noted that the legislation "seeks to strengthen the defense of legitimate business takeover by organized crime" and disavowed antitrust standing parallels. See 115 Cong. Rec. 6992 (1969). Senator McClellan echoed this point later, noting, "There is . . . no intention here of importing the great complexity of **antitrust law** enforcement into this field. . . ." *Id.* at 9567.

¹⁹ See, e.g., *MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081, slip op. at 37, 38 (7th Cir. 1983).

²⁰ See Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, *supra*, at 1113, 1114.

²¹ Organized Crime Control: Hearings on S. 30 Before the Subcommittee No. 5, House Committee on the Judiciary, 91st Cong., 20th Sess. at 149 (1969).

Instead, the Director asserts that Reserve suffered from the defrauding of the State Department of Insurance which permitted ARC to cause Reserve to continue to operate beyond its insolvency and to allow Reserve to be further drained of its income and more favorable [**52] business. Thus, the Director's allegation suggests an even stronger example of damage incurred through the operation of an enterprise than was alleged and upheld in *Computer Terminal Systems, Inc. v. Gross*, 1982 Trade Cases (CCH) P64,532 (E.D.N.Y. 1981), and *Hellenic Lines Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981), approvingly cited by defendants, in which the plaintiff corporations were damaged by a scheme of bribes and kickbacks conducted *through* the plaintiff corporation, thus entailing financial losses which stemmed directly from the commission of the predicate offenses.

The defendant directors argue alternatively that the "by reason of" requirement is not met by the Director in the present allegations because he fails to allege that Reserve suffered damage which it would not have suffered had Reserve become insolvent for reasons having nothing to do with the underlying fraudulent operations proscribed by RICO. We must reject this argument on behalf of such attenuated "but for" causation; it is the logical equivalent of proposing that a murderer may not be held liable for his victim's death since the state cannot demonstrate that the victim may not have perished [**53] eventually by accident. Equally fatuous is the suggestion of some of the defendants that they may not be held liable for damage arising from the fraudulent operation of ARC since Reserve's immediate injury stemmed from the Illinois Department of Insurance's assent to Reserve's continued operation. Such an argument plainly confuses cause with result, for the fraudulent operation of ARC was surely the alleged progenitor of Reserve's damage, regardless of whether the state regulatory authority was a necessary instrument in the accomplishment of that end.

In sum, we find that the complaint alleges a causal nexus between RICO-proscribed conduct and Reserve's damage sufficient to meet the requirements of [§ 1964\(c\)](#).

E. Miscellaneous Contentions

The defendants cite several other defects in the theory of the Director's complaint. We find them also to be without merit, and discuss them briefly below.

Defendants first argue that our decision in *Cenco*, denying civil RICO standing to an accounting firm attempting to sue its client corporation for damages stemming from a fraud aided by the accounting firm, precludes the maintenance of the Director's standing in the instant case. [**54] In denying standing to the auditors in that case, we noted that it "is probably on behalf of the owners, perhaps also the customers and competitors, of such businesses that the [RICO] civil damages remedy was created, and not on behalf of the people who supply office equipment or financial or legal services to criminal enterprises that may be violating RICO." [Cenco, 686 F.2d at 455](#). We therefore concluded that Congress did not intend to create a cause of action for "all who may have suffered *indirectly* from the violation, especially where many of them would inevitably be, as here, the *witting* [*1360] or *unwitting tools* of the violator." [Id. at 457](#) (emphasis added). Defendants seize on this latter phrase and argue that, if an action may be denied to an auditor who is a "witting or unwitting tool" of the violator, *a fortiori* a "violator" (i.e., Reserve) may not sue its "unwitting tool" (i.e., the accountant defendants). Such an argument must fail, for, unlike in *Cenco*, we have found here that the complaint alleges that Reserve was a *victim* of the RICO violation, not its perpetrator. See II, *supra*, at 8-9. Therefore, the Director, as [**55] the statutory "owner" of Reserve and the *direct* victim of the defendants' unlawful activity, is precisely the kind of plaintiff who must be given standing in order to fulfill the deterrent objectives of RICO. [Cenco, 686 F.2d at 455](#).

Defendants SCOR and SCOR Re next argue that they were not "employed by or associated with" ARC and are therefore excluded from liability under [§ 1962\(c\)](#). They argue that [§ 1962\(c\)](#) in essence requires that a defendant must be an "insider" or "manager" of the damage-causing enterprise in order to suffer liability. We do not believe that the language and purpose of [§ 1962\(c\)](#) supports such an interpretation.

As this court has noted before, in finding that a non-manager defendant arsonist met the [§ 1962\(c\)](#) requirement, "The nature of racketeering connections to an otherwise legitimate business suggests that elements outside a company may assist in obtaining the company's illegal goals. Thus, [HN16](#)[] the substantive proscriptions of the RICO statute apply to insiders and outsiders -- those merely "associated with" an enterprise -- who participate

directly and indirectly in the enterprise's affairs through a pattern of racketeering activity. [**56] [Citations omitted]. Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise." *United States v. Starnes*, 644 F.2d 673, 679 (7th Cir. 1981), quoting *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978), cert. denied, sub nom. *Delph v. United States*, 439 U.S. 953, 99 S. Ct. 349, 58 L. Ed. 2d 344 (1978) (emphasis in the original).²² Other courts as well have had little trouble in finding that defendants who are not managers or employees in the colloquial sense are nevertheless reached by § 1962(c). See *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), pet. for reh. en banc granted, Sept. 17, 1982 (upholding liability against mortgage lender, attorneys, accountants of enterprise); *United States v. Bright*, 630 F.2d 804, 830-31 (5th Cir. 1980) (bonding company paying kickbacks to sheriff's office in return for business is sufficiently "associated with" that office); *United States v. Forsythe*, 560 F.2d 1127, 1135-36 (3rd Cir. 1977) (magistrate receiving bribes from local bonding agency is sufficiently "associated with" latter enterprise; alternatively, magistrates are constructive "employees" [**57] of the enterprise); *Hanna v. Norcen Energy Resources, Ltd.*, [Current]Fed. Sec. L. Rep. (CCH) P98,742 (N.D. Ohio 1982) (upholding RICO liability against accounting firm and company in connection with client enterprise's securities fraud). The defendant insurance companies here, who allegedly entered into long-term contracts with ARC entailing complicated reinsurance and financing arrangements and SCOR's service as a conduit for Reserve's income and retroceded business, and the defendant auditors, who allegedly aided the managerial defendants in operating ARC through systematic fraud, are sufficiently "associated with" or "employed by" ARC within the meaning of the statute.

[**58] Defendants SCOR and SCOR Re argue next that their alleged conduct does not entail culpability under the predicate mail fraud allegation. They first argue that no deception took place because the State Director of Insurance was aware of, and agreed to, the SCOR reinsurance agreement. SCOR neglects to mention, however, that a key to the allegedly deceptive [*1361] scheme, the clandestine retrocession agreement and guarantee by ARC of GRC's obligations to SCOR, were not disclosed to the state authorities, with the contemplated result that Reserve's *de facto* retention of liability for formally ceded business²³ secretly continued and deepened its insolvency. SCOR also argues that the fact that it entered into the reinsurance agreement several months before the consent decree negates any inference of SCOR's intent to defraud. The complaint, however, alleges that the negotiations in connection with the consent decree may have been underway in late 1974 at the time the SCOR agreement was concluded, with the full fraudulent impact in view and that SCOR was aware throughout subsequent years that the continued viability of the consent decree rested on the continued transmission [**59] of the fraudulent information; if proven, such facts clearly support an invocation of the mail fraud predicate offense under § 1961.

Finally, defendant Andersen suggests that the presence of the terms "he" and "his" in certain sections of RICO indicates that only biological individuals may violate RICO § 1962(c). We must reject this contention, as § 1961(3) HN17[+] plainly states that a violating "person" may be "any individual or entity capable of holding a legal or beneficial interest in property."

Conclusion

[**60] There is no doubt that many theoretical and practical objections may be raised to even the most routine application of RICO's civil damage provisions. As suggested above, Congress, by granting both plaintiff and defendant status to "any person" who possesses the rudimentary connection with the operation of an enterprise

²² Defendants suggest that *Starnes* is distinguishable because it involved a violation alleged under § 1962(d) which makes it unlawful for a person to conspire to violate § 1962(c). However, in *Starnes* we explicitly determined that the same enterprise-person nexus requirements contained in § 1962(c) were independently satisfied vis-a-vis the accused arsonist. See *Starnes*, 644 F.2d at 679.

²³ It is true, as defendants note, that the allegation does not spell out in detail the precise monetary liability which Reserve effectively maintained as a result of the secret agreements, but it does assert that there was "substantial risk of loss" from the ceded business retained by the entire "ARC insurance group," which includes Reserve. We consider such an allegation, at least at this stage, adequate to suggest that SCOR could have been aware of the misleading impact of the secret guarantee.

through predicate offenses or who suffers injury therefrom, may well have created a runaway treble damage bonanza for the already excessively litigious. The statute, however, does not speak ambiguously, and Congress, as RICO's legislative history indicates, was alerted to the far-reaching implications of its enactment. The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime. *United States v. Turkette, 452 U.S. at 586-87 (1981)*.

With this principle in view, we find that the Director's complaint adequately states at least one cognizable claim under RICO, § 1962(c). We thus affirm the district court's denial of defendants' motion to dismiss Counts I, II, III and IV of the complaint. We intend to [**61] express no judgment on the merits of the complaint.

AFFIRMED.

End of Document



United States v. Southern Motor Carriers Rate Conference

United States Court of Appeals for the Fifth Circuit,* Unit B

April 11, 1983

No. 79-3741

Reporter

702 F.2d 532 *; 1983 U.S. App. LEXIS 28938 **; 1983-1 Trade Cas. (CCH) P65,320

UNITED STATES of America, Plaintiff-Appellee, v. SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., and North Carolina Motor Carriers Association, Inc., Defendants-Appellants, National Association of Regulatory Utility Commissioners, Intervenor-Appellant

Prior History: [**1] Appeals from the United States District Court for the Northern District of Georgia.

Core Terms

state action, compulsion, private party, immunity, Sherman Act, carriers, articulated, supervision, ratemaking, cases, state policy, anticompetitive, anti trust law, exemption, bureaus, rates, antitrust, regulation, state action doctrine, municipalities, transportation, antitrust immunity, district court, appellants', interstate, motor carrier, involvement, decisions, sovereign, threshold

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Federal Government > US Congress

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

HN1 [?] Exemptions & Immunities, Parker State Action Doctrine

Insofar as the Sherman Act (Act), [15 U.S.C.S. § 1](#), applies only to persons, Congress intended application of the Act to the business combinations of individuals and corporations. The Act was not, therefore, intended to restrain a state or its officers or agents from activities directed by its legislature. Congress made no mention of states, and in a dual system of government in which, under the United States 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.

* FORMER FIFTH CIRCUIT CASE (SECTION 9(3) OF PUBLIC LAW 96-452 -- OCTOBER 14, 1980).

702 F.2d 532, *532L^A 1983 U.S. App. LEXIS 28938, **1

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN2 [down] Exemptions & Immunities, Parker State Action Doctrine

The state action issue is a question of whether the challenged acts could be attributed to the state as sovereign.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN3 [down] Parker State Action Doctrine, Local Governments & Private Parties

The fact that Congress did not intend to restrain anticompetitive acts attributable to states does not mean that only states could assert a state action defense. A defense of state action may also be available to private parties under certain limited circumstances.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN4 [down] Parker State Action Doctrine, Local Governments & Private Parties

In determining whether compulsion is present, the court does not believe that private parties may have no role in proposing mandatory state action. An action still may be compelled by the state even though private parties petitioned the state to consider requiring such action. Still, once a state has adopted some policy, whether or not after a petition by a private party, private parties will be exempt from the antitrust laws only if the state requires some action pursuant to that policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN5 [down] Exemptions & Immunities, Parker State Action Doctrine

The legislative history and wording of the Sherman Act (Act), [15 U.S.C.S. § 1](#), point to the conclusion that Congress wished to restrain the anticompetitive actions of persons, that is, individuals and corporations. Thus, an anticompetitive action undertaken by a private party necessarily is proscribed by the Act unless for some reason that action cannot fairly be attributed to the private party. When a state compels the private party to act, it deprives him of his freedom of choice; his action, being mere obedience, cannot be described as individual action and must therefore be attributed to the state.

702 F.2d 532, *532L^A 1983 U.S. App. LEXIS 28938, **1

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN6 Scope, Exemptions

A state may not give immunity to those who violate the Sherman Act. [15 U.S.C.S. § 1](#), by authorizing them to violate it, or by declaring that their action is lawful, and state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity. So long as the state merely allows, but does not compel, anticompetitive conduct, the decision to adopt such conduct remains that of the individual and is within the scope of the Act. Regardless of how strongly a state may wish to remove private action from the Act's jurisdiction, it will not succeed unless it structures a program so as to make individual actions the actions of the state itself, by means of the mechanism of compulsion.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN7 Exemptions & Immunities, Parker State Action Doctrine

If a private party is permitted by the state to make the choice whether or not to compete, there is no necessary conflict between state and federal law because the private party may comply with both federal and state law at the same time.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN8 Parker State Action Doctrine, Local Governments & Private Parties

Compulsion should not be required of state defendants. Regardless of their motives for undertaking anticompetitive behavior, states are nevertheless acting as states. The analysis of state action differs substantially depending on whether the defendant is a private party or a public institution. The same analysis applies to municipalities, at least when they act as agents of the state. Thus, the supreme court has not required compulsion for municipalities, but has held that when a state indicates its intention that the municipality may act as an instrumentality of the state, when the state sanctions anticompetitive behavior of the municipality, a state action defense may be available to the municipality.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

702 F.2d 532, *532L^{1983 U.S. App. LEXIS 28938, **1}

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

HN9 [blue icon] Exemptions & Immunities, Parker State Action Doctrine

N.C. Gen. Stat. § 62-152.1(b) states that in order to realize and effectuate the policy of uniform rates among carriers, any party to an agreement with other carriers regarding uniform rates may apply to a state commission for approval of the agreement; Section 62-152.1(h) relieves parties to an agreement so approved from the operation of the antitrust laws. The statute does no more than authorize or permit collective ratemaking. There is no compulsion.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

HN10 [blue icon] Regulated Industries, Transportation

Tennessee Public Service Commission Rule 1220-2-1.40 adopts section 5a of the Interstate Commerce Act, 49 U.S.C.S. § 10706(b), which permits carriers to file joint rates and exempts those who do file such rates from the antitrust laws. In addition, Tenn. Code Ann. § 65-1506 permits the Public Service Commission to establish joint ratemaking procedures. Again, there is no state compulsion.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

HN11 [blue icon] Exemptions & Immunities, Parker State Action Doctrine

Georgia Code Ann. § 68-613, which requires a state commission to establish ratemaking procedures for all motor common carriers, which procedure shall include, but not be limited to, collective ratemaking procedures, explicitly indicates that Georgia intends to give carriers the option of filing rates jointly or individually.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

HN12 [blue icon] Exemptions & Immunities, Parker State Action Doctrine

Mississippi, in Miss. Code Ann. §§ 77-7-1 to -341, merely contemplates cooperation among carriers to the limited extent of establishing joint rates. This falls short of compelling joint applications for proposed rates.

702 F.2d 532, *532L^A 1983 U.S. App. LEXIS 28938, **1

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN13[] Exemptions & Immunities, Parker State Action Doctrine

Decisions establish two standards for antitrust immunity. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN14[] Exemptions & Immunities, Parker State Action Doctrine

Anticompetitive restraints engaged in by state municipalities or subdivisions must be clearly articulated and affirmatively expressed as state policy in order to gain an antitrust exemption.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN15[] Exemptions & Immunities, Parker State Action Doctrine

Both supervision and compulsion are necessary for a finding of state action. A state cannot deprive competitors of their ability to subvert competition merely by compelling them to formulate collective rates. Conversely, active supervision of anticompetitive conduct undertaken at the voluntary election of a private party also is not by itself adequate. For example, a state may by regulation supervise the reasonableness of rates, but the reasonableness of any particular rate may have little to do with whether it was arrived at anti-competitively. A state regulatory system does not even necessarily have the regulatory power to supervise anticompetitive behavior if the resulting rate falls somewhere within the zone of reasonableness. Compulsion serves an entirely different purpose from supervision: the compulsion inquiry is to determine whether the specific anticompetitive activity at issue was actually that of the state acting as sovereign.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN16[] Exemptions & Immunities, Parker State Action Doctrine

It is not enough that anticompetitive conduct is prompted by state action; rather, anticompetitive activities must be compelled by direction of the state acting as a sovereign. Private action must be compelled by the state in order for the private party to invoke state action immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

702 F.2d 532, *532L^A 1983 U.S. App. LEXIS 28938, **1

[**HN17**](#) [blue document icon] Parker State Action Doctrine, Local Governments & Private Parties

The mere fact that anticompetitive conduct by a private party effectuates a clearly articulated state regulatory policy is not in itself sufficient to justify a state action defense against injunctive relief. The defense is only available if the state has elected to effectuate its policy by requiring the private conduct under attack. To summarize, a state action defense against injunctive relief should be available for private conduct only if the state has specifically required the conduct in question without abdicating final decisionmaking authority to private parties.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN18**](#) [blue document icon] Sherman Act, Defenses

The rationale of the state action doctrine is federalism, not the maximization of competition. It is the source of the decision not to compete, not the extent of competition, which determines whether state action exists. Unless it is the state rather than the individual or corporation that decides to act anti-competitively, a state action defense would be inconsistent with the wording and intent of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

[**HN19**](#) [blue document icon] Exemptions & Immunities, Parker State Action Doctrine

Congress has instructed courts not to treat lightly overt collusion by private parties in setting prices. Permitting states to confer antitrust immunity on private parties who voluntarily elect state regulation would open the way for the creation of large loopholes in federal **antitrust law**, loopholes whose contours would be difficult to contain. If a state wishes to displace federal antitrust laws, it should be permitted to do so only if it speaks in the clearest and strongest possible terms, by compelling private parties to submit to its own regulatory system.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Charters

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

[**HN20**](#) [blue document icon] Exemptions & Immunities, Parker State Action Doctrine

There is no implied immunity from the antitrust laws resulting from the antitrust exemption granted motor carriers under [49 U.S.C.S. § 10706](#), or from the existence of pervasive state regulation permitted by [49 U.S.C.S. § 10521\(b\)](#).

Counsel: Allen I. Hirsch, Atlanta, Carolina, Simon A. Miller, Atlanta, Carolina, For: Southern Motor Carriers Bryce. Rea, Jr. N.W., Washington, District of Columbia, David Hyler Coburn, N.W., Washington, District of Columbia For: North Carolina Motor & Amicus Nat'l Motor Freight Trafic Assoc., for Appellant.

Paul Rodgers, Gen. Cnsl., Washington, District of Coulumbia Charles D. Gray, Pamela R. Melton, for Intervenor.

Robert P. Gruber, Raleigh, North Carolina Wilson B. Partin, Jr., Deputy Gen. Cls., Raleigh, North Carolina David Gordon, Associate AG, Raleigh, for Amicus Curiae

Barry Grossman, Antitrust Div., Appellate Section, Dept. of Justice, 10th & Constitution, N.W. Washington, District of Columbia, Elliott M. Seiden, Antitrust Div., Appellate Section, Dept. of Justice, 10th & Constitution, N.W.

Washington, District of Columbia, Nancy G. Garrison, Antitrust Divs., Appellate Section, Dept. of Justice 10th & Constitution, N.W. Washington, District of Columbia, William L. Harper, USA, Atlanta, Georgia, for Appellee.

Judges: Godbold, Chief Judge, Roney, Tjoflat, Hill, Fay, Vance, Kravitch, Frank **[**2]** M. Johnson, Jr., Henderson, Hatchett, Anderson and Thomas A. Clark, Circuit Judges. James C. Hill, Circuit Judge, with whom R. Lanier Anderson, III, and Thomas A. Clark, Circuit Judges, join dissenting. Thomas A. Clark, Circuit Judge, with whom Roney, Circuit Judge, joins dissenting.

Opinion by: JOHNSON

Opinion

[*534] FRANK M. JOHNSON, Jr., Circuit Judge:

In November 1976 the United States instituted this action under Section 4 of the Sherman Act, 15 U.S.C.A. § 4, to enjoin the continuing violation of Section 1 of the Sherman Act, 15 U.S.C.A. § 1, by three rate bureaus. These defendants, Southern Motor Carriers Rate Conference, Inc. (SMCRC), North Carolina Motor Carriers Association, Inc. (NCMCA), and Motor Carriers Traffic Association, Inc. (MCTA), represent common carriers before the regulatory commissions of the states of Alabama, Georgia, Mississippi, North Carolina, and Tennessee. The rate bureaus perform three basic functions: (1) they provide a forum for competing member carriers to discuss and agree on rates for intrastate transportation of general commodities to be proposed to state public service commissions for approval; (2) they publish tariffs and supplements containing **[**3]** the rates on which the carriers agree; and (3) they provide counsel, staff experts, and facilities for the preparation of cost studies and other exhibits and testimony for use in support of proposed rates at hearings held by the regulatory commissions.¹ The government challenged the first of these functions as price fixing in violation of Section 1 of the Sherman Act.

The district court granted the government's motion for summary judgment and held that defendants were in violation of Section 1. The court rejected arguments² that defendants' activities were immune under the state action doctrine or under the *Noerr-Pennington* doctrine. **[**4]** Defendants SMCRC and NCMCA and intervenor NARUC appealed, and a panel of the former Fifth Circuit affirmed. United States v. Southern Motor Carriers Rate Conference, Inc., 672 F.2d 469 (5th Cir. Unit B 1982). The Court en banc voted to rehear the case to consider two issues: first, whether a private party may avail itself of the state action exception to federal antitrust laws only if the state compels it to perform the disputed actions; and second, whether, if state compulsion is not necessary, the

¹ For further elaboration of the facts regarding the role of the rate bureaus, their relationship with the state regulatory commissions, and the general pattern of regulatory procedures in the five subject states, see the district court's carefully written opinion. United States v. Southern Motor Carriers Rate Conference, Inc., 467 F. Supp. 471, 476-78 (N.D.Ga.1979).

² In the district court, the state attorneys general of the states of Alabama, Georgia, Mississippi, North Carolina, and Tennessee participated as amici curiae. The National Association of Regulatory Utility Commissioners (NARUC) also was allowed to participate as an intervenor.

state policies here at issue were sufficiently clearly articulated and affirmatively expressed for the state action exception to apply. We hold that compulsion is required of private parties and thus do not reach the second issue. Accordingly, we affirm the judgment of the district court.

[**5] [*535] The Supreme Court first clearly articulated the "state action" exception to the antitrust laws in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). At issue in *Parker*, a suit against state officials, was the applicability of the Sherman Act to an agricultural proration system established by a California statute authorizing a commission to impose marketing programs for raisins upon the petition of raisin growers. Once the program was approved and instituted by the commission, participation by the growers was mandatory; under the statute, growers who refused to follow a program once instituted were subject to fines and imprisonment. *Id. at 347, 63 S. Ct. at 311-312*.³ Analyzing the intent of Congress in enacting the Sherman Act, the Court concluded that, **HN1** insofar as the Act applied only to "persons," Congress intended application of the Act to the "business combinations" of "individuals and corporations." *Id. at 351, 63 S. Ct. at 313-314*. The Act was not, therefore, intended to "restrain a state or its officers or agents from activities directed by its legislature." *Id. at 350-51, 63 S. Ct. at 313*. Congress made no mention of states, and [**6] "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." *Id. at 351, 63 S. Ct. at 313*.⁴ Applying this analysis to the California program, the Court reasoned that the Sherman Act was not intended to apply to the state of California in its establishment of a program operating under "state command." "The state in adopting and enforcing the prorate program," the Court concluded, "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." *Id. at 352, 63 S. Ct. at 314*. The Court's opinion in *Parker* therefore established **HN2** the state action issue as a question of whether the challenged acts could be attributed to the state as sovereign.

HN3 The fact that the Court in *Parker* concluded that Congress did not intend to restrain anticompetitive acts attributable to states of course did not mean that only states could assert a state action defense. Thus, while *Parker*'s holding applied to state party defendants, the Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975), suggested that a defense of state action may also be available to private parties under certain limited circumstances. *Goldfarb* was a class action against the Virginia State Bar and a Virginia county bar association in which the Court considered the validity under the Sherman Act of a minimum fee schedule for lawyers published by the county bar association. After determining that the county bar association was not a state agency, [**8]⁵ the Court addressed the "threshold inquiry" of whether the bar association's "activity is required by the State acting as sovereign." *Id. at 790, 95 S. Ct. at 2015*. The county bar association had [*536] argued that its action was "prompted" by the state, but a unanimous Court held that this was not enough for a state action defense. Rather, the action must be "compelled by direction of the State acting as a sovereign." *Id. at 791, 95 S. Ct. at 2015*. Deciding that the state of Virginia did not require the publication of minimum fee schedules, the Court stated that it "need not inquire further into the state-action question," *id. at 790, 95 S. Ct. at 2015*, and held that the challenged action was not state action for Sherman Act purposes.

³ Appellants seek to characterize *Parker* as a case in which individual growers were not compelled to act anticompetitively, citing a provision of the program which permitted growers to set aside up to 30% of their crops for sale on the free market. The 30% set-aside provision, however, did not affect the ability of a grower to elect not to participate as to the remaining 70% of his crops. In this sense, the state mandated the participation of every grower and compelled the challenged anticompetitive behavior.

⁴ [**7] Significantly, this reference to federalism concerns was directed not to any limitation on Congress' power to act; instead, it was stated merely as a rule of statutory interpretation -- that is, whether and to what extent Congress had chosen to override existing state regulation.

⁵ The State Bar was, for "some limited purposes," a state agency. *421 U.S. at 791, 95 S. Ct. at 2015*. But because the fee schedule itself was published by the county bar association, we agree with those who characterize *Goldfarb* as an action against a private party. Cf. *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) (antitrust claims raised only against state bar, which was a state defendant).

[**9] After *Goldfarb*, the question remained as to what would be required in addition to the threshold compulsion requirement for a finding of state action for private parties. This question was partially answered the next term in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976). At issue in *Cantor* was a program in which Detroit Edison -- a private defendant -- provided light bulbs to its electricity customers without a separate charge. Detroit Edison could not discontinue its program, the Court stated, without the approval of a Michigan state commission, and in this sense the threshold compulsion requirement was at least formally satisfied. See *id. at 592, 96 S. Ct. at 3118* ("In this case we are asked to hold that private conduct *required by state law* is exempt from the Sherman Act." (emphasis added)); *id. at 594, 96 S. Ct. at 3119*.⁶ As *Goldfarb* had hinted, however, compulsion alone was not enough, particularly in *Cantor*, where "there can be no doubt that the option to have, or not to have, such a program is primarily [Detroit Edison's], not the [State's]," *id. at 594, 96 S. Ct. at 3119*, and where the state [**10] was neutral as to the desirability of providing the light bulbs. Noting that it would not find an exception to federal **antitrust law** unless one was required for the state regulatory program to function, a majority of the Court concluded that Michigan's policy interest in regulating electricity would not be affected by the inapplicability of the state action doctrine.⁷ Thus, although Detroit Edison's action was formally commanded by the state, the Court declined to grant the company state action immunity where no significant state interest would be undermined by enforcement of federal **antitrust law**. This discussion as to the factors necessary for private party invocation of the state action doctrine is, however, for the most part not at issue in the present case. It is enough for our purposes that the Court premised its discussion on the fact that Detroit Edison's action was "required" by the state. *Id. at 592, 96 S. Ct. at 3118*. In fact, although there were four separate opinions in *Cantor*, none of the Justices questioned the continued validity of *Goldfarb*'s requirement -- which had been imposed by a unanimous Court -- that a private party must first meet the compulsion [**11] requirement as a threshold matter.⁸

[*537] In our view, the analytical basis for *Goldfarb*'s compulsion requirement for private parties traces its roots directly to the analysis in *Parker*. The lesson of *Parker* is that **HN5**↑ the legislative history and wording of the Sherman Act point to the conclusion that Congress wished to restrain the anticompetitive actions of "persons," that is, "individuals and corporations." Thus, an anticompetitive action undertaken by a private party necessarily is proscribed by the Sherman Act unless for some reason that action cannot fairly [**13] be attributed to the private party. Under *Goldfarb*, when a state compels the private party to act, it deprives him of his freedom of choice; his action, being mere obedience, cannot be described as individual action and must therefore be attributed to the state. The Court elaborated on this freedom of choice analysis in *Cantor* after reviewing Supreme Court cases involving state action immunity:

In each of these cases the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking. In each case, notwithstanding the state participation in the decision, the private

⁶ **HN4**↑ In determining whether compulsion is present, we do not believe that private parties may have no role in proposing mandatory state action. In *Parker and New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1979), the Supreme Court made it clear that an action still may be compelled by the state even though private parties petitioned the state to consider requiring such action. See also California *Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961). In *Cantor*, formal compulsion was present despite the fact that Detroit Edison could with little difficulty have petitioned the state commission for discontinuance of the program which the company itself had proposed. Thus, by compulsion we mean something less than that envisioned by some commentators. See e.g., 1 P. Areeda & D. Turner, **Antitrust Law** para. 215 (1978). Still, once a state has adopted some policy, whether or not after a petition by a private party, private parties will be exempt from the antitrust laws only if the state requires some action pursuant to that policy.

⁷ [**12] In a prior part of the opinion (Part II) Justice Stevens, joined only by three other members of the Court, concluded that *Parker* should be limited to suits against state officials.

⁸ The disagreement in the Court centered on what in addition to compulsion was required for state action immunity for private parties. In fact, Justice Stewart, joined by Justices Powell and Rehnquist, argued that Michigan's decision to adopt Detroit Edison's proposal and then compel compliance with it should have been by itself sufficient for state action immunity.

party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision.

[428 U.S. at 593, 96 S. Ct. at 3119](#). This reasoning also explains the Court's statement in *Parker* that [HN6](#) a state may "not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful," [317 U.S. at 351, 63 S. Ct. at 314](#), and its statement in *Cantor* that "state authorization, approval, encouragement, or participation in restrictive [\[***14\]](#) private conduct confers no antitrust immunity," [428 U.S. at 592-93, 96 S. Ct. at 3118-3119](#) (footnotes omitted). So long as the state merely allows, but does not compel, anticompetitive conduct, the decision to adopt such conduct remains that of the individual and is within the scope of the Sherman Act. Regardless of how strongly a state may wish to remove private action from the Act's jurisdiction, it will not succeed unless it structures a program so as to make individual actions the actions of the state itself -- by means of the mechanism of compulsion.⁹

A necessary corollary of the rationale of *Goldfarb* and *Cantor* is that [HN8](#) compulsion should not be required of state defendants. Regardless of their motives [\[***15\]](#) for undertaking anticompetitive behavior, states are nevertheless acting as states.¹⁰ Since *Goldfarb*, the Court has consistently pointed out that the analysis of state action differs substantially depending on whether the defendant is a private party or a public institution. See, e.g., [Bates, 433 U.S. at 361, 97 S. Ct. at 2697-2698](#) (*Cantor* would have been an "entirely different case" had the action been against a public official or public agency rather than against a private party); [Cantor, 428 U.S. at 600-601, 96 S. Ct. at 3122-3123](#) (plurality opinion) (noting that *Parker* might have been different had there been a private defendant); [id. at 585-92, 96 S. Ct. at 3115-3118](#) (distinguishing *Parker* as case against public officials). The same analysis applies to municipalities, at least when they act as agents of the state. Thus, the Supreme Court has not required compulsion for municipalities, but has held that when a state indicates its intention that the municipality may act as an instrumentality of the state -- i.e., when the state "sanctions" anticompetitive behavior of the municipality -- a state action defense may be [\[*538\]](#) available to the municipality. [\[***16\] Community Communications Co. v. City of Boulder, 455 U.S. 40, 51, 102 S. Ct. 835, 840, 70 L. Ed. 2d 810 \(1982\); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413, 98 S. Ct. 1123, 1136-1137, 55 L. Ed. 2d 364 \(1978\)](#) (plurality opinion).

Under the foregoing analysis of the state action doctrine, we have little difficulty in holding that the activities of appellants are not immune from Sherman Act coverage. Specifically, a defense of state action fails because this litigation was brought against private defendants and none of the states in question compels the ratemaking bureaus to set rates collectively.¹¹ Because the anticompetitive practices [\[***17\]](#) challenged by the government are

⁹ Another rationale for the compulsion requirement is that [HN7](#) if a private party is permitted by the state to make the choice whether or not to compete, there is no necessary conflict between state and federal law because the private party may comply with both federal and state law at the same time.

¹⁰ We acknowledge that *Bates* and *Parker*, which involved state defendants, discussed the presence of compulsion, but we view those cases -- as appellants would have us do -- as instances in which the presence of compulsion provides the best evidence of clear articulation and affirmative expression of state policy to displace competition.

¹¹ The district court found that "regardless of the virtual romance between the states and the ratemaking conferences, no state requires that rates be published collectively." [467 F. Supp. at 483](#) (emphasis in original). An analysis of each state's policies reveals the correctness of the district court's finding. [HN9](#) [North Carolina General Statute § 62-152.1\(b\)](#) states that in order to realize and effectuate the policy of uniform rates among carriers, any party to an agreement with other carriers regarding uniform rates may apply to a state commission for approval of the agreement; [Section 62-152.1\(h\)](#) relieves parties to an agreement so approved from the operation of the antitrust laws. The statute does no more than authorize or permit collective ratemaking. There is no compulsion. [HN10](#) [Tennessee Public Service Commission Rule 1220-2-1.40](#) adopts Section 5a of the Interstate Commerce Act, [49 U.S.C.A. § 10706\(b\)](#), which permits carriers to file joint rates and exempts those who do file such rates from the antitrust laws. In addition, Tenn. Code Ann. § 65-1506 permits the Public Service Commission to establish joint ratemaking procedures. Again, there is no state compulsion. [HN11](#) [Georgia Code Ann. § 68-613](#), which requires a state commission to "establish ratemaking procedures for all motor common carriers, which procedure shall include, but not be limited to, collective ratemaking procedures," explicitly indicates that Georgia intends to give carriers the option of filing rates

undertaken at the individual election of the carriers and the rate bureaus, appellants fail to pass the threshold test established in *Goldfarb*. Thus, appellants' action cannot be said to constitute state action.

[**18] Appellants, however, urge that state action analysis has been changed in their favor by the recent Supreme Court decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). *Midcal* involved a challenge under the Sherman Act to a California statute that required wine producers and wholesalers to file fair trade contracts or price schedules with the state. Under the statute, wholesalers could not resell wine to retailers at prices below those on the contracts or schedules. In order to evaluate whether the state defendant California Department of Alcoholic Beverage Control was state action immune, the Court briefly reviewed several of the state action cases discussed above and then stated that "these [HN13](#)¹² decisions establish two standards for antitrust immunity under *Parker*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 [98 S. Ct. 1123, 1135, 55 L. Ed. 2d 364] (1978) (opinion of Brennan, J.)." [**19] 445 U.S. at 105, [*5391](#) 100 S. Ct. at 943. California's regulatory system, the Court ruled, met the first standard but not the second; it therefore refused to hold that the state defendant's activity was outside the coverage of the Sherman Act. Applying *Midcal* to the facts in the present case, the government and appellants agree that each state actively supervises the collective ratemaking process,¹² so the second *Midcal* standard is satisfied. As to the first *Midcal* standard, the parties disagree concerning the importance of the fact that none of the five states compels the challenged anticompetitive activity. Appellants assert that, despite the lack of compulsion, their actions meet the first standard. This is because the Supreme Court allegedly abandoned the practice established in *Goldfarb* of requiring compulsion of private parties, as evidenced by the fact that the first standard did not specifically refer to compulsion. We disagree with appellants' argument for several reasons.

[**20] Initially, we question the very premise upon which appellants' argument is based -- that the specific choice of wording in *Midcal* implies a rejection of a compulsion requirement for private parties. In the context of private parties, the first *Midcal* standard makes sense only if it includes a compulsion requirement. This is because we do not see how a private party can carry out a clearly articulated and affirmatively expressed state policy when it is left to the private party to carry out that policy or not as he sees fit. Our interpretation of the disputed passage in *Midcal* is that it should be read as a broad, general restatement of the Court's earlier holdings; the absence of any mention of compulsion in one specific application of the standard -- that is, to private parties -- therefore does not strike us as unusual. One additional factor points to the conclusion that the Court's choice of wording in *Midcal* does not imply a rejection of its prior holdings. The Court introduced the two standards with the statement that the prior decisions "establish" the standards, 445 U.S. at 105, 100 S. Ct. at 943, thus indicating that it did not view them as anything new. [**21] Furthermore, the Court used similar or identical language in earlier cases. See *New Motor Vehicle Bd.*, 439 U.S. at 109, 99 S. Ct. at 411-412; *City of Lafayette*, 435 U.S. at 410, 98 S. Ct. at 1135 (plurality opinion); *Bates*, 433 U.S. at 362, 97 S. Ct. at 2698. If these cases did not alter the standard for state action immunity for private parties, we see no reason to believe that *Midcal* did.

jointly or individually. The State of Georgia, participating as amicus in the district court, presented a 1942 order issued by its public service commission stating that "all for hire motor common carriers operating under Class A certificates be, and they are hereby, directed and required to publish and file with this Commission . . . a *tariff* containing all local and joint class and/or commodity rates applicable between points within Georgia." Pointing to the italicized language, the state argued that the commission "clearly directed all Class 'A' carriers to file a single joint tariff with the Commission," thus indicating its policy in favor of collective action. *Id.* We are not persuaded that the language of the 1942 order is susceptible of only this interpretation. At best it is ambiguous. Given the statute, only recently amended to insert the provisions outlined above, it would not, in any event, be controlling. A 1942 order of the Alabama Public Service Commission requires carriers to "prepare, publish and file with the Commission an individual tariff or . . . participate in an agency issue." As with Georgia, Alabama explicitly permits individual rate applications. Finally, [HN12](#)¹² Mississippi in *Miss.Code Ann. §§ 77-7-1* to -341 merely contemplates cooperation among carriers to the limited extent of establishing "joint rates." This falls short of compelling joint applications for proposed rates.

¹² The government points out that the district court conducted no fact-finding as to this issue. The record, however, reveals that the state commissions conduct hearings to review the reasonableness of proposed carrier tariffs and routinely suspend their effectiveness.

Our interpretation of *Midcal* is supported by the consideration that the case had nothing to do with the applicability of a state action defense to a private party. *Midcal* involved an action by a wholesale distributor of wine for a writ of mandate for an injunction against the California Department of Alcoholic Beverage Control -- a state agency.¹³ Because, as we said earlier, *Parker* immunity for state defendants does not require compulsion, it makes sense that the Court did not require compulsion of the state Department.¹⁴ Moreover, because the Court's holding against state action immunity in *Midcal* was grounded on the fact that the second standard, requiring active state supervision, was lacking, it is not surprising that the Court did not articulate a standard [**22] designed to encompass every conceivable state action case. The Court's citation to *City of Lafayette* -- a non-private party case -- immediately after listing the two standards further evidences that the Court's focus was only on cases involving public defendants. The Supreme Court recently agreed with our reading of this passage, referring to *Midcal* as having adopted the principle "that [HN14](#)[] anticompetitive restraints engaged in by state municipalities or subdivisions must be 'clearly articulated' [[*540](#)] and affirmatively expressed as state policy' in order to gain an antitrust exemption. *Midcal*, 435 U.S. at 105 [100 S. Ct. at 943]."[Community Communications Co., 455 U.S. at 51 n. 14, 102 S. Ct. at 841 n. 14](#) (emphasis added). The fact remains that the only two state action cases in the Supreme Court to date involving private defendants have applied the threshold compulsion requirement.¹⁵

[**24] Appellants suggest that their view of the state action doctrine does not really constitute a significant change from prior law, arguing that *Goldfarb* would have come out the same way under their reading of *Midcal* because in *Goldfarb* the minimum fee schedule lacked even state authorization. Such speculation, however, ignores the fact that the Supreme Court in *Goldfarb* could not possibly have been more clear in imposing a compulsion requirement on private parties. The very basis of the Court's holding was that compulsion was lacking; having made that determination, the Court reached no other issues, including whether the state had authorized the bar association's action. More importantly, reading a compulsion requirement out of the private party state action doctrine would require a complete reformulation of the theoretical foundations for state action first established in *Parker*. Under the view of federalism espoused in *Parker* and followed in *Goldfarb* and *Cantor*, the Court's inquiry focuses on the wording and intent of the Sherman Act in determining whether private action is mere obedience to a state command and therefore effectively the action of [**25] the state itself. Under appellants' view of federalism, on the other hand, Congress' explicit legislative determination to reach the conduct of "individuals and corporations" may be overridden by a state's decision to implement a voluntary supervision scheme that permits but does not compel anticompetitive behavior.¹⁶ Even if [[*541](#)] such a view of federal-state relations could be supported, its adoption

¹³ In the Supreme Court, petitioner California Retail Liquor Dealers Association had appealed the case as an intervenor.

¹⁴ In any event, compulsion was in fact present in *Midcal*. See [445 U.S. at 100, 100 S. Ct. at 940](#).

¹⁵ [**23] Appellants cite several lower court cases in support of their position, but only two of them actually found that private parties were immune without compulsion by the state. The first, [Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F. Supp. 711 \(D.D.C. 1979\)](#), aff'd per curiam, No. 79-1658 (D.C.Cir. 1980), cert. denied, 450 U.S. 914, 101 S. Ct. 1355, 67 L. Ed. 2d 339 (1981), a district court opinion, is of only limited relevance because in that case the court reviewed a governmental restraint involving a private party (and a state defendant) rather than, as here, a private restraint approved by the government. In the second case, [Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813 \(9th Cir. 1982\)](#), cert. denied, 456 U.S. 1011, 102 S. Ct. 2308, 73 L. Ed. 2d 1308 (1982), in which the Ninth Circuit reviewed an antitrust challenge to a private agreement allocating horse racing dates between two race track operators, the state had by statute specifically reserved the right to perform the allocation in the event that the private parties could not agree. [Id. at 816](#). Thus, although the state did not compel the private parties to enter into the racing date agreement, it had effectively ensured that the anticompetitive conduct would occur one way or another.

¹⁶ Appellants reason that the Court eliminated the compulsion requirement because the basis for state compulsion is the concern that the economic self interest of private parties might affect the rate setting process and, according to appellants, the second standard in *Midcal* -- the requirement of state supervision -- assuages that concern. They assert that a supervision requirement adequately ensures that the state has determined that the challenged activity is in furtherance of the state's policy and that the state does not abdicate its responsibility to private parties. We disagree with this analysis. If the second *Midcal* standard accomplished as much as appellants claimed, there would have been no need for the first standard. Further, if compulsion and supervision served the same purpose, the Supreme Court would have upheld, rather than denied, state action immunity in

would require at least some explanation or discussion. In *Midcal* there was none. Additionally, appellants' view of state action for private parties would raise extremely difficult practical questions of interpretation and application. For example, appellants presumably do not dispute the continued validity of the Court's statement in *Cantor* in 1976 that state authorization, approval, encouragement, or participation in restrictive private conduct does not confer antitrust immunity. See [428 U.S. at 592-93, 96 S. Ct. at 3118-3119](#). Yet appellants' interpretation of *Midcal* would have us find antitrust immunity where a state grants private parties the option of participating in a scheme of state supervision. If there is a significant difference between these two [\[**26\]](#) schemes, it eludes us. Thus, in light of the significant theoretical and practical difficulties that a reformulation in state action doctrine would create, we are not inclined to infer such a reformulation from a Supreme Court opinion which is completely silent on the subject.

[\[**27\]](#) The final reason why we conclude that *Midcal* does not represent a rejection of a compulsion requirement for private parties is found in the language of the opinion itself. The Court chose to cite *Goldfarb* with approval, and even quoted from it to the effect that "[HN16](#)"¹⁷ it is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities *must be compelled* by direction of the State acting as a sovereign." [445 U.S. at 104, 100 S. Ct. at 943](#) (quoting [421 U.S. at 791, 95 S. Ct. at 2015](#)) (emphasis added). Moreover, in a footnote immediately after setting out the two standards for state action immunity applicable to that case, the Court cited a student note in which the only argument contained at the cited page was that private action must be compelled by the state in order for the private party to invoke state action immunity.¹⁷

[\[**28\]](#) In addition to arguing that *Midcal* represents a rejection of a compulsion requirement for private parties, appellants also rely on various policy arguments against affirming the judgment of the district court. Even if we were not bound by the Supreme Court's decisions in *Goldfarb* and *Cantor*, we would find these arguments unpersuasive.

Appellants argue first that competition is undermined by a state action requirement that allows states to eliminate competition completely but not to maintain a policy that gives parties the choice of whether or not to compete. But [HN18](#)¹⁷ the rationale of the state action doctrine is federalism, not the maximization of competition. As we stated earlier, it is the source of the decision not to compete -- not the extent of competition -- which determines whether

Midcal because compulsion was present in that case. See [445 U.S. at 99-100, 100 S. Ct. at 940-941](#). That the Court did not reach this result is evidence that supervision and compulsion serve different purposes. In our view, [HN15](#)¹⁷ both supervision and compulsion are necessary for a finding of state action. A state cannot deprive competitors of their ability to subvert competition merely by compelling them to formulate collective rates. Conversely, active supervision of anticompetitive conduct undertaken at the voluntary election of a private party also is not by itself adequate. For example, a state may by regulation supervise the reasonableness of rates, but the reasonableness of any particular rate may have little to do with whether it was arrived at anticompetitively. A state regulatory system does not even necessarily have the regulatory power to supervise anticompetitive behavior if the resulting rate falls somewhere within the zone of reasonableness. As we stated earlier, compulsion serves an entirely different purpose from supervision: as *Goldfarb* and *Parker* established, the compulsion inquiry is to determine whether the specific anticompetitive activity at issue was actually that of the state acting as sovereign.

17

[HN17](#)¹⁷ The mere fact that anticompetitive conduct by a private party effectuates a clearly articulated state regulatory policy is not in itself sufficient to justify a state action defense against injunctive relief. The defense is only available if the state has elected to effectuate its policy by *requiring* the private conduct under attack.

Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor and Bates*, 77 Colum.L.Rev. 898, 916 (1977) (emphasis in original). The Note, at the end of the relevant section, was even more definite: "To summarize, a state action defense against injunctive relief should be available for private conduct only if the state has specifically required the conduct in question without abdicating final decisionmaking authority to private parties." *Id.* at 918.

The same footnote in the *Midcal* opinion also cited *Norman's on the Waterfront, Inc. v. Wheatley*, [444 F.2d 1011, 1018 \(3d Cir. 1971\)](#), and *Asheville Tobacco Bd. v. FTC*, [263 F.2d 502, 509-10 \(4th Cir. 1959\)](#), in which state action defenses were refused. Although both cases are ambiguous as to the requirements for state action, neither one implies that compulsion is not necessary for private parties.

state action exists.¹⁸ Unless it is the state [*542] rather than the individual or corporation that decides to act anticompetitively, a state action defense would be inconsistent with the wording and intent of the Sherman Act.

Appellants also urge that if we uphold the injunction against collective ratemaking and require competition among carriers, carriers will face the burden [**29] of additional expense in preparing individual rate filings. They also assert that the ability of state regulators to perform their task will be undermined. Even if these assertions were supported in the record,¹⁹ they would be irrelevant to proper antitrust analysis. Appellants' objections amount to the argument that competition does not work well, so the antitrust laws should not apply. This argument has consistently been rejected by the Supreme Court. See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-22, 60 S. Ct. 811, 842-843, 84 L. Ed. 1129 (1940). Moreover, if collective ratemaking is as desirable as appellants insist, then it should be but a small step for the states to compel it of all carriers. This latter point underscores a critical element of the state action issue. [HN19](#)[↑] Congress has instructed courts not to treat lightly overt collusion by private parties in setting prices. Permitting states to confer antitrust immunity on private parties who voluntarily elect state regulation would, in our view, open the way for the creation of large [**30] loopholes in federal **antitrust law**, loopholes whose contours would be difficult to contain. If a state wishes to displace federal antitrust laws, it should be permitted to do so only if it speaks in the clearest and strongest possible terms -- by compelling private parties to submit to its own regulatory system.

For the reasons stated above, we conclude that the district court properly decided that appellants were not entitled to claim state action immunity. On application for rehearing en banc appellants suggest no fault with the panel's determination that the Sherman Act was violated or that the *Noerr-Pennington* doctrine does not apply to the challenged activities. Accordingly, we reinstate that part of the panel opinion dealing with these issues, [672 F.2d 469, 476-81](#) [**31] (*5th Cir. 1982*),²⁰ and AFFIRM the judgment of the district court.

Dissent by: HILL; CLARK

Dissent

JAMES C. HILL, Circuit Judge, with whom R. LANIER ANDERSON, III, and THOMAS A. CLARK, Circuit Judges, join dissenting:

Once again, I respectfully dissent from the court's ruling that compulsion is an essential element of state action immunity when a state action defense is raised by a private defendant. I write not to profess great admiration for the existence of a state action exemption to federal antitrust laws, but rather to uphold what the Supreme Court has clearly articulated to be the status of the law in this area. The majority view that the Supreme Court could not possibly have meant what it said [**32] in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980), seems presumptuous at worst, and unsound policy as it pertains to the facts of this case at best. The *Midcal* test is clear and explicit. It should not be ignored simply because a different conclusion can be reached by reexamining the same line of cases already analyzed by the

¹⁸ Thus, a state may exempt a specific subclass of carriers from regulation or, as in *Parker*, it may predetermine a set amount or type of activity that may remain in the free market. In both of these cases, the state controls and sets the terms of the individual decision as to whether to compete. But where the option to compete or join a system of state regulation at all is up to the private party, state action does not exist.

¹⁹ We note that the government did not seek to enjoin the rate bureaus from performing joint rate studies or from undertaking joint publication of individual rates and agreements involving two or more parties who provide joint service.

²⁰ We also agree with the panel's determination that [HN20](#)[↑] there is no implied immunity from the antitrust laws resulting from the antitrust exemption granted motor carriers under [49 U.S.C.A. § 10706](#), or from the existence of pervasive state regulation permitted by [49 U.S.C.A. § 10521\(b\)](#). See [672 F.2d at 475 n. 9](#).

Supreme Court. In addition, the arbitrary nature of the compulsion requirement imposed by the majority today [*543] will significantly interfere with state trucking regulation. Like the federal government, the states interested in this litigation have adopted a sound program of regulation which embraces both the cost benefits of collective ratemaking and the added measure of competition that is preserved by permitting individual rate submissions. A compulsion requirement, as defined by the court, precludes such regulation -- no matter how clearly the state's policy may be expressed and supervised.

The principal flaw in the majority's position is not that it misinterprets the line of cases developing the doctrine of state action immunity. The court's analysis leading [***33] to its conclusion that compulsion is an essential element of the immunity for a private defendant certainly is plausible. However, the Supreme Court reached a different conclusion after examining the same line of cases, and the structure of the federal court system demands that we adhere to its ruling.

After reviewing the state action cases commencing with *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), the Supreme Court set forth two standards for determining when the state's involvement is sufficient to justify immunity for the challenged conduct. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105, 100 S. Ct. at 943 (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S. Ct. 1123, 1135, 55 L. Ed. 2d 364 (1978) (opinion of Brennan, J.)). In reaching this conclusion, the Court did not limit its analysis to those cases involving only state defendants, but instead examined all of its major decisions construing the state action exemption. The Court began its analysis [***34] by focusing on the state's involvement in the challenged restraint in light of the fact "that immunity for state regulatory programs is grounded in our federal structure." 445 U.S. at 103, 100 S. Ct. at 942. *Parker*, it argued, "found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against 'individual and not state action,' . . . state regulatory programs could not violate it." *Midcal*, 445 U.S. at 104, 100 S. Ct. at 942 (construing *Parker*, 317 U.S. at 352, 63 S. Ct. at 314).

Using *Parker* as its foundation, the Court went on to evaluate several recent decisions applying *Parker*'s analysis. The line of cases discussed in this portion of *Midcal* include those involving private defendants, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976), as well as those involving governmental defendants, *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) and *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978). After discussing [***35] each of these cases, a unanimous Court concluded that "these decisions establish two standards for antitrust immunity under *Parker v. Brown*," and proceeded to enunciate the two-part test set forth above. 445 U.S. at 105, 100 S. Ct. at 943. The Court did not purport to restrict application of its test to governmental entities; nor did it purport to derive the substance of its test from those cases involving governmental defendants. Indeed, as evidenced by the facts of the present case, to have drawn such a distinction on the basis of the identity of the defendant would have proven unreasonable and inconsistent with the federalism concerns underlying the doctrine.

When a state enacts a regulatory scheme characterized by a clearly articulated state policy and active and effective supervision over implementation of that policy, but its policy is that of permissive joint ratemaking, the state's policy will be undermined whether governmental entities or private participants are the subject of the lawsuit; few private companies will be foolish enough to participate in valid and constructive state programs when such participation [*544] is clouded by the threat of antitrust liability. [***36] ¹ [***38] As Justice Stewart noted in *Cantor*,

¹ There may be substantive limits on what conduct the state may immunize by making the challenged restraint a state policy. Indeed, there is some suggestion in Supreme Court precedent that federal antitrust laws do place substantive limits on the content of state economic regulation. See, e.g., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S. Ct. 745, 95 L. Ed. 1035 (1951) (invalidating a Louisiana fair trade statute containing a "non-signer" provision under which a retailer could be enjoined from knowingly underselling another retailer whose prices were set under a resale price maintenance contract, exempt from antitrust laws under the Miller-Tydings Act, with a supplier). But see P. Areeda & D. Turner, *Antitrust Law* para. 212 at 70 (1978) (interpreting this decision as an inadequate supervision case). See generally Posner, *The Proper Relationship Between*

If *Parker v. Brown* . . . could be circumvented by the simple expedient of suing the private party against whom the State's "anticompetitive" command runs, then that holding would become an empty formalism, standing for little more than the proposition that Porter Brown sued the wrong parties.

Cantor, 428 U.S. at 616-17 n. 4, 96 S. Ct. at 3130 n. 4 (Stewart, J., dissenting). Cf. id. at 604, 96 S. Ct. at 3124 (Burger, C.J., concurring) (for *Parker* purposes, focus should be "on the challenged activity, not upon the identity of the parties to the suit."); City of Lafayette, 435 U.S. at 420, 98 S. Ct. at 1140 (Burger, C.J., concurring in part and dissenting in part) (same). "The *Parker* state action exemption reflects Congress' intention to embody in the Sherman Act the federalism principal that States possess a significant measure of sovereignty under our Constitution." Community Communications Co. v. City of Boulder, 455 U.S. 40, 102 S. Ct. 835, 842, 70 L. Ed. 2d 810 (1982); see also Parker, 317 U.S. at 351, 63 S. Ct. at 313-314.² That sovereignty is subverted when federal law prohibits **[**37]** private companies from participating in well-developed and actively supervised state programs.

Unlike an arbitrary compulsion requirement, the *Midcal* test affords states greater flexibility in the formation of constructive regulatory programs so long as the state clearly and affirmatively expresses its intent to do so and remains continuously and actively involved. *Midcal* demands a very high degree of state involvement before state action immunity may be claimed. The Court did not purport to expand application of the doctrine, or to overrule *Goldfarb*. Instead, *Midcal* **[**39]** simply clarifies that the focus for immunity purposes should be upon the extent of the state's involvement in the challenged activity -- that is upon the kind of imprint of state authority the anticompetitive activity bears. Compulsion certainly remains a relevant factor in this determination. Indeed, it is the best evidence that a challenged restraint is a "clearly articulated and affirmatively expressed" state policy. As Professor Areeda has observed, after *Midcal*, "literal compulsion is powerful evidence, if not determinative, of the existence of state policy, but is neither necessary nor sufficient for *Parker* immunity." P. Areeda, Antitrust Law para. 212.5 at 62 (Supp.1982); see also Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 823 n. 8 (9th Cir.), cert. denied, 456 U.S. 1011, 102 S. Ct. 2308, 73 L. Ed. 2d 1308 (1982). See generally M. Handler, *Reforming Antitrust Laws* 64-65 **[*545]** (1982); Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L.Rev. 1099, 1122 n. 141 (1981).

Nevertheless, the majority insists that compulsion must be the litmus **[**40]** test for the first prong of *Midcal* for a nongovernmental defendant. It relies primarily upon the fact that *Midcal* did not expressly overrule the compulsion language in *Goldfarb*. Admittedly, *Goldfarb* does suggest that as the state action exemption was developing the Supreme Court anticipated that some type of compulsion might be incorporated into the doctrine.³ **[**42]** The

State Regulation and the Federal Antitrust Laws, 49 N.Y.U.L.Rev. 693 (1974). These limits may be reached in areas that have not been traditionally regulated by states.

Here, however, the states are involved in a type of private utility regulation. The ability to regulate motor carriers involved in intrastate activities not only is a traditional state regulatory function, but also is an authority conferred on the states by the Congress. 49 U.S.C.A. § 10521(b) (West Supp.1982).

² In *Parker* the Court concluded that "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." 317 U.S. at 351, 63 S. Ct. at 313. The state action doctrine therefore was enacted to effectuate Congressional intent that state restraints on competition would not be prohibited. However, "there is nothing to indicate that the Congress of 1890 intended to leave state-compelled restraints intact but to subject state-authorized restraints to antitrust." M. Handler, *Reforming Antitrust Laws* 64-65 (1982).

³ At least one commentator has suggested that "the compulsion requirement was an overreaction to the facts presented in *Goldfarb*, where the conduct challenged was actually contrary to the pronouncements of the state, and in *Cantor*, where the state agency never addressed the practice involved in any meaningful manner." M. Handler, *supra* at 64. Professor Areeda also agrees with this assessment:

Indeed, *Goldfarb* and *Cantor* may be readily explained as decisions resting not on the absence of compulsion, but rather on the absence of any sort of meaningful state participation in the challenged conduct. In *Goldfarb*, the defendants were private groups enforcing fee schedules without adequate state authority or supervision. The essence of *Cantor* was the

Court's early references to compulsion, however, were ill-defined and were not restricted to cases involving private defendants. As noted in footnote ten of the majority's opinion, compulsion was discussed in both *Bates* and *Parker* wherein governmental defendants were the subject of antitrust scrutiny. Scholars and lower courts also were uncertain about the nature of the compulsion requirement and whether it was a requirement at all.⁴ In *Midcal*, however, the Supreme Court reviewed its earlier treatment of compulsion, and concluded that the state action doctrine had developed to the point where a single test could provide the necessary analysis and satisfy the concerns articulated in *Goldfarb*. Thus, as the Ninth Circuit already has observed, "It appears that the statement in *Goldfarb* regarding [**41] compulsion refers to a combination of the criteria that there be both a clear articulation of state policy and active supervision by the state itself. [421 U.S. at 788-91, 95 S. Ct. at 2013-2015.](#)" *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 823 n. 8 (9th Cir.), cert. denied, 456 U.S. 1011, 102 S. Ct. 2308, 73 L. Ed. 2d 1308 (1982).

Clearly, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." [Parker, 317 U.S. at 351, 63 S. Ct. at 314](#). The Court in *Midcal* recognized this limitation [**43] on state action immunity, [445 U.S. at 106, 100 S. Ct. at 943-944](#), and thus formulated a test which examines the extent of the state's involvement at two levels -- first, at the level of articulation of state policy in favor of the challenged restraint and second, at the level of implementation of that policy through active supervision. Significant involvement at both levels is necessary to support a state action exemption. And it is the combination of these two criteria that effectively guarantees that the state has considered the course of its conduct and has chosen to replace open market pricing with state regulation. Hence, the balance struck in *Midcal* between the federal policy of competition and state sovereignty is thus: [*546] the state may choose to displace competition with economic regulation by making clear its intention to do so; having made that choice, however, the state bears the burden of ensuring that this policy is furthered and that the state itself remains the ultimate decision maker.

The Court's recent decision of [Community Communications Co. v. City of Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810 \(1982\)](#), amply illustrates the degree [**44] of directness and clarity necessary to satisfy the first prong of *Midcal*. In *Boulder*, the Court ruled that because the State's constitutional delegation of home rule authority to municipalities was not a "clear articulation and affirmative expression" of state policy in the area of cable television, a city's cable television moratorium was not afforded state action immunity. [102 S. Ct. at 843](#). In other words, when a home rule provision was added to Colorado's constitution, the state could not foresee that it was expressly authorizing a cable television moratorium. *Boulder* therefore can be fairly read to stand for the proposition that the state must be fully aware of what it is doing when it articulates and affirmatively expresses its policy to supplant open market competition. *Boulder* also is significant because a majority of the Court appears to have ruled that "a municipality may invoke the *Parker* doctrine only to the same extent as can a private litigant." [102 S. Ct. at 850](#) (Rehnquist, J., dissenting); accord M. Handler, *supra*, at 64 ("*Boulder*, however, indicates that municipalities enjoy no more liberal a standard of immunity than private parties.").

[**45] The majority, however, would adhere to the position that the only way a state can articulate a clear and express policy (when a private defendant is sued) is by compelling all carriers to engage in collective rate-making. Thus, the court maintains that if a motor carrier is permitted to join in the development and submission of joint rates

state's presumed indifference to the utility's "free" light bulb program; state approval, even if deliberate, was not intended to displace the antitrust laws.

Areeda, *Antitrust Immunity for "State Action" After LaFayette*, 95 Harv.L.Rev. 435, 439 n. 19 (1981).

⁴ Prior to *Midcal*, Professors Areeda and Turner observed that the precise meaning of the compulsion test and its role in determining immunity was left unclear by *Goldfarb* and *Cantor*. 1 P. Areeda & D. Turner, *Antitrust Law* para. 215 at 93 (1978); accord *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority*, 475 F. Supp. 711, 724-25 (D.D.C. 1979). Thus, they proposed that two requirements were essential to sustain a defense of state action immunity: "(1) adequate public supervision and (2) a clear state purpose to displace *antitrust law*." Areeda & Turner, *supra*, para. 212 at 71. The similarity between this proposal and the test eventually adopted in *Midcal* suggests that the Court perceived the reasonableness of dropping its earlier compulsion language and adopting a simple and clear rule of general applicability.

through the bureaus, at its election, such a program cannot be a clearly and affirmatively expressed state policy. Initially, it seems clear that a state can articulate clearly a policy which incorporates both the benefits of joint ratemaking and separate filings. Indeed, such a policy of permissive joint ratemaking may be far superior to the complete mandatory joint ratemaking suggested by the majority. As the district court suggested, rate bureaus provide important support services to state regulatory bodies such as the staff experts and facilities necessary to collate data for the preparation of cost studies. See *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 476 (N.D.Ga. 1979). See generally H.R. Rep. No. 1100, 80th Cong., 1st Sess. (1947). However, individual rate submissions also provide an important [**46] check on rate bureaus and preserve a certain degree of competition. For example, if an individual rate submission is significantly lower than a bureau rate proposal, the regulatory body is alerted to possible abuse of the privilege of collective ratemaking, and is better able to enforce and supervise its program than if there is no possibility of an individual rate proposal.

The irony of this litigation is that the Government seeks to enjoin states from implementing a transportation policy which parallels our national transportation policy. Federal law regulating interstate motor carriers adopts a policy of permissive joint ratemaking, and if a carrier chooses to participate in government approved collective ratemaking it is expressly exempt from antitrust liability. 49 U.S.C.A. § 10706(b)(2) (West Supp. 1982), former 49 U.S.C.A. § 5(b) (1959). Drafters of the original federal exemption for collective interstate ratemaking, upon which North Carolina's law is modeled, stated the following with respect to the conflict between the antitrust laws and national transportation policy:

It is recognized by all who are familiar with the problems of transportation that the carriers [**47] subject to the Interstate Commerce Act cannot satisfactorily meet their duties and responsibilities thereunder and the basic purposes of the Act cannot be effectively carried out, unless such carriers are permitted to engage in joint activities to a substantial extent. . . . It is obvious that confusion [*547] and uncertainty are inevitable where these two principles of public policy [antitrust laws and national transportation policy], administered and enforced by different agencies, are applied in such a way that there is conflict between them.

H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4-5 (1947); S. Rep. No. 44, 80th Cong., 1st Sess. 3-4 (1947). Although there have been modifications of the statutory exemption for interstate carriers engaged in collective ratemaking, and there are those who would disagree with the current status of the federal regulatory framework, few would seriously argue that the federal government had not clearly articulated and affirmatively expressed a national transportation policy of permissive joint ratemaking.

Further evidence of a state articulation of state policy is the fact that all rates are closely supervised by the state.⁵ [**49] This [**48] also illustrates the importance of satisfying both prongs of the *Midcal* test, for together they satisfy the function served by the *Goldfarb* formulation. The active supervision requirement is essential to the *Midcal* test because it inhibits the influence of economic self interest of the companies involved in the rate setting process. Such private self interest does not warrant the cloak of state action immunity. But, by requiring that a state actively supervise implementation of its economic policy, the *Midcal* test ensures that the state has determined that the challenged activity is in furtherance of the state's policy. When the state ceases to be the real party in interest, the sovereignty of the state cannot be said to be impaired by withholding state action immunity.⁶ But when the

5

While we treat these as separate requirements, we nevertheless want to stress their interrelationship. The existence of state supervision over anticompetitive behavior may, for example, indicate the requisite state intent as well. Similarly, inaction on the part of the state may both represent a failure of supervision and reflect an ambiguous state purpose.

1 P. Areeda & D. Turner, *Antitrust Law* P212 at 71 (1978).

6

The existence of a state action immunity enables states, like the federal government itself, to define areas inappropriate for market control. Moreover, the adequate supervision criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the Sherman Act is set aside, private firms are not left to their own devices. Rather,

state is the real party in interest, its continuous and active supervision evidences its intent to impose state regulation in lieu of open market competition, and withholding antitrust immunity does impair state sovereignty.

Because it is the requirement of active supervision which deters abuse of joint ratemaking procedures, if any distinction is to be drawn between public and private defendants, it should be in the amount of supervision deemed necessary to satisfy this portion of the *Midcal* test. It makes no sense to require compulsion for private and not public defendants when [**50] in both instances the same state policy will be thwarted by the threat of antitrust liability. Looking to the degree of active supervision, on the other hand, may be more relevant in a suit against a private defendant because it is possible that abuse of the state system may be an issue.⁷ Nevertheless, because the Government does not challenge the adequacy of any state's supervision in the present case, there is no reason to draw this distinction.

[**51] [*548] The only issue in this case, therefore, is whether the individual states involved clearly articulated and affirmatively expressed state policy in favor of permissive ratemaking. As set forth in my original dissent, I think it clear that the states of North Carolina, Tennessee and Georgia have such a policy. Nevertheless, because the district court entered a final judgment before the Supreme Court's pronouncements in *Midcal*, I would remand the case for further development of the factual record and for evaluation under the *Midcal* test.

THOMAS A. CLARK, Circuit Judge, with whom RONEY, Circuit Judge, joins dissenting:

I concur in Judge Hill's dissent and his thorough analysis of *Midcal* which demonstrates that compulsion is not a prerequisite for application of the state action exception.

Differing interpretations of Supreme Court opinions are not uncommon. What disturbs me so deeply about the majority opinion is that it completely ignores the Interstate Commerce Act, public policy, history, and fairness. As pointed out by Judge Hill, the functions of rate bureaus or conferences declared illegal by the majority have been accepted national policy for more [**52] than thirty years. These same defendants have performed the identical functions¹ for interstate carriers whose rates are fixed by the Interstate Commerce Commission. These functions, when performed by these bureaus for interstate carriers are exempted from the Antitrust Act by the Interstate Commerce Act:

As provided by this subsection, a motor common carrier of property providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. . . . If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act ([15 U.S.C. 12](#)), do not apply to parties and other persons with respect to making or carrying out the agreement.

[49 U.S.C.A. \[**53\] § 10706\(b\)\(2\)](#).

immunity will be granted only when the state has substituted its own supervision for the economic constraints of the competitive market.

1 P. Areeda & D. Turner, [Antitrust Law](#) para. 213 at 73 (1978) (footnotes omitted).

⁷ Professor Areeda has even suggested that *Midcal*'s active supervision requirement may be inapplicable to governmental defendants. Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435, 445 n. 50 (1981) ("A few courts erroneously appear to use the *Midcal* formula (clearly articulated state policy plus active supervision of private parties) to require state supervision of governmental defendants.") In *Community Communications Co. v. City of Boulder*, however, the Supreme Court expressly declined to decide whether the active supervision criterion must be met by a municipality with respect to the challenged ordinance. [455 U.S. 40, 102 S. Ct. 835, 841 n. 14, 70 L. Ed. 2d 810 \(1982\)](#).

¹ Described in the majority opinion, at 534.

The states involved here likewise permit joint filings of rates by carriers through the medium of a bureau or conference, and permit individual carriers to file their own rates. Thus, not all carriers are compelled to file rates through a conference or bureau. The majority holds that if a state compelled uniform action by the carriers, such a state statute would meet the *Parker v. Brown* requirement of state action and joint action would be exempt from the antitrust statute. Again, I turn to the Interstate Commerce Act and find that the national act forbids exclusive rate-fixing in the following manner:

(2) The Commission may not approve an agreement under this section --

* * *

(C) establishing a procedure for determination of a matter through joint consideration unless the Commission finds that each party to the agreement has the absolute right under it to take independent action before or after a determination is made under that procedure.

[**54] [49 U.S.C.A. § 10706\(d\)\(2\)](#). Thus, as can be seen, the Commission does not compel carriers to participate in the agreement. The state statutes are patterned very much after the national act, permitting joint action through the bureaus and conferences, but also permitting individual action.

By way of hypothecation, Southern Motor Carriers Rate Conference, Inc. may file with the Interstate Commerce Commission rates for the carriage of carpeting from Rome, Georgia, to Nashville, Tennessee. [*549] That same Conference may perform the identical function for the intrastate carriage of carpeting from Rome to Macon, Georgia, approximately the same distance. This has been done for three decades prior to the filing of this action in 1976. It is patently unfair at this late date to declare that these defendants violated the antitrust act when following identical procedures that are not violative of the antitrust act when done in interstate commerce.

End of Document

United States v. Missouri Valley Constr. Co.

United States Court of Appeals for the Eighth Circuit

November 11, 1982, Submitted ; April 12, 1983, Decided

No. 82-1307

Reporter

704 F.2d 1026 *; 1983 U.S. App. LEXIS 28900 **; 1983-1 Trade Cas. (CCH) P65,319

United States of America, Appellee, v. Missouri Valley Construction Co., Appellant

Prior History: [**1] Appeal from the United States District Court for the District of Nebraska.

Core Terms

recommendation, sentence, district court, plea agreement, guilty plea, withdraw, compliance, indictment, binding, jury trial, no right, advise, pleas

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

HN1[ Guilty Pleas, Allocution & Colloquy

See [Fed. R. Crim. P. 11\(e\)\(2\)](#).

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Allocution & Colloquy

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

HN2[ Guilty Pleas, Allocution & Colloquy

District courts are required to act in substantial compliance with the dictates of [Fed. R. Crim. P. 11](#), although "ritualistic" compliance is not required. If a district court, in accepting a guilty plea, fails to comply substantially with [Rule 11](#) requirements, the guilty plea should be set aside and the defendant allowed to plead anew.

Antitrust & Trade Law > Sherman Act > Penalties

Criminal Law & Procedure > Sentencing > Fines

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN3 Sherman Act, Penalties

A sentence imposed by a district judge, if within statutory limits, is generally not subject to review.

Counsel: J. Clifford Gunter III, Michael Kuhn, Bracewell & Patterson, Houston, Texas, for Appellant, Missouri Valley Construction Co.

Robert V. Allen, Richard J. Braun, Department of Justice, Chicago, Illinois, William F. Baxter, Assistant Attorney General, Barry Grossman, Stephen F. Ross, Department of Justice, Washington, District of Columbia, for Appellee.

Judges: Heaney, John R. Gibbon, Circuit Judges, and Dumbauld, Senior District Judge. * Dumbauld, Senior District Judge, dissenting.

Opinion by: GIBSON

Opinion

[*1027] JOHN R. GIBSON, Circuit Judge.

The significant issue [*2] before us is whether the district court erred in failing to advise [*1028] the representative of defendant Missouri Valley Construction Company that it was not entitled to withdraw a guilty plea, based on a recommendation of sentence under [Fed. R. Crim. P. 11\(e\)\(1\)\(B\)](#). The corporate defendant, in entering its guilty plea, was told that the recommendation was not binding on the court but was not advised that the plea could not be withdrawn, as required by [Fed. R. Crim. P. 11\(e\)\(2\)](#). We hold that the district court erred and reverse and remand for further proceedings.

On December 23, 1981, the United States and Missouri Valley entered into a pre-indictment plea agreement. Missouri Valley, a subsidiary of Peter Kiewit Sons, Inc., agreed to plead guilty to a two-count indictment alleging violations of [section 1](#) of the Sherman Act, [15 U.S.C. § 1 \(1976\)](#). In return, the Government agreed not to prosecute several Kiewit companies or employees for bid rigging in Nebraska, Oklahoma, and Kansas (with a named exception) and further agreed to recommend to the district court a fine of \$1,000,000 in accordance with [Fed. R. Crim. P. 11\(e\)\(1\)\(B\)](#). The agreement stated that the Government's [*3] recommendation was not binding on the sentencing judge and that conviction under the two-count indictment could result in a maximum fine of \$2,000,000.

On January 14, 1982, Missouri Valley was indicted on two counts alleging that Missouri Valley had conspired with other contractors to rig bids and allocate highway construction contracts, in violation of the Sherman Act, [15 U.S.C. § 1 \(1976\)](#). On the same date, Missouri Valley entered a plea of guilty to the two-count indictment. Before accepting appellant's plea of guilty, the district court questioned the company's representative, Mr. Thoendel, concerning the existence and nature of the plea agreement. The following colloquy occurred:

THE COURT: You understand, do you not, Mr. Thoendel, . . . that this plea agreement calls upon the United States Attorney to make certain recommendations and you realize that those recommendations are only recommendations and that while I will listen carefully to them and give them full consideration that they are not binding upon me, that is to say, I need not accept them? You understand that?

MR. THOENDEL: Yes, Your Honor.

* The Honorable Edward Dumbauld, Senior District Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

THE COURT: Let me explain that more carefully because I use the [**4] word accept and I shall explain that. I mean that the plea agreement calls for there to be recommendations to me. But you realize that I may or may not give to the corporation some sentence which is different from the recommendation?

MR. THOENDEL: Yes, Your Honor.

THE COURT: And I do that upon the basis of my own thinking and it may not match their recommendation.

MR. THOENDEL: Yes, Your Honor.

THE COURT: All right, sir. Very well. In that tone, then, I will accept the plea of guilty on behalf of the corporation as to Counts I and II.

On February 19, 1982, the district court rejected the sentencing recommendation of the Government, and fined Missouri Valley \$1,000,000 on each count, a total of \$2,000,000.

Missouri Valley's meritorious contention raised in its reply brief is that the district court did not comply with the requirements in [Fed. R. Crim. P. 11\(e\)\(2\)](#) when it accepted the guilty plea, in that it did not advise defendant that if the recommendation for sentencing were not accepted, the defendant would have no right to withdraw the plea.¹

[**5] There is no dispute that the plea agreement here is of the type specified in [Fed. R. Crim. P. 11\(e\)\(1\)\(B\)](#). Under the type (B) agreement, a prosecutor promises only to make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that [*1029] such recommendation or request shall not be binding upon the court. It is distinguishable from other types of plea agreements in that an agreement to recommend or not to oppose is discharged when the prosecutor performs as he agreed to do. Advisory Committee Note to [Fed. R. Crim. P. 11\(e\)\(2\)](#). By contrast, the remaining types of plea agreements specified in [rule 11\(e\)\(1\)](#), types (A) and (C), provide for a particular disposition, whether it be charge dismissal or an agreed-to sentence. The distinction is significant because in a type (B) plea agreement neither the acceptance provisions of [rule 11\(e\)\(3\)](#) nor the rejection provisions of [rule 11\(e\)\(4\)](#) are applicable.² Advisory Committee Note to [Fed. R. Crim. P. 11\(e\)\(2\)](#). Thus, if a district court imposes a sentence different from that recommended in a type (B) agreement, under [rule 11](#) it need not offer the defendant an opportunity [**6] to withdraw his plea.³

To ensure that defendants would fully understand the nature of a type (B) agreement, an amendment was added to [rule 11\(e\)\(2\)](#), effective August 1, 1979. The amendment provides that "If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant [**7] that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea".⁴ The rationale for the amendment is summarized in the Advisory Committee Note as follows:

¹ Missouri Valley also contends (1) that the district court failed to comply with [Fed. R. Crim. P. 11\(e\)\(4\)](#) by not affording it an opportunity to withdraw its plea, and (2) that the district court abused its discretion in assessing the maximum fine under the Sherman Act, [15 U.S.C. § 1 \(1976\)](#).

² Appellant's contention with respect to the district court's alleged violation of [Fed. R. Crim. P. 11\(e\)\(4\)](#) is thus rejected.

³ Nor is there any constitutional requirement that a district court permit a defendant to withdraw a guilty plea when that court decides after the hearing not to accept a recommendation for sentencing. Cf. [Lindner v. Wyrick](#), 644 F.2d 724, 728 (8th Cir.) (when defendant is aware that plea is not in exchange for particular sentence but hopes state trial court will follow sentence recommendation, defendant not misled so as to undermine voluntariness of plea if court rejects sentence recommendation), cert. denied, 454 U.S. 872, 70 L. Ed. 2d 178, 102 S. Ct. 345 (1981).

⁴ The full text of amended [rule 11\(e\)\(2\)](#) provides as follows:

(2) **HN1** [↑] *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant

Because a type (B) agreement is distinguishable from the others in that it involves only a recommendation or request not binding upon the court, it is important that the defendant be aware that this is the nature of the agreement into which he has entered. The procedure contemplated by the last sentence of amended subdivision (e)(2) will establish for the record that there is such awareness.

[**8] The established rule in this circuit is that [HN2](#) district courts are required to act in substantial compliance with the dictates of [rule 11](#), although "ritualistic" compliance is not required. See [United States v. Scharf, 551 F.2d 1124, 1129 \(8th Cir., cert. denied, 434 U.S. 824, 54 L. Ed. 2d 81, 98 S. Ct. 70 \(1977\)\)](#); [United States v. Lambros, 544 F.2d 962, 966 \(8th Cir. 1976\)](#), cert. denied, 430 U.S. 930, 51 L. Ed. 2d 774, 97 S. Ct. 1550 (1977). If a district court, in accepting a guilty plea, fails to comply substantially with [rule 11](#) requirements, the guilty plea should be set aside and the defendant allowed to plead anew. See [United States v. Riegelsperger, 646 F.2d 1235, 1237 \(8th Cir. 1981\)](#); [United States v. Cammisano, 599 F.2d 851, 855, 857 \(8th Cir. 1979\)](#).

In this case, the district court went only half way in meeting the notice requirements of [rule 11\(e\)\(2\)](#). Although the court informed the defendant that the court was not required to accept the recommendation contained in the plea agreement, it failed to go further and to advise the defendant that if the court did not accept the recommendation, the defendant would have no right to withdraw [**9] the plea. [Rule 11\(e\)\(2\)](#) clearly, precisely, and unequivocally requires that "the court *shall* advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea" (emphasis added). The district court did not comply with this mandate.

The Government argues that the defendant has shown no prejudice because it was aware that it was entering into a type (B) agreement and thus knew the risks it was taking in making that agreement. The Government points to three factors in particular: the written plea agreement itself, which states that it is a type (B) agreement; the trial court's oral admonishments that it was not required to accept the sentence recommended in the plea agreement; and appellant's adequate representation by retained counsel. Under [McCarthy v. United States, 394 U.S. 459, 22 L. Ed. 2d 418, 89 S. Ct. 1166 \(1969\)](#), we do not believe appellant is required to show prejudice to obtain relief on this direct appeal. See [id. at 471](#) ("prejudice inheres in a failure to comply with [Rule 11](#)"). See generally 9 *Federal Procedure, Lawyers Edition* § 22:548, at 216 (1982). Even so, it [**10] is our view that the district court's failure to give the mandated warning resulted in evident prejudice to appellant.

Because of the failure to comply with the clear mandate of [rule 11\(e\)\(2\)](#), we reverse the conviction and remand with instructions that the defendant be given an opportunity to plead anew.⁵

[**11]

Dissent by: DUMBAULD

that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

Prior to the 1979 amendment, [rule 11\(e\)\(2\)](#) read as follows:

(2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

⁵ We need not reach appellant's alternative argument that the district court abused its discretion in assessing the maximum fine under the Sherman Act, [15 U.S.C. § 1 \(1976\)](#). We observe, however, that [HN3](#) a sentence imposed by a district judge, if within statutory limits, is generally not subject to review. [United States v. Tucker, 404 U.S. 443, 447, 30 L. Ed. 2d 592, 92 S. Ct. 589 \(1972\)](#); [United States v. Ross, 666 F.2d 1163, 1165 \(8th Cir. 1981\)](#). We further observe that the district court gave careful consideration not only to the severity of the offense but also to arguments urged by appellant in mitigation. Finally, we note that the district court allowed the appellant to pay the fine over a five-year period so as not to bring appellant "to its knees," and that other Kiewit corporations were protected from antitrust prosecution for bid rigging.

Dissent

DUMBAULD, Senior District Judge, dissenting:

In my opinion, the conclusion reached by the majority, although warrantably based upon the *language* of [Rule 11\(e\)\(2\) F.R.Cr.P.](#), exalts form over substance and defeats the *policy* of that rule. It also contravenes the wise policy that criminal procedure should be as free as possible from unnecessary complexities, since the greater the number of artificial niceties that must be scrupulously heeded with punctilious exactitude, the greater will be the volume of litigation unrelated to the guilt or innocence of the defendant.

The majority insists upon the ritualistic incantation of "talismanic phrases" such as the indispensable common law formula "warrantizando vendidit or barganizasset," which Justice Frankfurter scathingly denounced in [Yonkers v. I.C.C., 320 U.S. 685, 698, 88 L. Ed. 400, 64 S. Ct. 327 \(1944\)](#).

It must be confessed that to some extent the terms of [Rule 11](#) itself transgress this sound policy. For example, the Rule provides that the sentencing judge must "personally address the defendant" and point out the rights which the defendant waives by entering a plea of guilty. Carried to its logical [\[**12\]](#) conclusion, this necessitates that the judge pronounce the defendant's name in the vocative case. Such a requirement is hardly essential, since the defendant is usually standing at the bar at the side of his attorney, and is personally aware of every word that is spoken, whether or not he is [\[*1031\]](#) specifically identified as the addressee of the court's inquiries. It is also questionable whether the prescribed procedure is more impressive or efficacious than the former practice where the prosecutor or the defendant's own attorney enunciated the "laundry list" of rights waived by entry of a plea of guilty, and the judge merely reinforced the enumeration by stressing some of the crucial points.

Whatever the means used, the basic and fundamental purpose of the Rule is to minimize frivolous post-conviction claims that the plea was not voluntary but clearly placing on the record admissions by the defendant which preclude the assertion of such claims.¹ Any method of attaining this objective should be sufficient insofar as substance is concerned.

[\[**13\]](#) It is true that the majority's view finds support in [McCarthy v. U.S., 394 U.S. 459, 464, 22 L. Ed. 2d 418, 89 S. Ct. 1166 \(1969\)](#), where it is stated that "any noncompliance with [Rule 11](#) is reversible error" and that the remedy for such violation (a remedy formulated in exercise of the Supreme Court's supervisory authority) is to permit withdrawal of the plea.

The McCarthy case is one of the less successful products of the "Warren Court"² and the Advisory Committee's Note points out the existence of "uncertainty as to the continued vitality and the reach of McCarthy."³

To eliminate the evil effects of *McCarthy* the committee proposed its new [Rule 11\(h\)](#), proclaiming that:

Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

In further criticism of the *McCarthy* automatic reversal rule the Advisory Committee Note [\[**14\]](#) explains that:

Though the *McCarthy* per se rule may have been justified at the time and in the circumstances which obtained when the plea in that case was taken, this is no longer the case. For one thing, it is important to recall that

¹ Advisory Committee Note to proposed [Rule 11\(h\)](#), in *Preliminary Draft of Proposed Amendments to the Federal Rule of Criminal Procedure*, October 1981, 25-30. The proposed [Rule 11\(h\)](#) was approved by the Judicial Conference of the United States at its September, 1982 meeting. 14 *The Third Branch* (No. 10, October 1982) 7.

² The opinion is by the former Chief Justice himself.

³ *Op. Cit.* note 1, *supra*, at 26.

McCarthy dealt only with the much simpler pre-1975 version of [Rule 11](#), which required only a brief procedure during which the chances of a minor, insignificant and inadvertent deviation were relatively slight. This means that the chances of a *truly* harmless error . . . are much greater under [Rule 11](#) than under the version before the Court in *McCarthy*. It also means that the more elaborate and lengthy procedures of present [Rule 11](#), again as compared with the version applied in *McCarthy*, make it more apparent than ever that a guilty plea is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim," but rather "a grave and solemn act", which is 'accepted only with care and discernment.' . . . A plea of that character should not be overturned, even on direct appeal, when there has been a minor and technical violation of [Rule 11](#) which amounts to harmless error.⁴

[**15] The complex character of [Rule 11](#) in its present form is described by the Advisory Committee Note as follows:

Prior to the amendments which took effect on Dec. 1, 1975, [Rule 11](#) was very brief; it consisted of but four sentences. The 1975 amendment increased significantly the procedure which must be undertaken when a defendant tenders a plea of guilty or nolo contendere, but this [*1032] change was warranted by the "two principal objectives" then identified in the Advisory Committee Note: (1) ensuring that the defendant has made an informed plea; and (2) ensuring that plea agreements are brought out into the open in court. An inevitable consequence of the 1975 amendments was some increase in the risk that trial judge, in a particular case, might inadvertently deviate to some degree from the procedure which a very literal reading of [Rule 11](#) would appear to require.

This being so, it became more apparent than ever that [Rule 11](#) should not be given such a crabbed interpretation that ceremony was exalted over substance. As stated in *United States v. Scarf*, [sic] [551 F.2d 1124 \(8th Cir. 1977\)](#), concerning amended [Rule 11](#): "It is a salutary rule, and district courts are [**16] required to act in substantial compliance with it although * * * ritualistic compliance is not required."

* * *

Two important points logically flow from these sound observations. One concerns the matter of construing [Rule 11](#): it is not to be read as requiring a litany or other ritual which can be carried out only by word-for-word adherence to a set "script." The other, specifically addressed in a new subdivision [sic] (h), is that even when it may be concluded [Rule 11](#) has not been complied with in all respects, it does not inevitably follow that the defendant's plea of guilty or nolo contendere is invalid and subject to being overturned by any remedial device then available to the defendant.⁵

To my mind, the policy set forth in support of the proposed [Rule 11\(h\)](#) approved by the Judicial Conference is conclusive and convincing, and should control the decision of the case at bar.

That [Rule 11](#) should be interpreted as requiring "substantial rather than ritualistic" compliance [**17] with its terms is the established rule in this Circuit. [U.S. v. Scharf, 551 F.2d 1124, 1129-30](#) (C.A. 8, 1977); [U.S. v. Lambros, 544 F.2d 963, 966](#) (C.A. 8, 1976). In the case at bar there is no doubt that the existence and terms of the plea bargain have been clearly recorded in writing, and that the government has fully performed its undertakings set forth in the agreement. For the defendant to be permitted to upset the agreement at this late date would be prejudicial to the government, especially in the light of the terms of the agreement relating to abandonment of prosecutions in other States than Nebraska. (See [544 F.2d at 967](#)).

⁴ *Ibid.*, at 28-29. So too, this Court in [U.S. v. Lambros, 544 F.2d 962, 965](#) (C.A. 8, 1976) said: "[Rule 11](#) proceedings are not an exercise in futility. The plea of guilty is a solemn act not to be disregarded because of belated misgivings about the wisdom of the same."

⁵ *Ibid.*, at 25-26.

The substantial compliance test was recently applied with respect to waiver of jury trial under Rule 23 in [U.S. v. DeMichael, 692 F.2d 1059, 1061](#) (C.A. 7, 1982):

From the foregoing summary gleaned from the transcript, it seems clear that the defendant knowingly and intentionally waived his right to jury trial. The contention in this Court to the contrary is an obvious afterthought. He sat through and took part in steps specifically designed to eliminate the impending jury trial and empower the Court to dispose of the case on the basis [**18] of stipulated facts, preserving for appellate review the defenses upon which he really relied. . . .

It is true that we feel misgivings in the departure from the normal practice of requiring that jury trial be waived "in writing with the approval of the court and the consent of the government" in accordance with FRCrP 23(a). In substance and fact, however, there was a waiver in writing, signed by the defendant, and approved by the Court and the Government. It would be adhering to form over substance, in view of the circumstances of the case at bar, to insist upon an additional separate piece of paper and further colloquy.

We think it proper to emphasize, however, that the proper practice, which should uniformly be observed in the absence of unusual circumstances, is as stated in [U.S. v. Scott, 583 F.2d 362, 364 \(7th Cir. 1978\)](#).

[*1033] The substantial performance standard should be applied in the case at bar.

The plea bargain itself discloses that it constitutes an "agreement in accordance with [Rule 11\(e\)\(1\)\(B\)](#)." Surely the subscribing corporation through its officers, experienced businessmen involved in [antitrust law](#) entanglements, and represented by able [**19] counsel, must have been familiar with the text of [Rule 11](#) and the nature and characteristics of type (B) pleas. They knew what they were doing and did it knowingly and intentionally and voluntarily.⁶

The sophistication of the parties involved in this plea is shown by the fact that negotiations for the plea were undertaken *before any indictment was returned* and that in execution of the agreed-upon steps the plea was entered on the same day that the contemplated indictment was returned.

The agreement itself was a five-page written document, drafted with the complexity and care of a business contract or a piece of tax legislation.⁷

[20]** Moreover, the terms of the agreement were highly advantageous to defendant. The plea not only disposed of the pending litigation in its incipency, but obligated the government not to prosecute any present or former Kiewit⁸ employees or to seek their testimony without a grant of immunity, or to further prosecute Kiewit for antitrust violations in two other States besides Nebraska.⁹ These advantages were obtained by the plea, and would not have been available if defendant had elected a jury trial.

[Rule 11\(e\)\(1\)\(B\)](#) describes a category of plea bargain which does not bind the Court and can be fully performed by the prosecutor by carrying out his promises, either to recommend a particular sentence or to refrain from opposing the defendant's [**21] recommendations to the Court. It differs in that respect from bargains under [Rule 11\(e\)\(1\)\(A\)](#) and [Rule 11\(e\)\(1\)\(C\)](#). (A) and (C)¹⁰ pleas must either be "rubberstamped" (i.e., accepted without

⁶ To ensure the voluntary nature of the plea and to manifest that nature indisputably on the record are the two main objectives of [Rule 11](#). See note 1, *supra*.

⁷ The executed agreement in writing surely constitutes the definitive memorialization of the plea bargain in the record which forms the second objective of [Rule 11](#). See note 6, *supra*.

⁸ This refers to the company of which defendant is a subsidiary, and all other subsidiaries in Kansas and Oklahoma, in addition to Nebraska.

⁹ In other States than Kansas, Oklahoma, and Nebraska the government reserved the right to prosecute Kiewit companies or employees.

change) by the Court [under [Rule 11\(e\)\(3\)](#)] or rejected [under [Rule 11\(e\)\(4\)](#)]. In case of rejection the defendant is free to withdraw the plea.

As was clearly stated in the plea itself in the case at bar, and as the court emphatically stressed at the time of sentence, the court was not bound, in this category (B) plea arrangement, to agree to the recommended sentence.

It is clearly the policy of [Rule 11](#) that a type (B) plea cannot be withdrawn by the defendant, whether the Court accepts or rejects [\[**22\]](#) the recommendation made by the parties. Unfortunately, the draftsmen of the Rule, instead of stating that proposition clearly and categorically in a separate subsection, as was done to describe the consequences of acceptance or rejection of (A) and (C) pleas, left it to be inferred from the direction contained in the last sentence of [Rule 11\(e\)\(2\)](#) that the Court should remind the defendant "that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea."

The majority hold that because the sentencing judge neglected to deliver this "talismanic" reminder, the defendant shall be free to escape from its type (B) plea,¹¹ in [\[*1034\]](#) the teeth of the clear policy of [Rule 11](#) that type (B) pleas cannot be withdrawn.

[\[**23\]](#) Because of this square conflict between the majority's permission to plead anew and the policy of [Rule 11](#) that (B) pleas cannot be withdrawn, I would interpret "shall" in [Rule 11\(e\)\(2\)](#) as directory rather than mandatory,¹² and conclude that the sentencing judge's failure to remind the defendant of this characteristic of its class (B) plea was harmless error, not affecting the defendant's substantial rights, and should be disregarded. Hence, the sentence as pronounced should stand. I therefore respectfully dissent.

[\[**24\]](#)

End of Document

¹⁰ This classification of pleas reminds one of the categories of reorganization under the Internal Revenue Code, [26 U.S.C. 368](#), of which practitioners discourse blithely as "B reorganizations" and the like. See Rabkin and Johnson, *Federal Income, Gift and Estate Taxation*, Vol. III, chapter 32, § 32.01 et seq.

¹¹ Under the remedy fashioned by the Supreme Court under its supervisory power ([394 U.S. at 464](#)), withdrawal of the plea is the appropriate remedy for any deviation from the procedures prescribed by [Rule 11](#). In the case at bar, however, such a consequence clearly conflicts with the policy which characterizes a (B) plea as one which cannot be withdrawn because of rejection by the Court of the sentencing recommendation contained in the type (B) plea.

¹² [Erhardt v. Schroeder](#), 155 U.S. 124, 128-30, 39 L. Ed. 94, 15 S. Ct. 45 (1894); Sutherland, *Statutes and Statutory Construction* (4th ed. Sands), Vol. 1A, § 25.03 and § 25.04. Particular portions of a legislative regulation should be interpreted in accordance with the general purpose and policy of the enactment. [N.L.R.B. v. Lion Oil Co.](#), 352 U.S. 282, 297, 1 L. Ed. 2d 331, 77 S. Ct. 330 (1957); [I.C.C. v. J-T Transport Co.](#), 368 U.S. 81, 114-15, 7 L. Ed. 2d 147, 82 S. Ct. 204 (1961).



CARTER-WALLACE, INC. v. HARTZ MT. INDUS.

United States District Court for the Southern District of New York

April 13, 1983

No. 81 Civ. 458 (RLC)

Reporter

1983 U.S. Dist. LEXIS 17768 *

CARTER-WALLACE, INC., Plaintiff, against HARTZ MOUNTAIN INDUSTRIES, INC., and THE HARTZ MOUNTAIN CORPORATION, Defendants.

Core Terms

antitrust, defendants', assertions, tape, inflation, pretrial, calculations, employees, questions, earnings, parties, motion to exclude evidence, summary judgment motion, subornation of perjury, depositions, discovery, damages, grand jury investigation, antitrust violation, motion to exclude, material fact, destruction, Memorandum, perjury, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Remedies > Damages > Monetary Damages

HN1 [down arrow] Sherman Act, Claims

A plaintiff makes out a prima facie antitrust claim by establishing (1) a violation, as alleged, of the Sherman Act, [15 U.S.C.S. §§ 1](#) and [2](#), [§§ 2](#), [3](#) and [7](#) of the Clayton Act, [15 U.S.C.S. §§ 13, 14, 18](#), (2) a nexus between the established violations and its claimed resultant injury, and (3) the extent of the monetary damages suffered as a consequence.

Torts > ... > Types of Losses > Lost Income > General Overview

HN2[Types of Losses, Lost Income

When lost future earnings are considered, a lump sum award is discounted to the present value by prevailing interest rates.

Counsel: [*1] BREED, ABBOTT & MORGAN, 153 East 53rd Street, New York, New York 10022, Donald B. daParma, Thaddeus Holt, Alan C. Drewsen, Robert S. Balsam, for Plaintiff

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, 425 Park Avenue, New York, New York 10022, LOUIS J. MAGGIOTTO, JR., 700 South Fourth Street, Harrison, New Jersey 07029, Fred A. Freund, Ira S. Sacks, for Defendants

Opinion by: CARTER

Opinion

CARTER, District Judge

OPINION

Motion for Summary Judgment

Defendants' motion for summary judgment is denied. This is the first in a series of motions now grown to seven, all voluminous, which have been filed on the eve of the projected trial of this complex antitrust suit. Defendants' 3(g) statement, filed in purported compliance with our local rules requiring a motion for summary judgment to be accompanied by a statement of material facts as to which there is no dispute, is fatally defective. Defendants' initial 3(g) statement was rejected by the court because it was not a statement of undisputed material facts but instead a series of conclusory assertions that set out defendants' version of the core issues in this controversy. The revised 3(g) statement, except for its being mercifully less wordy, [*2] does not remedy the original defect. It still fails to state material facts not in dispute and remains wholly conclusory.

The first alleged undisputed material fact is illustrative of the whole. Defendants state:

Hartz" alleged illegal conduct did not prevent plaintiff from selling its pet products to a substantial portion of high tariff retail outlets. Indeed, plaintiff was not excluded from selling its pet products to any high tariff outlet by Hartz" alleged illegal conduct.

It is a mystery to me how defendants can submit that assertion as a part of a 3(g) statement purporting to indicate that there are no disputed issues of fact to be tried. See *Fournier v. Canadian Pacific Railroad*, 512 F.2d 317, 318 (2d Cir. 1975) (motion for summary judgment to be denied when dispute as to material facts). Indeed, if plaintiff did not dispute this and other 3(g) assertions, it would be required to withdraw from the lawsuit. In fairness, it should be said defendants state that these assertions or more properly their converse must be proved by plaintiff at trial to sustain its burden of proof. Defendants argue that plaintiff will be unable to prove the converse, e.g., its proof will [*3] not establish defendants' responsibility for barring plaintiff's pet products from high tariff outlets. I do not know how I am to determine without a trial what proof plaintiff will or will not adduce.

Moreover, as I understand the law, **HN1[ plaintiff makes out a prima facie antitrust claim by establishing (1) a violation, as alleged, of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, Sections 2, 3 and 7 of the Clayton Act, 15 U.S.C. §§ 13, 14, 18, (2) a nexus between the established violations and its claimed resultant injury, and (3) the extent of the monetary damages suffered as a consequence. See, e.g., *Windham v. American Brands, Inc.*, 565 F.2d 59, 65 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 968 (1978). Plaintiff's case stays in court if it succeeds in the above respect as to any one of the asserted violations.**

What defendants have really done is file what is in effect a motion for a directed verdict which may be appropriate when plaintiff has concluded presentation of all its evidence.[Rule 50\(a\), F.R.Civ.P.](#) Such a motion is now premature, and in any event, it cannot at the pretrial stage take the place of a motion for summary judgment. See [Armco Steel \[*4\] Corp. v. Realty Investment Co., 273 F.2d 483, 484-85 \(8th Cir. 1960\)](#) (explaining difference between motion for summary judgment and motion for directed verdict).

Defendants cite [Solargen Electric Motor Car Corp. v. American Motors Corp., 530 F. Supp. 22, 25-26 \(S.D.N.Y. 1981\)](#) (Carter, J.), aff'd mem., 697 F.2d 297 (2d Cir.), cert. denied, U.S. 103 S.Ct. 217 (1982). That case provides no support for defendants' contentions here. Critical to plaintiff's claims in that case were its discrete assertions concerning activities taken by American and General Motors. Plaintiff alleged the existence of a contract with American Motors to sell equipment to plaintiff at a specific price; an unlawful breach of that agreement; and after plaintiff had agreed nonetheless to the higher price, a deliberate delay in discovery in furtherance of a conspiracy between American and General Motors to sabotage plaintiff's operations.

After discovery had been completed in Solargen, it was clear that plaintiff could not establish an agreement as to a price below the so called higher price. It was also clear that any delay in delivery was the fault of plaintiff, not defendant, American Motors, [*5] and finally it was evident that plaintiff's allegations of a conspiracy could not be substantiated. Summary judgment was, therefore, appropriate without the necessity of a time-consuming and expensive trial.

Carter-Wallace's case does not collapse so quickly. It has arguable claims of antitrust violations. I may conclude after all of plaintiff's proof is in that the evidence is insufficient to warrant sending the case to the jury. That, however, certainly cannot be done before trial.

Motion to Exclude Plaintiff's Damage Calculations

The motion to exclude plaintiff's damage calculations at trial is also denied. Defendants and the court are again far apart in the realm of conceptualism. Defendants contend that plaintiff's experts who are expected to testify about plaintiff's damage theory did not calculate or perform various critical elements that are the foundation of the damage claim. This work was done, they allege, by unknown Carter-Wallace personnel. Ergo the expert testimony should be barred. As a rule, an expert's testimony cannot be challenged, much less proscribed, because he did not himself perform certain steps which are part of the methodology essential to [*6] his thesis. As long as the methodology is his and the steps taken were at his direction, the credibility of the expert has not been breached. Moreover, if the assistance given has gone beyond the methodology and instructions set out by the expert and the expert will not be able to explain what was done, which is what defendants seem to be saying here, no case is made to bar the expert before he testifies. In that instance, it would appear that the expert has left himself open to a scathing attack on cross examination which could seriously jeopardize the jury's acceptance of the expert's testimony. If the expert cannot give a cogent explanation as to what was done and how at trial, a motion may then be in order to strike his testimony and bar his exhibits. Again, however, such relief must await developments at trial.

The only basis for a valid pretrial claim to bar expert testimony in this case is if plaintiff denied defendants pretrial access to these witnesses. There may also be a basis for a claim to bar testimony by the Carter-Wallace personnel, if plaintiff calls them, provided defendants sought and were barred access to them. Neither situation is raised in the instant [*7] motion.

The court would be hard pressed to bar or place rigid strictures on plaintiff's evidentiary proof on its damage claims before the claims are presented, since damages in antitrust suits "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts", [Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 123 \(1969\)](#); and "[w]here there is a basis on which a jury can reasonably infer significant antitrust injury, [the court] should be very hesitant before determining that damages cannot be awarded." [Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 304 \(2d Cir. 1979\)](#), cert. denied, 444 U.S. 1093 (1980). This does not mean that plaintiff is free to introduce irrelevant matters or immaterial calculations. However, I simply cannot rule that plaintiff will be prohibited from presenting its damage theory to the jury through its experts. Defendants will have ample opportunity to put the experts' credibility and reliability to the test. Accordingly, the motion is denied.

Motion to Bar Proof of Lost Profits Claims that Include an Inflation Factor

The alternative motion to bar proof of past damage claims that include [*8] a built-in inflation factor seems to be on sounder ground. While I do not agree that taking account of the effects of inflation at present for profits allegedly lost in 1976 is the same as prejudgment interest, it does add an unwarranted equation to the calculations. Plaintiff's argument, citing Judge Newman's discussion in [*Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 35 \(2d Cir. 1980\)*](#), cert. denied, 451 U.S. 971 (1981), and cases cited at page 9 of its Memorandum in Opposition, that inflation is being taken into account in calculating lost future earnings is not persuasive. Lost past earnings and lost future earnings are not the same. Lost past earnings are calculated and awarded without being discounted. What is shown to have been lost may be recovered, and as Judge Weinfeld indicated in [*Meinrath v. Singer Co., 87 F.R.D. 422, 427 \(S.D.N.Y. 1980\)*](#), to allow plaintiff to increase such awards for losses already incurred to compensate for inflation is not favored. Generally, in such cases prejudgment interest is considered sufficient, and to allow recovery of both interest and an inflation factor is considered a double recovery. See [*Carter v. Shop Rite Foods, Inc., 503 F. Supp. 680, 687-89 \(N.D. Tex. 1980\)*](#).

HN2[1] When lost future earnings are considered, a lump sum award is discounted to the present value by prevailing interest rates. See, e.g., [*United States v. English, 521 F.2d 63, 75 \(9th Cir. 1975\)*](#). This approach is increasingly being considered unjust since it does not reflect the fact that if one were to continue to work, one would receive cost of living increases to keep pace with inflation. [*Doca v. Marina Mercante Nicaraguense, S.A., supra, 634 F.2d at 34-40*](#). The fact that courts increasingly favor taking account of inflation in lost future earnings awards does not support the argument that such account is necessarily appropriate for lost past earnings.

Moreover, to paraphrase in part the statement in [*Trans World Airways v. Hughes, 449 F.2d 51, 80 \(2d Cir. 1971\)*](#) rev'd on other grounds, [*409 U.S. 363 \(1973\)*](#), "[i]t is reasonable to interpret Congress' silence on the matter as indicating that trebled damages are sufficient penalty and [that compensation for inflation] need not be included," seems to answer the question. No cases to the contrary in the antitrust field have been brought to my attention. Accordingly, the motion to bar plaintiff [*10] from including calculations for inflation in its damage claim is granted.

Motion to Bar Proof of Diminished Going Concern Value

Defendants' argument that plaintiff is barred from seeking damages for diminished going concern value because Carter-Wallace is still in business strikes me as unsound. An antitrust plaintiff who at the time of trial still operates a going concern should be able to recover damages for loss of the going concern value of the business (generally referred to as diminution of assets) so long as such damages do not overlap with damages for lost or future profits. The cases do not support defendants' contention, although in almost all the cases cited, the plaintiff had either left or been driven from the market at the time of trial. One case, [*Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 958-59 \(10th Cir. 1959\)*](#), expressly holds that damages for loss of going concern value may be awarded even though the complainant was still in the market. Cf. [*Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76, 95 n.30 \(2d Cir. 1981\)*](#), cert. denied, 455 U.S. 943 (1982).

The issue may prove to be academic in any event [*11] since I have grave doubts that plaintiff will be able to establish as diminished going concern value something that is not merely another version of lost past profits.

Motion to Exclude Certain Evidence

Defendants seek to exclude from trial evidence of phony credit memoranda, the use of prostitutes, gifts to buyers, document destruction and subornation of perjury in the Robins case, severance agreements with employees, the FTC investigation and consent decree and prior antitrust litigation.

The part of the motion to exclude evidence of phony credit memoranda, use of prostitutes, gifts to buyers and severance agreements with Hartz employees is denied. It is plaintiff's theory that these various activities were part of Hartz" successful effort either to exclude it altogether from, or damage its competitive position in, the marketplace. Because these acts constitute dirty tricks does not render them any less relevant as long as plaintiff establishes that they were among the series of acts which Hartz utilized to destroy or damage plaintiff as a

competitor. *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1346-48, 1354-57, reh. denied, 632 F.2d 894 (5th Cir. [*12] 1980), cert. denied, 450 U.S. 1030 (1981). Plaintiff cannot, of course, merely introduce this evidence to smear defendants and prejudice the jury. The evidence must be a part of its showing of defendants' anti-competitive activity, and such evidence is clearly admissible. Accordingly, the motion is denied.

The part of the motion to exclude evidence of document destruction and subornation of perjury in Robins is granted. The question will be discussed below as a part of the discussion concerning the witnesses who have asserted their *fifth amendment* privilege in refusing to respond to questions put at depositions.

The part of the motion to exclude evidence concerning the FTC investigation of Hartz and the consequent FTC consent decree is granted. As I understand it, sometime in the past the FTC undertook an investigation of Hartz to determine whether its activities constituted antitrust violations. The matter ended in a consent decree that settled the issue without a finding by the FTC or an admission by Hartz that Hartz had violated the law. Reference to this matter will not advance the issues raised in this case but only serve to prejudice Hartz. See Chambers & Barber, Inc. [*13] v. General Adjustment Bureau, Inc., 60 F.R.d 455, 457 (S.D.N.Y. 1973) (Gurfein, J.); *Control Data Corp. v. IBM*, 306 F. Supp. 839, 844 (D. Minn. 1969), aff'd, [430 F.2d 1277 \(8th Cir. 1970\)](#); .

Plaintiff argues that evidence of this FTC investigation and of various acts in Robins now under grand jury investigation and other antitrust litigation against Hartz "explain[s] the true nature and motivation of many of Hartz" business practices" and that Robins "in particular affords the background for appropriate inferences concerning destroyed documents and other evidentiary considerations." Plaintiff's Memorandum at 26. I am not persuaded. Plaintiff wants to utilize this kind of evidence to condition the jury to accept as established that Hartz is an antitrust law violator thus easing its own burden of proof. Any activity which Hartz engaged in in the relevant period which plaintiff establishes was an antitrust violation which affected its position in the marketplace is admissible. That Hartz was investigated by the FTC or was sued by Robins is not relevant to that question.

Motion to Exclude Evidence of *Fifth Amendment* Assertions at Trial

Defendants have moved for an order or [*14] ruling to prevent plaintiff from introducing at trial *fifth amendment* assertions made in pretrial proceedings by various Hartz executives, employees, former employees and third parties. Defendants argue that the *fifth amendment* assertions are lacking in probative value because plaintiff cannot establish a relationship of the privilege to the allegations plaintiff must establish. Defendants' Memorandum in Support of their Motion at 2. Defendants also argue that *fifth amendment* assertions by persons other than parties are not admissible; id. at 6; that the assertions are more prejudicial than probative and should be barred under *Rule 403, F.R.Evid.*; id at 9, and that plaintiff should not be allowed to call persons it knows will invoke the *fifth amendment* and should be required to use their deposition testimony, if such testimony is allowed. Id. at 14. Plaintiff takes the rather expansive position that it is entitled to call all the various parties within the reach of the subpoena power of the court who refused to give pretrial testimony on *fifth amendment* grounds, put to them such questions as will require them to assert their *fifth amendment* privilege, and urge the jury to draw [*15] adverse inference against Hartz based on those assertions. Plaintiff's Memorandum in Opposition at 34-35.

The issue is further informed by an April 5, 1983 conference in chambers when the court announced, after a telephone conversation with the Assistant United States Attorney from the Eastern District of Virginia in charge of a grand jury investigation of perjury, subornation of perjury and obstruction of justice in connection with pretrial proceedings in an antitrust case A. H. Robins had filed against Hartz, that it saw no need to grant defendants' request for continuance of the scheduled trial in this case until that investigation had been concluded and a decision made whether to prosecute certain Hartz officials. The focus of the grand jury investigation concerns whether Hartz executives ordered parties to lie under oath in giving testimony in Robins, ordered documents destroyed, or themselves committed perjury.

Defendants' contentions that *fifth amendment* assertions by persons other than a party are not admissible has no merit. *Fifth amendment* assertions by current employees, former employees who were responsible for carrying out Hartz' activities to restrict Carter-Wallace's [*16] competitive position in the marketplace, and other persons who acted under Hartz orders may be admissible. *Rule 403, F.R.Evid.* places no blanket proscription on the introduction

of this type of testimony. While Hartz's position may indeed be prejudiced if the jury is made aware of the fact that its personnel have refused to testify, this is not the kind of prejudice that Rule 403 is designed to prevent. See, e.g., Brink's, Inc. v. City of New York, 539 F. Supp. 1139, 1141-42 (S.D.N.Y. 1982) (Weinfeld, J.). To be admissible in this proceeding, however, the fifth amendment assertions must have come in response to questions concerning activities relevant to plaintiff's antitrust thesis, i.e., antitrust activities that affected Carter-Wallace's market position.

Hartz personnel who took the fifth amendment and refused to testify at pretrial, as I understand it, believed themselves to be targets of a grand jury investigation that was concerned with allegations that during 1978-1979, when A. H. Robins' antitrust case was in trial preparation, they were implicated in the destruction of records, subornation of perjury and perjury. That investigation is not related to what plaintiff [*17] has to prove in this case. Apparently, plaintiff wants to bring out defendants' malfeasance in the Robins case as a substitute for its own obligation to develop antitrust violations by Hartz at trial.

As I understand it, various persons who refused to testify did not do so to evade answering questions concerning their alleged antitrust activities which could arguably be said to have affected Carter-Wallace's competitive place in the market. They asserted the privilege as a protection in the event the grand jury investigation resulted in their being indicted for obstructing justice, perjury or subornation of perjury.

Plaintiff's position that it is entitled to bring these assertions to the attention of the jury at trial is not supported by Judge Weinfeld's holding and analysis in Brink's. There New York city sued to recover revenues stolen in the course of being collected by Brink's employees. The questions that Judge Weinfeld ruled permissible were those asking whether these employees had alone or in concert with others stolen money from parking meters while working for Brink's. Of course, that evidence is relevant, and indeed answers to those questions or refusals to answer are [*18] admissible. Similarly, here questions put to Hartz' employees, executives, consultants, etc. about actions that they took or were ordered to take that are relevant to the antitrust claims plaintiff seeks to develop are appropriate; the answers to or the refusals to answer those questions are admissible and come within Judge Weinfeld's analysis in Brink's. The fact, however, that testimony was refused because of a criminal investigation of obstruction of justice in another case is not pertinent to plaintiff's antitrust claims.

Plaintiff brings the court's attention to a statement in a memorandum opinion filed on October 27, 1981, now reported at Carter-Wallace, Inc. v. Hartz Mountain Industries, 92 F.R.D. 67, 70 (S.D.N.Y. 1981) (Carter, J.). There I said:

Robins involved substantially similar allegations of Hartz' monopoly power and anticompetitive activities to those propounded by C-W. And, the conduct which led to both lawsuits occurred during overlapping periods of time. Testimony by Hartz witnesses pertaining to its practices in the market is arguably as relevant to this action as to Robins and, therefore, should be produced so that C-W can review it for possible use in this [*19] case.

First, the quoted comment by the court concerns an entirely different issue, i.e., whether plaintiff was entitled during discovery in this case to require Hartz to turn over to it depositions taken in Robins concerning Hartz' antitrust activities. I agreed with plaintiff that the depositions should be turned over and that Carter-Wallace should not be required to depose these same people independently. That, however, does not mean that Carter-Wallace can now inquire at this trial concerning acts of perjury, destruction of documents, etc., in Robins.

I do not propose to try Robins or the government's putative obstruction of justice charges. While the plaintiff could utilize the depositions in Robins for discovery purposes in this case, it does not follow that such matters are relevant at trial. In pretrial depositions the standards for the admissibility of evidence are considerably lower than at trial. At the pretrial stage, the evidence need only be reasonably calculated to lead to the discovery of admissible evidence. Westhemeco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702, 709 (S.D.N.Y. 1979) (Cooper, J.), modified, 484 F. Supp. 1153 (1980); Xerox Corp. v. IBM, 75 F.R.D. 668, 670-71 (S.D.N.Y. 1977) (Edelstein, J.); United States v. IBM, 66 F.R.D. 180, 185-86 (S.D.N.Y. 1974) (Edelstein, J.). For use at trial the evidence has to be relevant and pertinent to Carter-Wallace's antitrust claims. United States v. Schiff, 612 F.2d 73, 80 (2d Cir. 1979). It should be added that a showing through documents generated during discovery in Robins of a nexus between antitrust violations by defendants and injury to Robins does not ipso facto reveal a link between defendants' wrongdoing and

injury to plaintiff. It is the latter nexus that plaintiff must prove at trial. In short, the fact of the Robins litigation and the similarity of the claims alleged in Robins and in this case do not render the claims the same for evidentiary purposes in a trial to determine whether defendants are guilty of Sherman and Clayton Act violations injuring plaintiff and entitling it to a treble damage award. At trial plaintiff must establish its own antitrust case.

Accordingly, the motion to exclude evidence of document destruction and subornation of perjury in Robins is granted. The motion to exclude evidence that various parties have asserted the [fifth amendment](#) privilege [*21] at pretrial is granted. These parties may be called at trial, and plaintiff will be free to ask them any questions concerning their alleged antitrust activities in this case that are relevant, as has been defined, to the issues raised in this case.

The Motion to Exclude the Hurney Tape

A tape was made by John Hurney, an employee of J & R Distributing, recording a visit in December, 1977 to Hurney in Pittsfield, New Hampshire by Walter Albuquerque, then the Hartz vice president for sales for the eastern regions, and James Spina, a Hartz regional manager. The tape was made without the knowledge or consent of Albuquerque or Spina, which renders the making of the tape unlawful under New Hampshire law. Defendants argue that the tape is not admissible at the trial pursuant to the provisions of [18 U.S.C. § 2511\(d\)\(2\)](#). The argument is that since the recording of this tape constituted an unlawful act under New Hampshire law, it was intercepted "for the purpose of committing a criminal act" under the laws of New Hampshire and hence is not admissible under the cited statute.

The applicable case law is to the contrary. The admissibility of the tape is governed by federal law, and [*22] the more restrictive New Hampshire law does not affect admissibility of the tape in this court. See [United States v. Zemek, 634 F.2d 1159, 1164 n.4 \(9th Cir. 1980\)](#), cert. denied, 452 U.S. 905 (1981). That making the tape without the consent of all the parties constitutes a criminal act under New Hampshire law does not bring the tape within the proscription of [18 U.S.C. § 2511\(d\)\(2\)](#). The motion to exclude the tape is denied.

IT IS SO ORDERED.

End of Document



AB Iro v. Otex, Inc.

United States District Court for the District of South Carolina, Greenville Division

April 18, 1983

Civil Action No. 77-2114-0

Reporter

566 F. Supp. 419 *; 1983 U.S. Dist. LEXIS 17652 **; 220 U.S.P.Q. (BNA) 239 ***; 1983-1 Trade Cas. (CCH) P65,421

AB IRO AND WESCO DIVISION OF TORRINGTON COMPANY, Plaintiffs, v. OTEX, INC. and ROJ ELECTROTEX, s.p.a., Defendants

Core Terms

thread, patent, winding, coils, feeder, rotating, drum, defendants', shaft, machine, infringement, arm, invention, axially, license, embodiment, mounted, prior art, driving, textile, includes, shifted, storage, weaving, specification, axis, feed, thread-laying, stripped, drawing

LexisNexis® Headnotes

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

HN1 [down arrow] **Specifications, Enablement Requirement**

The test concerning the adequacy of disclosures of a patent application is whether a skilled practitioner would find the disclosures adequate.

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

Patent Law > Nonobviousness > Elements & Tests > Prior Art

HN2 [down arrow] **Elements & Tests, Claimed Invention as a Whole**

See [35 U.S.C.S. § 103](#).

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

566 F. Supp. 419, *419L^A 983 U.S. Dist. LEXIS 17652, **17652L^A 220 U.S.P.Q. (BNA) 239, ***239

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

HN3 [] Elements & Tests, Ordinary Skill Standard

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 consideration as commercial success, long felt but unresolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter to be patented. As indicated of obviousness or nonobviousness, these inquiries may have relevancy.

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > ... > Claims > Claim Language > Dependent Claims

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

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

HN4 [] Infringement Actions, Burdens of Proof

See [35 U.S.C.S. § 282](#).

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > Infringement Actions > Defenses > General Overview

Patent Law > Nonobviousness > Evidence > Inferences & Presumptions

HN5 [] Burdens of Proof, Clear & Convincing Proof

The defendants bear the burden of proving obviousness by clear and convincing evidence.

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

Patent Law > ... > Claims > Claim Parts > Preambles

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

HN6 [] Specifications, Description Requirement

The presumption of validity attaching to an issued patent rests on the assumption that in issuing a patent the Patent Office has considered all pertinent prior art, therefore, the presumption of validity does not attach to prior art not considered by the Patent Office.

Patent Law > Infringement Actions > Defenses > General Overview

Patent Law > ... > Claims > Claim Parts > Preambles

HN7 [down] **Infringement Actions, Defenses**

Even though not cited as a reference by the Patent Examiner, there is no presumption in a patent infringement proceeding that patents not cited were overlooked, since they may have been considered and cast aside as not pertinent. It is as reasonable to conclude that a prior art patent not cited was considered and cast aside because not pertinent, as it is to conclude that it was inadvertently overlooked. However, the question whether the failure of the Examiner to cite certain art is consistent with its examination and rejection depends on the pertinency of the uncited art.

Patent Law > Infringement Actions > Prosecution History Estoppel > General Overview

Patent Law > ... > Claims > Claim Parts > Preambles

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

HN8 [down] **Infringement Actions, Prosecution History Estoppel**

Where the file wrapper of a patent indicates that the Patent Examiner searched the class and sub-class which contains the prior art cited by the party attacking the validity of a patent, it is presumed that the Patent Examiner considered all pertinent prior art in the sub-class.

Patent Law > Infringement Actions > Prosecution History Estoppel > General Overview

Patent Law > ... > Utility Patents > Product Patents > Machines

HN9 [down] **Infringement Actions, Prosecution History Estoppel**

The significance of a prior patent in a determination of patent validity is its teaching as prior art, not its commercial impact. Commercial impact is a secondary consideration.

Patent Law > Anticipation & Novelty > Elements

Patent Law > Anticipation & Novelty > General Overview

HN10 [down] **Anticipation & Novelty, Elements**

Anticipation is established under [35 U.S.C.S. § 102](#) only when a single device in the pertinent prior art includes all of the claimed elements of the invention in question.

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

Patent Law > ... > Claims > Claim Language > General Overview

Patent Law > ... > Claims > Claim Parts > Preambles

HN11[] **US Patent & Trademark Office Proceedings, Examinations**

To avoid a hindsight reconstruction of the relevant art, which would cloud any determination of the level of ordinary skill, it is essential to examine the development of the pertinent art.

Patent Law > ... > Claims > Claim Language > General Overview

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

Patent Law > Infringement Actions > Prosecution History Estoppel > General Overview

HN12[] **Claims, Claim Language**

The practitioner having the level or skill in the art is charged with a comprehensive knowledge of the pertinent prior art.

Patent Law > Anticipation & Novelty > General Overview

Patent Law > ... > Specifications > Best Mode > General Overview

Patent Law > Utility Requirement > Proof of Utility

HN13[] **Patent Law, Anticipation & Novelty**

The want of a successful combination of elements before patentee's suggests invention.

Patent Law > Nonobviousness > Elements & Tests > General Overview

Patent Law > Remedies > Damages > Patentholder Losses

HN14[] **Nonobviousness, Elements & Tests**

A prompt and dramatic shift to the patentee's teaching is evidence of non-obviousness.

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

Patent Law > Nonobviousness > Elements & Tests > General Overview

HN15[] **Graham Test, Secondary Considerations**

A defendants' imitation of an allegedly obvious patent suggests that the invention is not obvious.

Patent Law > Infringement Actions > Infringing Acts > General Overview

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN16[**Infringement Actions, Infringing Acts**

In determining whether an accused device or composition infringes a valid patent, resort must be had in the first instance to the words of the claim. If accused material falls clearly within the claim, infringement is made out and that is the end of it.

Patent Law > ... > Claim Language > Elements & Limitations > Alternative Limitations

Patent Law > ... > Claims > Claim Language > General Overview

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN17[**Elements & Limitations, Alternative Limitations**

[35 U.S.C.S. § 112](#) provides that a claim may be written in independent or dependent form. If written in dependent form, it must be construed to include all limitations of the claim incorporated by reference into the dependent claim. The dependent claims are, therefore, limited to the same extent as the claims that they incorporate by reference. A dependent claim can be infringed only if the independent claim (which is incorporated by reference therein) is infringed.

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

HN18[**Specifications, Description Requirement**

The patentee is required in his specifications to disclose structural and operational information which will support the language of the claims and will illustrate the application of the invention pursuant to [35 U.S.C.S. § 112](#).

Patent Law > ... > Claims > Claim Language > General Overview

HN19[**Claims, Claim Language**

The language of the claims, not the language of the supporting specifications, defines the invention, and includes all applications within the scope of the claims. The specifications are not limitations, and the invention is not limited or restricted to the language of the specifications.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Contracts Law > Contract Formation > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

Antitrust & Trade Law > Sherman Act > General Overview

HN20[**Communications, Sherman Act**

In order to make out a violation the Sherman Antitrust Act, [15 U.S.C.S. § 1](#), the defendants must show that there was an agreement involving a plurality of actors. This agreement must be one to achieve illegal ends or to achieve its end through illegal means. While the defendants are not required to show an express agreement between the plaintiffs, the defendants must produce evidence which shows that the plaintiffs came to a meeting of the minds. If there is no meeting of the minds, or if the resultant agreement is one which would achieve only legally permissible ends through legally permissible means, then there is no violation of [§1](#), and the plaintiffs are free to act as they will.

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

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

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

Patent Law > Infringement Actions > Exclusive Rights > General Overview

[**HN21**](#) **Monopolies & Monopolization, Conspiracy to Monopolize**

Conspiratorial cross-licensing and patent pooling by one group of competitors attempting to exclude others go far beyond the limited monopoly that a valid patent affords.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

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

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN22**](#) **Attempts to Monopolize, Elements**

To make out an attempt to monopolize in violation of Sherman Antitrust Act, [15 U.S.C.S. § 2](#), defendants must show that in the relevant market plaintiff had economic capacity which came dangerously close to monopoly power and had a specific intent to monopolize.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Ownership > Conveyances > General Overview

[**HN23**](#) **Conveyances, Licenses**

The patent holder has the right to exclude all others from the development of this invention, or to admit them to the use of the patent under whatever licensing terms the patent holder wishes to impose.

Judges: [**1](#) Matthew J. Perry, Jr., District Judge

Opinion by: PERRY, JR.

Opinion

[***242] [*422] ORDER

Plaintiff AB Iro (hereinafter Iro), a corporation of Sweden, is the owner by assignment [***423**] (Plaintiffs' Exhibit 3) of United States Patent No. 3,796,386 (P. Exh. 1), which issued on March 12, 1974, to Karl Tannert, a citizen of West Germany. Iro brought this action against Otex, Inc. (hereinafter Otex), a corporation of South Carolina, and Roj Electrotex s.p.a., (hereinafter Roj), a corporation of Italy, for infringement of the Tannert patent. Plaintiff Iro initiated this action in October, 1977. Subsequently, Roj and Otex filed a counterclaim against Iro and Iro's United States distributor, Wesco Division of the Torrington Company (hereinafter Wesco), alleging numerous antitrust violations. Wesco was joined in the action as an involuntary plaintiff. Trial was held on December 3 through 7, 1979. Subsequently, the Court has received from all parties voluminous briefs arguing the various positions.

The contentions of the parties can be grouped under three general headings: (1) Defendants' claims that the Tannert patent is invalid because of obviousness; (2) Plaintiffs' claims that the defendants, [****2**] by manufacturing and marketing the West 840 and West 1000 model yarn feeders, have infringed the Tannert patent, U.S. Patent 3,796,386; and (3) defendants' counterclaims that the plaintiffs by bringing their action, have violated sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2. In like manner, this opinion consists of three parts, the first addressing the question of obviousness, the second dealing with infringement, and a third dealing with the antitrust counterclaim.

I.

VALIDITY OF THE TANNERT PATENT

At the outset, I confess no expertise in the field of patent law, and further acknowledge that this is an area which demands considerable expertise. In order to make my course of reasoning clear, I will include matters which patent experts may consider obvious. The disdain of the experts notwithstanding, I prefer the cautious course of reciting the obvious, in the hope of resolving the complex questions this case raises.

To begin, the Tannert patent, U.S. Patent 3,796,386, the subject of this case, is embodied in a documentary exhibit, plaintiffs' Exhibit 1, which consists of 18 sheets, contained fifteen intimidatingly technical drawings, or "figures," followed [****3**] by a 22-column written explanation of the invention. Beginning at column 16, line 48 are 41 Claims of the patent, that is, to quote the jargon of the exhibit "what it is desired to secure by Letters Patent of the United States."

It is the plaintiffs' contention that the West 840 and West 1000 yarn feeders infringe Claims 1, 9, 10, 11, 12, 28 and 39 of the Tannert patent. Defending against this claim, the defendants press two arguments: obviousness and noninfringement.

In order to explain these claims and defenses, it is necessary that I undertake an admittedly lengthy discussion of yarn feeders and patents.

A. THE DISCLOSURE OF THE TANNERT PATENT.

The specification and drawings of the Tannert patent (P. Exh. 1) disclose a "Thread Feeder for Textile Machines." The specification of the Tannert patent at col. 1, lines 10-25 describes the type of thread feeders which the inventions of the patent in suit comprise. Such thread feeders are described as devices which are disposed between a thread storage spool (or the like) and an operating point of a textile weaving or knitting machine. Such thread feeders have a coiling or winding body, sometimes referred to as a drum. The feeder [****4**] withdraws thread from the storage spool and coils, that is, winds the thread onto the stationary winding body. The feeder includes means for moving the thread coils along the length of the winding body. The textile weaving machine takes thread from the winding body as it needs thread by pulling it off overhead; i.e., over one end of the winding body. With a

weaving machine, the thread is withdrawn by the weaving machine in a rapidly varying [*424] pattern alternatingly withdrawing thread and not withdrawing thread.

As the specification points out, such apparatus is generally known and the primary purpose of it is to eliminate variations and fluctuations in tension caused by different factors such as thread size, coil size, and the like. The end result is to enable the textile machine to receive thread at a continuous, although not necessarily constant, rate without problems occasioned by tension variation, thread breakage, and depletion of the storage spool of thread. For example, when a storage spool has been emptied a sensing device turns the textile machine off. There is a normal momentary delay until the machine actually [***243] stops. The presence of a number of thread turns [**5] in the coil store on the thread feeder during this momentary delay enables the textile machine to continue for that moment without damaged fabric being produced.

Conventionally the thread is initially taken from the supply package by a rotating element on the thread feeder. In one basic variation of prior art thread feeders (rotating drum feeders) the winding body is the rotating element. It rotates and, in effect, wraps itself in a coil of thread withdrawn from the thread source.

An alternative basic variation of prior art thread feeders utilizes a non-rotating winding body and a rotating arm or cage encircling the winding body. In this prior art device it is the rotating arm or cage which withdraws thread from the storage spool and coils it onto the winding body.

In either case the coil turns are laid onto the winding body at one end of the body in a fixed location relative to the axis of the body and then are moved down the body toward its other end, as more thread turns are added. As the Tannert specification points out at col. 1, lines 21-25 (P. Exh.1), thread feeders are conventionally provided with some means for axially displacing the coil progressively along the winding [**6] body.

Thread is then pulled off "overhead", i.e., "over . . . (the other) end" of the winding body by the weaving machine as it uses thread, as pointed out at col. 1, lines 24-25, of the specification (P. Exh.1). As it does so the coil store on the winding body is depleted from that end. As is necessary, means are provided to start the coiling operation each time the coil store is depleted to a certain minimum length along the winding body and stop the coiling operation again when the coil store reaches a certain maximum length along the winding body. By the very nature of the thread feeder construction thought necessary for many years, regardless of whether a rotating or non-rotating drum was employed, it was impossible to employ simple and inexpensive, yet accurate and maintenance free, internal thread coil store length measuring devices.

The Tannert patent thread feeder invention eliminates the problems inherent in rotating body feeders by employing a non-rotating body. It also eliminates the problems of complexity, expense, and lack of reliability which was thought to be inherent in non-rotating bodies, as the Tannert patent specification points out at col. 1, lines 51-53 [**7] (P. Exh.1).

The specification of the Tannert patent points out at col. 1, lines 54-67 (P. Exh.1), that the solution is achieved by assembling thread feeder in a way not contemplated before. First, the coiling body was rigidly mounted on the chassis of the thread feeder so that no complex magnet or weight imbalance system or the like had to be employed to keep the winding body stationary. A stationary drum allowed the use of a simple coil-store length sensing device, a simple mechanical feeler, for example, having a direct connection, without rotating contacts, to the power source for driving a thread laying guide. The rotating thread laying guide was moved to the opposite end of the winding body from that which the prior art had taught; i.e., the end of the winding body toward the weaving machine rather than the end facing the thread storage spool. Thread was then run from the thread storage spool through the center of the winding body and radially outwardly to the thread laying guide (as shown as Embodiment A, pictured below in figure 1, [*425] taken from the Tannert patent file, P. Exh. 1), or through a cage-like extension or arm of the thread laying guide and then radially [**8] inwardly to the winding body (as shown as Embodiment B, pictured below in figure 2, taken from P. Exh. 1). Thread would then be layed onto the coiling body at the end opposite the storage spool from which it was being withdrawn and would progressively move axially along the winding body toward the end facing the thread storage spool. From this other end the thread would be stripped axially off the winding body in the manner of a spin casting reel paying out fishing line. In embodiment A this stripping would take place axially

back in the direction of the one end of the winding body or drum directly toward the weaving machine operating point. In embodiment B the thread is stripped axially away from the smaller end of the winding body, the direction of travel would then reverse and the thread would go axially through the fixed winding body toward the weaving machine. (As in embodiment A, the thread travels through the shaft moving away from the source, toward the weaving machine; the coil store travels away from the weaving machine and toward the thread source).

The specification of the Tannert patent goes on to explain at col. 2, lines 1-9, that the use of either of embodiment [**9] A or embodiment B thread feeders, with a winding body or drum rigidly and stationarily mounted on the thread feeder chassis, permits using a simple and inexpensive, yet positively acting and reliable, control means for the coil laying drive wherein the control means operates the thread laying guide as a function of the length of the coil store. The advance noted here is the simplicity, low cost, and reliability of a system which controls thread coiling by sensing [***244] the length of the coil store. Such systems in more complex form had been available in the prior art as the specification acknowledges at col. 1, lines 45-47.

The specification then summarizes at col. 2, lines 15-39, by describing the generic combination of the thread feeder invented by Tannert in broad terms under the heading SUMMARY OF THE INVENTION. A thread feeder combination is provided, as indicated at col. 2, lines 15-22 of the specification. Its winding body is stationary and coils wound on the body are shifted axially along it, as pointed out at col. 2, lines 22-27, the stationary body permits of the use of a simple sensing means to control the amount of thread coiled on the body, as pointed out at col. 2, lines [**10] 28-33. To achieve the stationary body the thread passes through the axial center of the winding body in a direction opposite the coil movement along the body, as further pointed out at col. 2, lines 33-38.

Figures 1 and 2 show the two basic embodiments of the Tannert patent. In some ways, these are two very different devices: the thread paths are, in effect, the reverse of each other. In Embodiment A (figure 1), the thread (101-101-a) travels through the center shaft, moving from left to right in the figure, is wound onto the tapered surface (21), with the coils of thread gradually pushing one another along the drum (2) from the right back to the left. The thread is then stripped off the outside of the machine. In Embodiment B, the thread (101) is brought to the tapered surface (21) on the outside of the machine. As in Embodiment A, however, the coils again move from right to left, that is opposite the initial direction of the thread path. When the thread coils are stripped off the drum, the thread is pulled through the center shaft.

Although the two Embodiments are different, the claims of the Tannert patent -- that is, those features which Karl Tannert, and now plaintiff [**11] Iro as his assignee, (See Assignment of U.S. Patent 3,796,386, from Karl Tannert to AB Iro, 11 July 1977, P. Exh. 3) contend are the patented invention -- apply equally to both Embodiments. Further, the comparison of these claims to the feature of the West 840 and West 1000 thread feeders show that these machines combine features found in Embodiment B and in a variation of Embodiment A (Embodiment A2). It is therefore necessary to discuss the features found in each of the basic embodiments.

[*426] Embodiment A of the storage feeder invention claimed is illustrated in Figure 1 and described in col. 4, line 22 -- col. 6, line 63, of the specification. At col. 4, lines 22-30, the specification states that the feeder comprises a housing (1) illustrated in sectional view which is mounted on a weaving machine, the weaving machine itself not being shown. The feeder is designed to take thread from a storage spool 100 and transmit that thread to a weaving machine to the right of the feeder in Figure 1.

At col. 4, lines 30-41, there is described cylindrical thread winding body (2) secured to the housing (1). At its right end the winding body (2) has an integrally formed, tapered [**12] thread feed lip (21). The winding body (2) has a hollow bore extending axially through it from end to end and hollow shaft (3) is rotatable in that bore. The shaft has a drive pulley (4) secured to its drive (left) end and a thread feed rotor (5) secured to its head (right) end. The drive pulley, and with it the shaft (3), is rotated by a belt (41) from a suitable belt drive (411), a conventional electric motor.

At col. 4, lines 42 -- col. 5, line 2, the specification describes the rotor (5) which serves to wind the thread onto the winding body (2). The rotor includes a hub (unnumbered) on the shaft. A thin conical disk (unnumbered) extends radially outwardly of the hub and terminates in an annular hood (51). The annular edge of the hood on the left in

Figure 1 is turned radially inwardly so that it covers at least a portion of the tapered thread feed guide (21) on the winding body (2). The hood has a thread winding eye (52) mounted on it. The conical disk (unnumbered) of the rotor is radially slotted (in the plane of the drawing as seen in Figure 1) so that a thread reversing idler wheel (50) and its support (unnumbered) can be mounted on the rotor as illustrated. In operation [**13] of the feeder the thread comes through the shaft (3), out of its right end, and passes over the idler wheel (50), whereupon the thread is fed through the winding eye (52) and is laid down on the tapered feed guide (21). The hood (51) and its contents, the guide wheel, are covered by a cap 53 frictionally seated into the hood. The cap (53) serves, in effect, to enclose the head end of the feeder itself.

At col. 5, lines 3-22, of the specification a simple and inexpensive feed control mechanism possible for the first time in a non-rotating winding body feeder is described in general terms. It is mounted in a recess (22) in the winding body (2), the recess extending radially of the winding body along a substantial portion of its axial length in the plane of the drawing. In operation of the feeder, as the coil of thread builds upon the winding body (2), the coil begins to cover this recess from right to left in Figure 1. Adjacent to recess, in the feeder housing, a radial slot (unnumbered) is formed. Mounted in this slot for [***245] pivoting movement in the plane of the drawing on a pin (8) is a simple wire lever having two arms (71 and 72). One arm (71) extends into the recess while the [**14] other arm (72) remains in the radial slot formed in the housing. The second arm (72) carries a permanent magnet (73 degrees) on its free end and a small magnet operated electrical switch (6) is mounted in the housing 1 slot with electrical leads (61 and 62) extending therefrom to the belt drive mechanism 411. The switch 6 then controls the drive mechanism (411) in response to action of the lever arms (71 and 72), which action is, in turn, controlled by the number of thread coils which accumulate on the winding body or drum (2).

At col. 5, lines 23-48 (P. Exh. 1), the operation of the sensing lever (71/72) is discussed in greater detail. The lever arm (71) engages the thread coil (102) from beneath in the recess (22) and, when just a few thread coil turns are present, the arm (71) is in its solid line position, as is the lever arm (72). At this time the lever arm (72) is up against the stop (unnumbered) in the housing (1) slot immediately adjacent to switch (6) and the switch is closed, as is conventional with magnetic switches under the effect of a magnetic field (from the permanent magnet (73 degrees) on the lever arm (72)). With the switch closed, the belt drive (411) is energized [**15] and rotates the rotor (5) to feed [*427] thread onto the winding body (2). As the rotor lays more coil turns on the winding body the coil store advances (to the left in Figure 1) from a point 102e to a point 102a, at the latter of which it has forced the lever arm inwardly to its dotted line position. The lever arm (71) carries the lever arm (72) with it to the dotted line position, which is far enough from the switch so that the magnet is no longer effective and the switch contacts open, stopping the rotor from laying more coil turns onto the winding body.

The specification goes on at col. 5, line 49 -- col. 6, line 51, to describe the operation of embodiment A of the thread feeder illustrated in Figure 1. When the rotor is rotating, thread is being drawn from the spool through a thread breaking device which keeps some tension on it, and then into the shaft (3) from which the thread emerges, passes over the guide wheel (50), and then through the winding eye (52) onto the tapered feed guide (21) of the winding body. At this point the thread tension created by the rotor pulling the thread through the breaking device, coupled with the axially sliding movement (to the left in [**16] Figure 1) of the thread turns being successively formed on the tapered feed guide (21), pull the thread tighter as the coils are formed so that the coils slide down onto the cylindrical surface of the winding body. As more coils are added they force previously formed coils axially to the left in the direction W. This continues until the thread coils reach point 102a and the lever (71/72) reaches its dotted line position, finally shutting off the belt drive (411) and the thread laying operation by opening the switch when it reaches this position. With a weaving machine in operation, it is, in the meantime, pulling thread over the right end of the feeder through a thread guide (12). Its thread needs are intermittent. Accordingly, the rotor intermittently succeeds in filing the winding body with a thread coil up to a preset point (102a). When this happens the switch opens, as has been pointed out. Further use of the thread by the weaving machine depletes the thread coil 102 store. Because the magnetic switch (6) requires a relatively large magnetic flux to close its contacts but will stay closed until the magnetic flux effective on it has been reduced to a relatively smaller amount, [**17] the switch will not close again until the lever reaches its solid line position. This is true even though in the opposite travel direction going from its solid line position to its dotted line position, when coils 102 are added to the winding body, the switch 6 will remain closed. It is the general nature of such magnetic switches. In practice this speed at which the rotor 5

can lay coils on the winding body 2 is slightly greater than the speed at which the weaving machine can trip them off so that the feeder can never be completely stripped of coils.

The specification goes on in col. 6, line 64 -- col. 7, line 67 (P. Exh. 1), to describe the embodiment of the invention illustrated in Figure 2 and designated B1 herein for ease of reference. As the specification points out this embodiment B1 differs essentially from embodiment A1 of the feeder in the direction of thread travel through the center of the apparatus. In contrast to embodiment A1 of the winding body 2 of the embodiment B1 is on the left end and the drive pulley 4 is on the right end, as seen in Figure 2. The thread passes through the winding body after departing the coil store rather than before reaching the coil [**18] store on the winding body, as in embodiment A1.

As described in col. 7, lines 3-17 (P. Exh. 1), the construction of embodiment B1 provides for the feeder housing and the winding body to be secured together by pins (one of them shown, unnumbered) and to have aligned central axis passageways which form a coextensive thread guide way. To the right of the winding body a pulley is journaled on the housing and a belt (41) drives the pulley. The pulley mounts on L-shaped thread laying arm (45) which extends axially along the winding body and rotates around the winding [***246] body. Thread guide eyes (111 and 112) are formed on the arm (45).

In col. 7, lines 19-36 (P. Exh. 1), of the specification, thread (101) travel from the storage spool onto the winding body is described. [*428] The thread passes through the thread eyes (111 and 112) on the rotating arm. The rotating thread eye (112) is located so that as the thread emerges, it is laid directly on the tapered thread feed guide surface at the right end of the spool. Like embodiment A1 of the feeder, turns of thread constrict and slide down the tapered surface to the cylindrical surface of the winding body where they form the coil store [**19] which moves to the left in the direction W. In this feeder embodiment B1 thread from the coil store is stripped; i.e., pulled axially in the manner of a spin casting reel, off the left hand end of the winding body over the bead-like edge (23). The drawing illustrates such a bead or bead-like surface as to rounded surface which guides the thread from the coil store over the left end of the winding body into the passage (3A), as illustrated, lifting the thread radially off the winding body surface. The thread (now numbered 101a), passes out of the guide way (3A) in the direction F (to the right) to the weaving machine.

Specification at col. 7, lines 37-67, describes the control of the thread feeder embodiment B1 by the switch (83). The switch is operated by a two arm wire lever (74/75) mounted on a pin in a radial recess in the winding body (in the plane of the drawing). The switch is connected by electrical leads (84 and 85) to the belt drive for the belt. The lever is mounted so that when just a few coils of thread are on the winding body surface, as shown in Figure 2, the switch arm (75) permits the switch (83) contacts to remain closed. The switch contacts are spring biased [**20] to their closed positions so that as the coil of thread moves to the left on the winding body the lever arm is forced inwardly but is not effective to cause the lever arm (73) to exert enough pressure on the switch (83) contacts to open them until a substantial number of thread coil turns have been laid on the winding body. When such a substantial number of coil turns are laid on the winding body the switch opens and belt drive stops, stopping the laying on of thread turns. As thread is then stripped from the winding body in the manner previously described, the coil store is depleted and the lever permits the switch 83 contacts to close again. The feeder starts once more to accumulate thread.

The remaining five thread feeder variations illustrated in Figures 3-15 are all variations of either embodiment A or embodiment B. They all differ principally from two basic embodiments in that, in addition to the tapered feed guide lip of these basic embodiments, the other variations employ positive acting feed devices for moving the thread coils axially along the winding body and those "active" feed devices are coupled to the drive which rotates the thread laying guide. Only one of the [**21] infringed claims, Claim 12, is concerned with such an axial positive feed device and then only in the broadest terms; i.e., it calls for "a positive axial feed device coupled with said means for driving the . . . thread laying guide." As such, only one variation of the principal embodiments, that is embodiment A2 illustrated in Figures 3-8 and described at col. 9, line 1 -- col. 12, line 41, of the specification is discussed, since it provides all the support required in the disclosure for the subject matter of Claim 12.

Col. 9, line 1 -- col. 10, line 41, describes the thread feeder A2 as it is illustrated schematically in Figures 3-5. Col. 10, line 42 -- col. 12, line 41, goes into details of the actual structure and its operation is illustrated in Figures 6-8.

The winding body in embodiment A2 is made up of a plurality of circumferentially arranged rods 24 mounted on and extending parallel to each other away from the thread feeder housing. These rods in effect comprise the thread winding body, as pointed out at col. 10, lines 44-57. As in embodiment A1, a shaft (3) extends through the housing is rotated by a pulley at one end (left), and rotates a rotor carrying a thread laying **[**22]** guide (52) at its opposite end. This is pointed out in col. 10, lines 58-65.

In col. 10, line 66 -- col. 11, line 47, an inner cylindrical feed roll member (13) is described as being mounted within the hollow body formed by the rods. The feed roll (13) is mounted on the shaft (3) through an **[*429]** eccentric shaft section (30). The feed roll 13 is essentially a solid member but has a plurality of radially extending, axially parallel ribs (130) which are designed to protrude outwardly through and between the rods of the winding body. On the shaft the eccentric shaft section (30) is arranged so that the axis of the body, and angularly skewed from that axis at an angle. As a result, when the shaft rotates to lay thread on the body defined by the rods the cage does not actually rotate but moves in a planetary and wobbling manner, with its outwardly extending ribs penetrating between the interstices of the rods in interdigitating fashion; i.e., each rib moves radially outward of a bracketing pair of rods and then radially inwardly thereof as the feed roll moves in planetary fashion within the body. In its planetary movement, which embodies radially outward movement and wobbling **[**23]** movement **[***247]** relative to the axis of the feeder, the feed roll lifts the coil turns of thread from one location on the rods, moves them axially off the rods, and deposits them back on the rods at a distance determined by the amount of eccentricity of the bearing axis relative to the shaft axis and the angle of eccentricity of the bearing axis to the shaft axis.

This complex technical material is the disclosure of the Tannert patent, and it sets forth what the plaintiffs contend is Mr. Tannert's invention. With this disclosure in mind, I turn to the one issue in this case which presents a close legal question: is the Tannert invention obvious in light of prior art? Many of the other questions in this case, although factually complex largely present problems of deciphering great blocks of technical material with which the Court has no prior experience. Once the pattern amid the technical complexities was finally discerned, the legal questions were easily resolved. The issue of the validity of the Tannert patent is of a different sort. The factual and technical questions are difficult enough, but more, the underlying legal question is far closer than the questions presented elsewhere **[**24]** in this case, of which are factually complex but legally clear cut.

B. ADEQUACY OF DISCLOSURE IN THE TANNERT PATENT.

As a preliminary matter, the defendants have contended that the disclosure in the original Tannert patent application was inadequate under 35 U.S.C. § 112. Although they do not press this issue in their post-trial memorandum, the Court addresses the question as a matter of caution: better the issue should be resolved than the suggestion arises that it was overlooked. It appears that the defendants' argument is that the Patent Office found the disclosure in the initial application inadequate, and that the continuation-in-part did not correct this fault, so that the Tannert patent as issued should not be considered valid.

I would note, first of all, that the inventor Tannert did not appeal the adverse determination on his initial application, but elected instead to file a continuation-in-part. Under these circumstances, no *res judicata* effect follows from the initial, adverse determination of the Patent Office. *Application of Ackermann, 58 C.C.P.A. 1405, 444 F.2d 1172 (1971); Application of Russell, 58 C.C.P.A. 1081, 439 F.2d 1228 (1971); Application [**25] of Hitchings, 52 C.C.P.A. 1141, 342 F.2d 80 (1965).* This Court is free to consider the adequacy of the disclosure of the application as a whole.

HN1  The test concerning the disclosures of a patent application is whether a skilled practitioner would find the disclosures adequate. *Application of Goodwin, 576 F.2d 375 (C.C.P.A. 1978), aff'd, 599 F.2d 1060 (C.C.P.A. 1979); Application of Edwards, 568 F.2d 1349 (C.C.P.A. 1978); Application of Cescon, 474 F.2d 1331, 1335 (C.C.P.A. 1973); Application of Forman, 59 C.C.P.A. 1178, 463 F.2d 1125 (1972); Application of Moore, 58 C.C.P.A. 1042, 439 F.2d 1232, 1236 (1971); Application of Feinberg, 58 C.C.P.A. 960, 437 F.2d 1405 (1971).*

During the trial, the plaintiff's expert, Mr. Chadwick, testified that the disclosures contained in the Tannert patent

application were wholly adequate. (Tr. 124-25.) More significantly, the defendants' own expert, Dr. Amed [***430**] Tayebi, testified that the disclosures in the original application (P. Exh. 7) were "most definitely" adequate. (Tr. 446-47.) Given this acknowledgment by the defendants' expert, I find that the disclosures contained in the Tannert patent application was [****26**] adequate to meet the requirements of [35 U.S.C. § 112](#).

C. NONOBVIOUSNESS AND THE STATUTORY PRESUMPTION OF VALIDITY.

The key question in this case, as in many patent cases is whether the plaintiff's Tannert patent meets the test of nonobviousness under [35 U.S.C. § 103](#). The pertinent language of [§ 103](#) provides:

HN2[] A patent may not be obtained . . . if the difference 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 defendants contend that the Tannert device is obvious in light of two particular prior art patents, Pfarrwaller, U.S. Patent 3,411,548 (D. Exh. 6; P. Exh. 4), and Pourtier, West German Patent DT-PS 1,191,197 (D. Exh. 5; P. Exh. 35).

The test for the determination of obviousness is set forth in [Graham v. John Deere Company, 383 U.S. 1, 15 L. Ed. 2d 545, 86 S. Ct. 684 \(1966\)](#):

HN3[] 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 [****27**] of ordinary skill in the pertinent art resolved. [****248**] Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary consideration as commercial success, long felt but unresolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter to be patented. As indicated of obviousness or nonobviousness, these inquiries may have relevancy. [Id. at 17-18](#).

The question of the validity of the Tannert invention does not, of course, come to this Court on a clean slate. In considering this question, this Court in essence reviews the determination of the Patent Office that the Tannert patent (P. Exh. 1) should issue. In *Graham*, the Supreme Court reiterated a principle which has been apparent throughout the history of the patent system: Primary responsibility for determining patentability rests with the Patent Office with its reservoir of experience and expertise. [383 U.S. at 18-19](#). Accord, [Tights, Inc. v. Acme-McCrory Corp., 541 F.2d 1047, 1053-54 \(4th Cir.\)](#), cert. denied, 429 U.S. 980, 97 S. Ct. 493, 50 L. Ed. 2d 589 (1976); [Georgia-Pacific Corp. v. United States Plywood Corp., 258 F.2d 124 \(2d Cir. 1958\)](#), cert. denied, 358 U.S. 884, 3 L. Ed. 2d 112, 79 S. Ct. 124 (1958); [S.A.B. Industries AB v. Bendix Corp., 199 U.S.P.Q. 95, 102 \(E.D. Va. 1978\)](#).

This expertise has led to a presumption that an issued patent is valid, a presumption now codified in [35 U.S.C. § 282](#):

HN4[] A patent shall be presumed valid. Each claim of a patent (whether in independent or dependent form) shall be presumed valid independently of the validity of the other claims, dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing validity of a patent or any claim thereof shall rest on the party asserting it.

Because of this statute and long-standing judicial policy, the plaintiffs are entitled to rely on the presumption that the Tannert patent is valid. **HN5**[] The defendants bear the burden of proving obviousness by clear and convincing evidence. [Mumm v. Decker & Sons, 301 U.S. 168, 57 S. Ct. 675, 81 L. Ed. 983 \(1936\)](#); [Speed Shore Corp. v. Denda, 605 F.2d 469, 470-71 \(9th Cir. 1979\)](#); [Lee Blacksmith, Inc. v. Lindsay Bros., Inc., 605 F.2d 341 \(7th Cir. 1979\)](#); [Santa Fe-Pomeroy, Inc. v. P & Z Co., 569 F.2d 1084, 1091 \(9th Cir. 1978\)](#); [Blumcraft of Pittsburgh v. Citizens & Southern National Bank, 407 F.2d 557 \(4th Cir.\)](#), cert. denied, 395 U.S. 961, 23 L. Ed. 2d 747, 89 S. Ct. 2103, reh'g denied, [396 U.S. 870, 24 L. Ed. 2d 125, 90 S. Ct. 39](#), reh'g denied, 396 U.S. 949, 24 L. Ed. 2d 254, 90 S. Ct. 369 (1969); [Colgate-Palmolive Co. v. Carter Products, Inc., 230 F.2d 855 \(4th Cir.\)](#), cert. denied, 352

U.S. 843, 1 L. Ed. 2d 59, 77 S. Ct. 43, reh'g denied, 352 U.S. 913, 1 L. Ed. 2d 120, 77 S. Ct. 152 (1956); [Lundy Electronics & System, Inc. v. Optical Recognition Systems, Inc.](#), 362 F. Supp. 130 (E.D. Va. 1973), aff'd, 493 F.2d 1222 (4th Cir. 1974); [Esco Corp. v. Tru-Rol Co., Inc.](#), 352 F. Supp. 416, 425 (D. Md. 1972), aff'd, 489 F.2d 699 (4th Cir. 1974).

In challenging this presumption, the defendants contend that the most pertinent prior art patents with respect to the Tannert patent are Pfarrwaller and Pourtier. In issuing the Tannert patent, the Patent Examiner did not cite the Pfarrwaller patent (D. Exh. 6; P. Exh. 4). The Examiner did cite the Pourtier patent (D. Exh. 5; P. Exh. 35).

HN6[] The presumption of validity [**30] attaching to an issued patent rests on the assumption that in issuing a patent the Patent Office has considered all pertinent prior art. It is therefore well established that the presumption of validity does not attach to prior art not considered by the Patent Office. [Blohm & Voss AG v. Prudential-Grace Lines, Inc.](#), 489 F.2d 231, 244 (4th Cir. 1973), cert. denied, 419 U.S. 840, 42 L. Ed. 2d 67, 95 S. Ct. 70 (1974); [Eisele v. St. Amour](#), 423 F.2d 135, 138-39 (6th Cir. 1970); [Bentley v. Sunset House Distributing Corp.](#), 359 F.2d 140, 146 (9th Cir. 1966); [Heyl & Patterson, Inc. v. McDowell Co.](#), 317 F.2d 719 (4th Cir. 1936); [Crane Packing Co. v. Spitfire Tool & Machine Co.](#), 276 F.2d 271 (7th Cir. 1960), cert. denied, 363 U.S. 820, 4 L. Ed. 2d 1517, 82 S. Ct. 1259 (1960); [Sabel v. Wickes Corp.](#), 345 F. Supp. 1227, 1229 (D.S.C. 1971); [National Steel Corp. v. Baltimore & Ohio R. R.](#), 313 F. Supp. 934, 941 (D. Md. 1970); [Uniroyal, Inc. v. Daly-Herring Co.](#), 294 F. Supp. 754, 757 (E.D.N.C. 1968). Relying on this rule, the defendants insist that the Tannert Patent must be considered without the benefit of any presumption in its favor because the Examiner [**31] did not cite Pfarrwaller.

The defendants have overstated the effect of the failure of the Patent Office to cite the Pfarrwaller patent in the Tannert patent. While the failure of the Patent Office to cite a single patent *may* be sufficient to defeat the presumption of validity, [Dresser Industries, Inc. v. Smith-Blair, Inc.](#), 322 F.2d 878 (9th Cir. 1963), the presumption does not automatically cease to exist on showing [**249] that a prior art patent was not cited by the Patent Examiner.

To weaken the presumption of validity which attaches to the Tannert patent, there must be some showing that pertinent prior art was not considered by the Patent Examiner, not merely that it was not cited. As the court in [Lundy Electronics & Systems, Inc. v. Optical Recognition Systems Co., Inc.](#), 362 F. Supp. 130, 142 (E.D. Va. 1973), explained:

HN7[] Even though not cited as a reference by the Patent Examiner, there is no presumption in a patent infringement proceeding that patents not cited were overlooked, since they may have been considered and cast aside as not pertinent. [Davis v. Buck-Jackson Corp.](#), 138 F. Supp. 908 (E.D.S.C. 1955) aff'd, 230 F.2d 655 (4th Cir.), cert. denied [**32], 351 U.S. 950, 100 L. Ed. 1474, 76 S. Ct. 846 (1956). It is as reasonable to conclude that a prior art patent not cited was considered and cast aside because not pertinent, as it is to conclude that it was inadvertently overlooked. However, the question whether the failure of the Examiner to cite certain art is consistent with its examination and rejection depends on the pertinency of the uncited art. [Maschinenfabrik Rieter, A.G. v. Greenwood Mills](#), 340 F. Supp. 1103 (D.S.C. 1972); [Technograph Printed Circuits, Ltd. v. Bendix Aviation Corp.](#), 1218 F. Supp. 1 (D. Md. 1963), aff'd, 327 F.2d 497 (4th Cir.), cert. denied, 379 U.S. 826, 13 L. Ed. 2d 36, 85 S. Ct. 53 (1964)].

Further, **HN8**[] where the file wrapper of a patent indicates that the Patent Examiner searched the class and sub-class which contains the prior art cited by the party attacking the validity of a patent, it is presumed [*432] that the Patent Examiner considered all pertinent prior art in the sub-class. [Panduit Corp. v. Burndy Corp.](#), 517 F.2d 535, 538 (7th Cir.), cert. denied, 423 U.S. 987, 46 L. Ed. 2d 304, 96 S. Ct. 395 (1975); [Uarco Inc. v. Moore Business Forms, Inc.](#), 440 F.2d [**33] 580, 585 (7th Cir. 1971); [Canaan Products, Inc. v. Edward Don & Co.](#), 388 F.2d 540, 544-45 (7th Cir. 1968); [Minnesota Mining & Manufacturing Co. v. Berwick Industries](#), 393 F. Supp. 1230, 1234-35 (M.D. Pa. 1975), aff'd, 532 F.2d 330 (2d Cir. 1976); [Deering Milliken Research Corp. v. Beaunit Corp.](#), 382 F. Supp. 403, 410 (W.D.N.C. 1974), rev'd on other grounds, 538 F.2d 1022 (4th Cir. 1976), cert. denied, 426 U.S. 936, 49 L. Ed. 2d 388, 96 S. Ct. 2651 (1976); [Amerace Esna Corp. v. Highway Safety Devices Inc.](#), 330 F. Supp. 313 (N.D. Tex. 1971); [Lage v. Caldwell Manufacturing](#), 221 F. Supp. 802 (D. Neb. 1963).

In this instance, the Patent Examiner's search included Class 242, sub-class 47.12, the class and sub-class which contained the Pfarrwaller patent. Therefore, although the Examiner did not cite the Pfarrwaller patent, there is a strong presumption that he considered it. His reason for not citing this patent may well have been that he considered it no more pertinent than the other prior art patents which he did cite. [A. R. Inc. v. Electro-Voice, Inc., 311 F.2d 508 \(7th Cir. 1962\)](#). The Examiner's citation of Rosen suggests this is what occurred. [**34] Rosen cites Pfarrwaller (see P. Exh. 5).

Even assuming *arguendo* that the Examiner did not consider the Pfarrwaller patent, this alone would not void the presumption of validity which attaches to the Tannert patent. It would weaken that presumption only insofar as the Pfarrwaller patent is prior art more pertinent than the art cited and considered by the Patent Examiner. [La Salle Street Press, Inc. v. McCormick & Henderson, Inc., 445 F.2d 84, 93 \(7th Cir. 1971\)](#); [TSC Industries Inc. v. International Harvester Co., 406 F.2d 53, 57 \(7th Cir. 1968\)](#); [National Dairy Products Corp. v. Borden Co., 394 F.2d 887, 891 \(7th Cir.\)](#), cert. denied, 393 U.S. 953, 21 L. Ed. 2d 364, 89 S. Ct. 378 (1968); [Ekstrom-Carlson & Co. v. Onsrud Machine Works, Inc., 298 F.2d 765, 768 \(7th Cir.\)](#), cert. denied, 369 U.S. 886, 8 L. Ed. 2d 287, 82 S. Ct. 1160 (1962); [Brennan v. Hanger, Inc., 479 F. Supp. 1215, 203 U.S.P.Q. 697, 702 \(S.D.N.Y. 1979\)](#); [Dennison Mfg. v. Ben Clements & Sons, Inc., 467 F. Supp. 391, 203 U.S.P.Q. 895, 907 \(S.D.N.Y. 1979\)](#); [State Bank of Annawan v. Rendispos Corp., 173 U.S.P.Q. 136, 143 \(S.D. Ill. 1971\)](#); [Mercantile National Bank of Chicago v. Quest, Inc., 303 F. Supp. 926 \(N.D.Ind. 1969\)](#); [Illinois Tool Works, Inc. v. Continental Can Co., 273 F. Supp. 94, 111 \(N.D. Ill. 1967\)](#).

In this case, the Patent Examiner did cite the Rosen U.S. Patent 3,720,384 (P. Exh. 5), and the defendants' expert, Dr. Tayebi, testified that in terms of the teaching relevant to this case, this first Rosen Patent is equivalent to the later Rosen Patent (U.S. patent 3,796,384; D. Exh. 10), and is equivalent to the Pfarrwaller patent (P. Exh. 4; D. Exh. 6) (Tr. 396, 417-18).

My own examination of the patents in question convinces me that Dr. Tayebi was correct in this view. The earlier Rosen patent (P. Exh. 5), and the later Rosen patent (D. Exh. 10) each contain five technical figures [***250] which are identical in every respect. The earlier patent adds two other figures, but these illustrate features not pertinent to this inquiry. Although there are differences between the two written abstracts of the patent, much of the language is again identical. The defendants would totally discount the significance of the earlier Rosen patent, pointing out that it was never put to a commercial use, and that it was intended for use in knitting rather than [**36] weaving applications. I find neither reason persuasive. [HNG\[↑\]](#) The significance of a patent in this context is its teaching as prior art, not its commercial impact. The authorities are unanimous that commercial impact is a secondary consideration. Secondly, although knitting machines are distinct from weaving machines, the Rosen patent is unquestionably pertinent art. [Cathodic Protection Service v. American Smelting & Refining Co., 594 F.2d 499, 507 \(5th Cir. 1979\)](#).

The Pfarrwaller patent (P. Exh. 4, D. Exh. 6) is superficially different from the Rosen patents. The defendants, however, cite the [*433] Pfarrwaller patent for only a single feature: that it teaches the control of yarn feeding onto the winding body in response to the length of the thread store on the winding body. (Tr. 359-61; Defendants' Brief at 2, 4). As Dr. Tayebi has acknowledged, the Rosen patent (P. Exh. 5) teaches the same concept. (Tr. 396).

Having carefully examined the Pfarrwaller patent and compared it with the Rosen patent cited by the Patent Examiner, I do not believe that the Pfarrwaller patent is more pertinent to the determination of the obviousness or nonobviousness than the Rosen patent [**37] is. Therefore, the presumption of validity under [35 U.S.C. § 282](#) is not weakened by the Patent Office's failure to cite the Pfarrwaller patent.

As noted above, the Patent Examiner did cite the Pourtier patent. Where the Patent Office has cited the prior art on which a defendant relies in challenging the validity of a patent, the presumption of validity is greatly strengthened. [Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp., Inc., 546 F.2d 530, 540 n. 28 \(3d Cir. 1976\)](#); [Chicago Rawhide Mfg. Co. v. Crane Packing Co., 523 F.2d 452, 458 \(7th Cir. 1975\)](#), cert. denied, 423 U.S. 1091, 47 L. Ed. 2d 103, 96 S. Ct. 887 (1976); [Tracor, Inc. v. Hewlett-Packard Co., 519 F.2d 1288, 1292 \(7th Cir. 1975\)](#); [Research Corporation v. Nasco Industries, Inc., 501 F.2d 358 \(7th Cir. 1974\)](#); [Ling-Temco-Vought,](#)

Inc. v. Kollsman Instrument Corp., 372 F.2d 263, 268 (2d Cir. 1967); Marston v. J.C. Penney Co., 353 F.2d 976, 982 (4th Cir. 1965), cert. denied, 385 U.S. 974, 17 L. Ed. 2d 437, 87 S. Ct. 515 (1966); Arnold Pipe Rentals Co. v. Engineering Enterprises, Inc., 350 F.2d 885, 890 (5th Cir. 1965); Shumaker v. Gem Manufacturing Co., 311 F.2d 273 (7th Cir. 1962); Power Curbers, Inc. v. Etnyre & Co., 298 F.2d 484, 492-93 (4th Cir. 1962); Jeoffroy Manufacturing, Inc. v. Graham, 219 F.2d 511, 519 (5th Cir. 1955); Southern States Equipment Corp. v. U.S.C.O. Power Equipment Corp., 209 F.2d 111 (5th Cir. 1953); Dart Industries, Inc. v. E. I. du Pont de Nemours & Co., 348 F. Supp. 1338, 1355 (N.D. Ill. 1972); Shields-Jetco, Inc. v. Torti, 314 F. Supp. 1292, 1295 (D. R. I. 1970); Arthur J. Schmitt Foundation v. Stockham Valves & Fittings, Inc., 292 F. Supp. 893, 907 (N.D. Ala. 1966), aff'd 404 F.2d 13 (5th Cir. 1968), cert. denied, 398 U.S. 965, 26 L. Ed. 2d 549, 90 S. Ct. 2177 (1970); Illinois Tool Works, Inc. v. Continental Can Co., 273 F. Supp. 94, 111 (N.D. Ill. 1967).

Thus, there is a strong presumption in this case that the Tannert patent is valid and not obvious. While the question is not foreclosed and requires an independent consideration by this Court, reasonable doubt must be resolved in favor of a finding that the plaintiffs' Tannert patent is valid. Radio Corp. of America v. Radio Engineering Laboratories, 293 U.S. 1, 7, 79 L. Ed. 163, 54 S. Ct. 752 (1934). [**39]

D. THE TANNERT PATENT AND ANTICIPATION, 35 U.S.C. § 102.

Although the defendants rest their attack on the validity of the Tannert patent primarily on the contention that the invention is obvious and the patent therefore invalid under 35 U.S.C. § 103, there is a sufficient contention of anticipation under 35 U.S.C. § 102 to warrant the Court's attention.

The defendants contend that, without reference to other art, the Pourtier device can be modified to achieve the patented device. (Tr. 359-61, 369; Defendants' brief at 4). Assuming *arguendo* that this contention is true, I find it is not sufficient to make out a case of anticipation as that term is construed in the cases interpreting 35 U.S.C. § 102. **HN10** Anticipation is established only when a single device in the pertinent prior art includes all of the claimed elements of the invention in question. American Original Corporation v. Jenkins Food Corp., 696 F.2d 1053, 1058-59 (4th Cir. 1982); [**251] Carter-Wallace, Inc. v. Gillette Co., 675 F.2d 10, 15 (1st Cir. 1982); Arbrook, Inc. v. American Hospital Supply Corp., 645 F.2d 273, 276-77 (5th Cir. 1981); Milgo Electronic Corp. v. United Business Communications, Inc. [**401], 623 F.2d 645, 654 (10th Cir.), cert. denied, 449 U.S. 1066, 66 L. Ed. 2d 610, 101 S. Ct. 794 (1980); Application of Marshall, 578 F.2d 301 (C.C.P.A. 1978); [*434] Tights, Inc. v. Acme-McCrory Corp., 541 F.2d 1047, 1056 (4th Cir. 1976); Illinois Tool Works, Inc. v. Sweetheart Plastics, Inc., 436 F.2d 1180, 1182-83 (7th Cir. 1971) and cases cited therein; Plasser American Corporation v. Canron, Inc., 546 F. Supp. 589 (D.S.C. 1980); Thomas & Betts Corp. v. Winchester Electronics Division of Litton Systems, Inc., 519 F. Supp. 1191 (D. Del. 1981); Wycuff v. Motorola, Inc., 502 F. Supp. 77 (N.D. Ill. 1980); Duplan Corp. v. Deering Milliken, Inc., 444 F. Supp. 648 (D.S.C. 1977), aff'd in part, rev'd in part on other grounds, 594 F.2d 979 (4th Cir. 1979), cert. denied, 444 U.S. 1015, 100 S. Ct. 666, 62 L. Ed. 2d 645 (1980). As the defendants admit, the Pourtier device responds to the length of the coil store on the winding body by engaging and disengaging the coil removal function. In a weaving situation, this would mean that the loom would have to continually start and stop. This is impractical in a weaving situation. This alone is sufficient [**41] to defeat any claim of anticipation, and I conclude that the Tannert patent was not anticipated by the Pourtier patent, or by any other cited prior art.

E. SCOPE AND CONTENT OF THE PRIOR ART.

The prior art patents upon which Roj and Otex rely are the Pourtier German patent No. DT 1,191,197 (P. Exh. 35, D. Exh. 5) and the Pfarrwaller U.S. patent No. 3,411,548 (P. Exh. 4, D. Exh. 6). These are described in the following pages. In addition to this, because of their equivalence to the Pfarrwaller patent, the Rosen U.S. patent No. 3,720,384 (P. Exh. 5) and the Rosen U.S. patent No. 3,796,384 (D. Exh. 10) are also described.

1. Pourtier German Patent No. 1,191,197

(P. Exhs. 35A, 35B, 36)

As described in the translation (P. Exh. 35B), the drawing (P. Exh. 36) and Mr. Chadwick's testimony (Tr. 514-18), this German patent cited by the Patent Office shows a device for feeding wire cable. It comprises a drum which is rigidly fixed to a shaft. The shaft is, in turn, rigidly mounted on the framework of the storage device.

The storage device is designed to take up and store wire cable being continuously delivered from a manufacturing process during those periods when drums are not [**42] being filled with the wire for marketing; i.e., when a drum has been filled and is being removed and an empty drum substituted for it. Viewing the storage device in the single figure of the patent drawing, the wire is received from the wire manufacturing machine at the right through a guide. It proceeds to a pulley mounted on the periphery of a rotatable disc. The disc is rotated through a drive pulley by a belt drive.

The disc rotates relative to the fixed drum. As it does so, it circumferentially lays wire in successive coils on the drum adjacent to a wobbling ring also rotated by the disc. The disc is rotated at the speed at which the wire is being manufactured so as to continuously lay it on the drum as the wire is manufactured.

The wobbling ring successively nudges each new coil to the right on the drum to make way for the next coil. In this way the coils are built upon and moved to the right along the drum. Notably, the coils move toward the source.

To remove wire from the drum a marketing spool to which the wire coming from the left end of the devices is attached, is rotated. The wire is pulled through the passage in the shaft from the right end of the shaft over [**43] a wire reversal guide. It reaches the guide by being circumferentially unwrapped from the drum over a pulley. The pulley is mounted on a radial arm of a bushing rotatable on the shaft.

Rotation of the marketing spool thus causes the arm and the pulley to rotate. Wire is circumferentially unwrapped from the drum, drawn over the pulley as the pulley rotates, and passes in the opposite direction through the shaft to the rotating spool. The spool is rotated under the control of a switch operated by two photocells and on the drum. When the coils on the drum are reduced in number to a point [*435] where the photocells receive a sufficient light signal from the light source, the spool is stopped and wire removal ceases until sufficient coils again build up on the drum to cover the cells. During this period, a full spool may be removed and an empty spool put in its place to begin filling it when spool rotation again is called for. Wire continues to be laid on the drum at all times. [***252]

2. Pfarrwaller U.S. Patent No. 3,411,548

(P. Exh. 4, D. Exh. 2)

Referring to the patent and Mr. Chadwick's testimony (Tr. 63-67), the Pfarrwaller patent (see esp. Fig. 2) discloses a weft [**44] thread feeder for looms. The feeder takes thread from the storage bobbin and coils it on its drum. The thread is removed from these coils on the drum by a gripper shuttle. The feeder includes a supporting arm which is fixed to the loom frame. The arm mounts bearings which rotatably carry a hollow shaft.

At the left end of the shaft a pulley is loosely seated on it. A clutch plate on the pulley cooperates by magnetic coupling with a disc fixed to the shaft to cause the shaft to rotate with the pulley when the magnetic coupling is energized.

At the right end of the shaft, an eye and bore is provided through which the weft thread passes from the inside to the outside of the shaft. The shaft has affixed to its right end a hollow conical body which functions as a flyer arm. At the outer edge of the flyer arm is provided a thread feeding eye through which the weft thread is passed.

The shaft, at its right end, includes an extension inside the hollow cone. A drum is rotatably supported with respect to the shaft in this space on ball bearings. Whereas the shaft with its right end rotates, the drum is held against any substantial rotation by two permanent magnets supported within [**45] a ring which encircles the right end of the drum so as to leave an annular space between the ring and the drum. The drum carries two armatures which cooperate with the magnets to substantially prevent the drum from following the rotation of the shaft. In effect, these magnets and armatures counter-rotate the drum relative to the shaft.

The support arm additionally carries a light source whose beam is obliquely incident on the drum. The reflected beam of light impinges on a photocell which is shielded from the source by means of a mask. The photocell is connected by conductors to the switching device.

During operation of the loom, rotation of the cone continuously pulls weft thread from the bobbin through the hollow shaft and through the eye formed on the cone or flyer, and the thread so withdrawn is wound onto the drum. During each pick by the weaving shuttle, the thread unwinds from the drum under the brushes of the braking ring.

As the coils of thread are laid on the drum by the eye, they are laid on the conical enlargement of the drum. The drum has a polished surface so that the arriving coils cause those already wound to slip to the right, and thus move onto the cylindrical [**46] portion of the drum. After several revolutions have been executed by the shaft, several turns will build up on the cylindrical portion. By reason of the polished nature of the drum surface and because of the looseness with which the turns are wound, each coil will be shifted to the right by the coil to the left of it. In contrast to the Pourtier and Tannert devices, the coils in the Pfarrwaller device are shifted away from the source.

If the axial length of the space occupied by the coils of thread on the drum extends to the right so as to cover the point at which the light beam is reflected, the reflected beam will be interrupted. The photocell and a switching device are so adjusted that with this reduction of light incident on the photocell, the supply of current to the magnetic coupling is interrupted and the hollow shaft and cone come to rest.

When, after one or more additional picks, enough coils are withdrawn from the drum so as to uncover the spot at which the light beam is incident on the drum, the photocell will again receive the reflected beam so [*436] that the magnetic coupling will be restored by operation of the photocell and the switching device will cause [**47] the cone to resume rotation with the shaft and once more with raw weft thread from the bobbin and wind it on the drum.

In a modified embodiment of the thread feeder, the drum includes an eccentric mass which causes the drum to be unbalanced. The weight of the mass hinders rotation of the drum so as to make the ring magnet and armatures unnecessary. Again, the effect is to counter-rotate the drum relative to the shaft.

3. Rosen U.S. Patent No. 3,720,384

(P. Exh. 5)

As shown in the patent and Mr. Chadwick's testimony (Tr. 67-71), the Rosen patent (P. Exh. 5) discloses a thread feeder also. The feeder comprises a chassis housing in which a shaft is journaled on ball bearings. The shaft has a hollow projecting arm bent downwardly at its outer end. Thread comes from a supply package through the hollow shaft and out of the arm where it is laid on the cylindrical surface of the winding body by the rotation of the shaft and arm. A pulley wheel driven by a belt is connected to the shaft and rotates it.

The winding body is mounted on the shaft also but it is held against rotation with the shaft. This is accomplished by a complicated [***253] arrangement of a gear ring fixed on the housing, [**48] a gear ring of identical size mounted on the winding body, and a pair of sprockets which run around these two rings on a pin as the shaft rotates. This planetary gear arrangement keeps the winding body stationary. As in the Pfarrwaller device the effect is one of counter-rotation.

As the arm rotates it lays thread on the stationary winding body in precisely the same location relative to the axis of the winding body with each rotation. These turns of thread are successively and progressively moved axially down the winding body by the pressure of an inclined, toothed disk. The disk is mounted on the rotating shaft with bearings so that it does not rotate. Its teeth protrude outwardly of the winding body cylindrical surface. Although the disk does not rotate with the shaft, its bearing mounting plate does so that the disk wobbles as the shaft rotates. This wobbling forces thread laid on the winding body to be forced axially down the winding body with each rotation.

The disk is actually maintained in its inclined position by the pressure of a spring. When a predetermined number of yarn coil turns have accumulated in the yarn store on the winding body, the increasing frictional [**49] resistance of this growing reserve overpowers the spring whereupon the disk moves to a more horizontal position. This

permits a pin to become disengaged from a ring on the drive pulley and rotation of the shaft as well as the thread laying arm is stopped.

4. Rosen U.S. Patent No. 3,796,384

(D. Exh. 10)

Insofar as its disclosure of a non-rotating drum is concerned, this patent is identical to the earlier Rosen Patent (P. Exh. 5). It discloses control of the thread laying arm as a function of the thread store length in a manner identical to the earlier Rosen Patent. Dr. Tayebi admits that the two patents are identical in this teaching (Tr. 418). Dr. Tayebi also admits that the teaching of the Rosen patents with regard to thread laying arm control as a function of thread storage coil length is the same as the Pfarrwaller (P. Exh. 4, D. Exh. 6) thread feeder (Tr. 418).

F. DIFFERENCES BETWEEN THE PRIOR ART AND THE CLAIMED INVENTION.

The device defined by Claim 1 of the Tannert patent (P. Exh. 1) in suit is critically different than the prior art Pourtier wire storage (P. Exhs. 35, 36, D. Exh. 5). The Tannert invention:

- a) Is a "thread feeder" for taking, storing, and feeding **[**50]** "thread" to a textile machine.
- b) Is a "Thread feeder" with a thread coil storage or winding body which is "fixed" to the feeder chassis or support.
- [*437]** c) Is a "thread feeder" wherein a "thread laying guide" is rotated by "driving means" and that "driving means" is under the control of a "control device . . . operated in response to the length . . . (of the thread coil) store."
- d) Is a "thread feeder" wherein the thread moves in a passageway through the thread coil winding body in a direction opposite to the direction in which thread coils are shifted on the outside of the winding body.
- e) Is a thread feeder wherein thread is stripped from the second end of the thread coil store, i.e., pulled axially over the winding body end.

Referring to the patent (P. Exh. 35A), translation (P. Exh. 35B), drawing (P. Exh. 36) and Mr. Chadwick's testimony (Tr. 522-29) the Pourtier device, in contrast:

- a) Is an *electric cable* storage device which receives and stores *cable* being manufactured by a cable manufacturing machine, as Dr. Tayebi admits (Tr. 433).
- b) Is a storage device wherein cable laying onto its storage drum is *not* under control of a control device operated **[**51]** in response to the length of the coiled cable store, as Dr. Tayebi admits (Tr. 348).
- c) Is a storage device where the drum constantly receives cable from a constantly rotating arm, as Dr. Tayebi admits (Tr. 433-34).
- d) Is a cable storage device where the wire is not guided by a "bead-like means" as it departs, as Dr. Tayebi admits (Tr. 442).
- e) Is a storage device wherein cable is not stripped off the drum by being pulled over the drum end but rather is unwound from the drum circumferentially over a rotating arm and pulley, as Mr. Chadwick testified (Tr. 518).

In reviewing these differences between the Pourtier art and the Tannert art, I find that the last difference, the unwinding device in the Pourtier art, is particularly critical. Given the speed at which the modern high-speed loom draws off picks of thread, a passive unwinding device would be simply unworkable. It would, almost undoubtedly reintroduce such an element of tension that the very function of a thread feeder would be defeated. Alternatively, an active unwinding device would require the sort of powerful driving **[***254]** force and braking mechanism found in rotating drum feeders which has been cited as one of their key **[**52]** disadvantages. I believe my impressions are borne out by the apparent absence of an unwinding in any nonrotating drum feeder brought to my attention. In short, I find that there are significant differences between the Pourtier art and the Tannert art.

The device defined by Claim 1 is also critically different than the Pfarrwaller (P. Exh. 4), Rosen (P. Exh. 5), and Rosen (D. Exh. 10) prior art device. For purposes of their prior art value, these patents are identical as Dr. Tayebi admits (Tr. 418). The Tannert invention:

- a) Is a thread feeder with a thread coil storage drum or winding body which is "fixed" to the feeder chassis or support.
- b) Is a thread feeder which, because the drum is "fixed" to the chassis, permits the use of a simple and inexpensive yarn coil store sensing device within the drum.
- c) Is a thread feeder wherein the thread moves in a "passageway" through the thread coil winding body in a direction opposite to the direction in which thread coils are shifted on the outside of the winding body.

The Pfarrwaller, Rosen, and Rosen prior art devices, in contrast, are:

- a) Thread feeders with thread coil storage drum or winding bodies which are *not* "fixed" to ****53** the feeder chassis or support. They are, as has been discussed in great detail, loosely mounted on the support and prevented from rotating (or, so to speak, counter-rotated relative to the shaft) by complicated magnetic or unbalanced weight means.
- b) Thread feeders which, because their thread coil storage drums are not "fixed", must use yarn coil store sensing devices mounted on separate structure outside the drum (Pfarrwaller) or complicated and expensive ***438** connecting devices inside the drum (Rosen).
- c) Are thread feeders wherein the thread does *not* move in a passageway through the thread coil winding body in a direction opposite to the direction in which the thread coils are shifted on the outside of the winding body nor is it guided to this passageway by "bead-like means."

I consider the change from a non-rotating drum mounted on a rotating shaft to a fixed drum significant. In the Rosen and Pfarrwaller art, means must be introduced to maintain the drum in a fixed position on an intermittently rotating shaft. Unbalancing weights, although relatively simple, introduce the problem that they restrict the positioning of the thread feeder: the shaft must be kept in ****54** a horizontal position. Alternatively, magnet and armature arrangements introduce elements of complexity and expense. With either adaptation, there is the problem of maintaining the bearings or other means on which the drum rotates. A feeder without these additional bearings, weights, magnets, or armatures would be an advance over the Rosen or Pfarrwaller art.

G. THE LEVEL OF ORDINARY SKILL IN THE PERTINENT ART.

The third of the major factors set forth in *Graham v. John Deere Co., 383 U.S. at 17*, is the level of ordinary skill in the pertinent art. This is certainly the most amorphous of the three elements of the test, as Judge Learned Hand cogently commented:

The test laid down is indeed misty enough. It directs us to surmise what was the range of ingenuity of a person "having ordinary skill" in an "art" with which we are totally unfamiliar; and we do not see how such a standard can be applied at all except by recourse to the earlier work in the art, and to the general history of the means available at the time. To judge on our own that this or that new assemblage of old factors was, or was not, "obvious" is to substitute our ignorance for the acquaintance with ****55** the subject of those familiar with it.

Reiner v. I. Leon Co., 285 F.2d 501, 503-04 (2d Cir. 1960), cert. denied, 366 U.S. 929, 6 L. Ed. 2d 388, 81 S. Ct. 1649 (1961). A particular danger to any court attempting such a determination is the projection of hindsight on the problem. The old quip "the solution to this problem, once discovered, will be completely obvious," hangs over any determination of the level of ordinary skill in an art which requires an expertise far outside the learning of the law. Courts have repeatedly and rightly cautioned against determinations based on hindsight. E.g., *Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1378-79 (5th Cir. 1976)*, cert. denied, 429 U.S. 1094, 97 S. Ct. 1108, 51 L. Ed. 2d 540 (1977); *Charvat v. Commissioner of Patents, 164 U.S. App. D.C. 47, 503 F.2d 138, 144-45 (D.C.*

Cir. 1974); Application of Bodley, 57 C.C.P.A. 1142, 426 F.2d 390, 394 (1970); Kaiser Industries Corp. v. McLouth Steel Corp., 400 F.2d 36, 42 (6th Cir. 1968), cert. denied, 393 U.S. 1119, 22 L. Ed. 2d 124, 89 S. Ct. 992 (1969); Zegers v. Zegers, Inc., 365 F.2d 156, 159 (7th Cir.), cert. denied, 385 U.S. [**56] 948, 17 L. Ed. 2d 226, 87 S. Ct. 320 (1966); Berry Bros. [***255] Corp. v. Sigmon, 317 F.2d 700, 704 (4th Cir. 1963); Honolulu Oil Corp. v. Shelby Poultry Co., 293 F.2d 127, 131 (4th Cir. 1961); Manville Boiler Company v. Columbia Boiler Company of Pottstown, 269 F.2d 600, 603-04 (4th Cir. 1959); Lundy Elect. & Systems, Inc., *supra*, 362 F. Supp. 130, 148; Hunt Industries, Inc. v. Fibra Boats, Inc., 299 F. Supp. 1145, 1148 (S.D. Fla. 1969) ("the test of obviousness is not hindsight"); Blumcraft of Pittsburgh v. Citizens & Southern National Bank of South Carolina, 286 F. Supp. 448, 455-56 (D.S.C. 1968).

HN11[To avoid a hindsight reconstruction of the relevant art, which would cloud any determination of the level of ordinary skill, it is essential to examine the development of the pertinent art. As another court, faced with a problem comparable to the one raised in this case commented:

We must ultimately resort to a review of the history of the art before and after the invention. Incidentally, such a review in combination with the prescribed [*439] prefatory analysis of the prior patents and publication, is also usually the best, and frequently the only, way [**57] to determine "the level of ordinary skill in the art" as further directed by Graham.

Plantronics, Inc. v. Roanwell Corporation, 403 F. Supp. 138, 142 (S.D.N.Y. 1975), aff'd, 535 F.2d 1397 (2d Cir., cert. denied, 429 U.S. 1004, 50 L. Ed. 2d 617, 97 S. Ct. 538 (1976), reh'g. denied, 429 U.S. 1079, 50 L. Ed. 2d 800, 97 S. Ct. 826 (1977); and, see generally, Safety Car Heating & Lighting Co. v. General Electric Co., 155 F.2d 937 (2d Cir. 1946).

HN12[Concomitantly, the practitioner having "the level or skill in the art" is charged with a comprehensive knowledge of the pertinent prior art. Continental Can Company v. Crown Cork & Seal Co., 415 F.2d 601, 603-04 (3d Cir. 1969); David & David, Inc. v. Myerson, 388 F.2d 292, 294 (2d Cir. 1968); Anthony v. Ranco, Inc., 316 F.2d 509, 511-12 (5th Cir. 1963) (the inventor is conclusively presumed to know prior art, whether or not he has actual knowledge); Andis Clipper Co. v. Oster Corp., 481 F. Supp. 1360, 1376 (E.D. Wis. 1979); Novelart Mfg. Co. v. Carlin Container Corp., 363 F. Supp. 58 (D.N.J. 1973); Lundy Electronics & Systems, Inc. v. Optical Recognition Systems, Inc., 362 F. Supp. 130, 148 [**581] (E.D. Va. 1973); Blair v. Westinghouse Elec. Corp., 291 F. Supp. 664, 668-69 (D. C. 1968).

Accordingly, to define and evaluate the level of ordinary skill in the art, I turn to a discussion of the development of yarn feeders, directed towards an assessment of the significance (or absence of significance of the plaintiff's invention.

H. EARLY THREAD FEEDERS.

The weaving looms with which most lay-people are familiar are simple hand looms. On these, there are two sets of vertical threads, and weaving is accomplished by passing a shuttle between them. The shuttle carries the yarn which is laid out as the cross-threads or wefts in the fabric. Modern commercial weaving is done on shuttleless looms. Thread is taken from external spools and forced between the sets of vertical strands, with the looms laying down several hundred wefts per minute.

In high-speed weaving, the tension of the wefts must be kept relatively constant. Where thread is unwound directly from a spool or bobbin, the necessary constancy of tension cannot be maintained. This has led to the development of devices which draw a small store of weft material and feed it, with relatively constant tension into the [**59] weaving machine. Such devices are variously called thread feeders, yarn storage feeders, and yarn accumulators. (Tr. 50). In this opinion, for the sake of consistency, I will use the term thread feeder.

The purpose of thread feeders is multifold. Primarily they prevent potential variations in thread tension caused by a poorly wound or damaged thread package from being transmitted to the loom (Tr. 51). In a shuttleless loom, for example, a sudden increase in tension, coupled with the extremely high speeds at which the weft thread is pulled from the thread source, may result in a broken thread and, consequently, loom shutdown.

Mr. Arthur Chadwick, discussing the history of the development, testified that the first device referred to as a thread feeder by skilled practitioners in the textile machinery art was made by Anton Junkers in Germany around 1925. (See U.S. Patent 1,849,983, P. Exh. 37).

Subsequent to the development of the Junkers feeders, it was not until the late 1950's that the next innovation in thread feeders appeared. In 1959 Gebreuder Sulzer of Winterthur, Switzerland, developed the feeder illustrated in U.S. patent No. 3,131,729. (P. Exh. 38). This feeder [**60] incorporated a rotating drum which drew thread from the feed package. (Tr. 531-32). As will be explained [***256] below, one of the significant developments in modern thread feeders is the development of feeders having stationary storage drum. By 1961, the firm of Sobrevin Brevests Industrielles (hereinafter "Sobrevin"), an Italian company with headquarters in Lichtenstein, whose experts were A.G. Sarfati and Giuseppe Vischiani, developed the thread feeder disclosed in the [*440] Sarfati et al., United States Patent No. 3,225,446. (P. Exh. 10). Like the Junkers thread feeder, Sarfati's thread feeder relied upon rotation of a drum rotatably mounted on the framework of the textile machine to draw thread from the supply source and, in effect wrap itself in coil after coil of thread (Tr. 532).

These early rotating drum thread feeders successfully prevented unwanted variations in tension caused by thread spool damage or other problems at the thread source. Unfortunately, these feeders also caused undesired effects. If the thread is twisted while being woven or knit, it either gets a tighter twist or it untwists and becomes fluffy, weakening it and tending to cause it to disintegrate. [**61] The rotating drum construction was found, unhappily, to introduce just such an unwanted twist. Specifically, since the drum rotates, it naturally carries the coil store with it. When no thread is being drawn off by the weaving machine, the thread between the endmost coil and the weaving station is rapidly twisted in the direction the drum rotates and substantial unwanted twist is created until the coil store is full and the drum rotation stops. When weaving does start, the twisted thread segment is woven into the fabric and creates a striation in the fabric because of the difference of the tightness of its twist compared to the thread alongside it. (Tr. 74-85).

The rotating drum also presented other problems. Since the drum itself was constantly starting and stopping or speeding and slowing, its mass had to be taken into consideration with regard to the power required for starting-driving the drum and the braking force required for slowing-stopping the drum. A small but relatively powerful motor and a commensurately strong braking system was required. The result was relatively sophisticated construction, and thus a relatively expensive feeder. (Tr. 55-57, 74-85).

These various [**62] problems associated with rotating drum feeder led in about 1960 to efforts to develop a thread feeder in which the drum would be stationary, and the thread would be coiled around the drum by means of a rotating arm of considerably smaller mass commensurately easier to start and stop.

I. NON-ROTATING THREAD FEEDERS.

The Pourtier cable-winding device (P. Exh. 35, D. Exh. 5) preceded the development of thread feeders having a non-rotating winding-body. In the Pourtier device, the winding body, is fixed on a shaft, so that it cannot rotate. There are two rotating arms, one at either end of the winding body. The rotating arm at the end away from the cable source is situated so that the cable coming to it travels outside the winding body. This arm lays cable continuously on the drum, with the coil-store moving back toward the cable source. (This, of course, contrasts with the movement of the coil-store in Pfarrwaller, in which the coil-store moves away from the source). A second arm operates intermittently to circumferentially unwind cable from the end of the drum closer to the source. The cable is then pulled through the hollow shaft, thus passing through the drum. The rotation [**63] of the second arm is controlled by two photo-electric cells mounted on the drum, which are activated by an external light source when the thread store is depleted. When the cells are activated, the unwinding arm is disengaged, allowing additional coil store to build up on the drum. This additional coil store covers the cells, and the unwinding arm is then re-engaged.

While this device was patented in West Germany in 1965, there is no evidence in the record of this case indicating that its art was adapted for use in thread feeders before the introduction of the Tannert device.

By 1960, yarn feeding experts had concluded that the various problems associated with a rotating-drum feeder required the development of a device in which the drum remained stationary. The first practical fixed-drum thread

feeder was invented in 1965 by Erwin Pfarrwaller, and is shown in U.S. patent 3,411,548 (P. Exh. 4), which is extensively discussed in the prior art section, [*441] *supra*. This device did include a winding body which did not rotate, but it was kept stationary only through the use of complex and relatively expensive means: a magnet and armature system acting from outside the drum, [**64] or unbalancing weights inside the drum. (Tr. 535-36). Further, because the drum is mounted on an intermittently rotating shaft rather than on any fixed object, any device for controlling the thread-laying arm in response to the length of the coil store on the drum either had to be placed outside the drum, or had to have an intricate mechanism for carrying the start-stop signals from the stationary drum through the rotating shaft.

At the time Erwin Pfarrwaller introduced his device, he had the Pourtier patent for a cable-winding device available for his use. [***257] Despite a lengthy career as an extraordinarily prolific inventor in the field of textile machinery, including six patents directed specifically to thread feeders and over 100 American patents concerning textile machinery and methods (see P. Exh. 42), Pfarrwaller built a device which did not take advantage of the advantages of the Pourtier construction concerning yarn path, advantages which are now quite apparent.

The next significant advance in the art of thread feeders came in 1970, with the patenting of another Pfarrwaller device, U.S. patent 3,761,031 (P. Exh. 14). Again, the drum, although stationary, is mounted on a rotating [**65] shaft and must be kept stationary (or counter-rotated) by magnets or eccentric weights. Further, the device for sensing the length of the coil store is, as in the earlier Pfarrwaller device (P. Exh. 4), external to the winding body.

This device was followed by others, such as the Sobrevin device, U.S. patent 3,791,598 (P. Exh. 16); the Ruti devices, U.S. patents 3,519,025 (P. Exh. 31), and 3,575,025 (P. Exh. 32); the Teijin Limited device, West German patent (DT-PS 2,039,716 (P. Exh. 33); the earlier Rosen device, U.S. patent 3,720,384 (P. Exh. 5), extensively discussed above; and the Wesco device, U.S. patent 3,737,112 (P. Exh. 40). An examination of each of these patents shows that the inventor stationed a winding body on a rotating shaft, and then faced the two problems mentioned previously: the need to create a counter-rotational effect, and the requirement of having either an external device for measuring the size of the coil store or an intricate mechanism for carrying the signal from the stationary drum across an intermittently rotating shaft.

This was the state of the prior art at the time of the plaintiffs' claimed invention underlying U.S. patent 3,796,386 (P. Exh. 1). [**66] A practitioner having the level of ordinary skill would be familiar with rotating winding-body feeders, which prove unworkable in the weaving context; with the Pfarrwaller art and subsequent feeders having a non-rotating, rotatably-mounted winding bodies; and with the Pourtier art for cable making machines, with its fixed drum and reversed winding path.

I believe that from this collection of devices, all of the various elements of the plaintiff's device *could* be found. Prior to the Tannert invention, however, no one had put all of these elements together. [HN13](#)↑ The want of a successful combination before Tannert's suggests invention. [United States v. Adams, 383 U.S. 39, 15 L. Ed. 2d 572, 86 S. Ct. 708 \(1963\)](#).

Until the Tannert invention, there had been no device which provided the particular advantages that that device provides in the thread feeder art. After a very lengthy examination of the pertinent prior art as cited by the parties, consideration of the testimony of the opposing expert witness, and review of the relevant authorities, I can see how the Tannert invention can be developed from the prior art. I cannot be certain, however, that any such understanding of the [**67] evolution of thread feeder art is fundamentally the product of hindsight. In this case, I feel it is appropriate to turn to the secondary consideration mentioned in [Graham v. John Deere Company, 383 U.S. at 18](#), because, if at all possible, this Court must render a determination based on objective rather than subjective analysis. [Honolulu Oil Corp. v. \[**442\] Shelby Poultry Co., 293 F.2d 127, 131-32 \(4th Cir. 1961\)](#).

J. COMMERCIAL IMPACT OF THE TANNERT PATENT.

The Tannert patent illustrated the first thread feeder embodying a fixed winding body and a thread path in which the coil store moves on the winding body towards the thread store. The plaintiffs cite abundant art subsequent to the Tannert invention which adopts this configuration. Many of these devices were patented by the same companies

which had previously developed thread feeders following the basic teaching of Pfarrwaller. (See Sobrein West German patent DT-OS 2,142,486 P. Exh. 52; U.S. Patent 3,921,925, P. Exh. 21; U.S. Patent 3,999,447, P. Exh. 22; Wesco U.S. patent 3,782,661, P. Exh. 24; Elitex West German application DT-OS 2,410,791, P. Exh. 46; Savio U.S. patent 4,037,802, P. Exh. 50; Memminger [**68] West German application DT-OS 2,415,413, P. Exh. 41; See also P. Exh. 15, various patents in which Tanner has rights or licenses).

Beyond the tribute paid to the Tannert invention by other inventors who have followed his teaching, the Tannert device has enjoyed considerable commercial success. AB Iro took a non-exclusive license under which it pays a royalty rate of one percent. For this license, it has made payment of approximately \$230,000.00 (Tr. 638-40). Wesco took a license from Tannert (P. Exh. 67), under which they advanced Tannert \$60,000 against a four percent royalty on the net selling price of all feeders sold by Wesco or any sub-licensee. In return, Wesco became the exclusive licensee subject to the previously granted non-exclusive licenses held by Iro and Memminger. In anticipation of substantial commercial success, Wesco agreed to pay royalty minimums for 20,000 thread feeders in [***258] 1977 and 30,000 thread feeders every year thereafter while it held an exclusive license. While I discount the significance of these licenses somewhat because of the significant participation of the plaintiffs, I believe it is relevant to the determination of the question of obviousness. [**69] [Tights, Inc. v. Acme-McCrory Corp.](#), 541 F.2d 1047, 1059 (4th Cir.), cert. denied, 429 U.S. 980, 97 S. Ct. 493, 50 L. Ed. 2d 589 (1976); [Shaw v. E.B. & A.C. Whiting Company](#), 417 F.2d 1097, 1105-06 (2d Cir. 1969); [Otto v. Koppers Co.](#), 246 F.2d 789, 799-800 (4th Cir. 1956), cert. denied, 355 U.S. 939, 2 L. Ed. 2d 420, 78 S. Ct. 427 (1958).

Sulzer, even though it has the services of the prolific inventor Pfarrwaller, has bought Iro's IWF feeders for their weaving machines rather than using any of the Pfarrwaller designs. Sulzer has purchased or ordered between four and five thousand IWF units. (Tr. 666.) Given the importance of Pfarrwaller, I regard this purchase as clearly indicating the commercial success of the Tannert device.

Considerable evidence of the impact of the Tannert device is also indicated by the fact that the plaintiffs hold a considerable share of the market, some 15% in 1979. To anticipate the ruling concerning infringement set forth *infra*, the defendant's share of the market (some 30% as of 1979) must be added to this figure. The total share of the market, some 45 percent indicates HN14[¹⁴] a prompt and dramatic shift to the Tannert teaching. This [**70] is evidence of non-obviousness. [Eibel Process Co. v. Minnesota & Ontario Paper Co.](#) 261 U.S. 45, 54-56, 67 L. Ed. 523, 43 S. Ct. 322 (1923); [Marvel Specialty Co. v. Bell Hosiery Hills, Inc.](#), 330 F.2d 164, 172 (4th Cir.), cert. denied, 379 U.S. 899, 85 S. Ct. 187, 13 L. Ed. 2d 175 (1964); [Berry Brothers Corp. v. Sigmon](#), 317 F.2d 700, 703 (4th Cir. 1963); [Rohm & Haas Co. v. Roberts Chemicals](#), 245 F.2d 693, 696-97 (4th Cir. 1957); [Diamond International Corp. v. Walterhofer](#), 289 F. Supp. 550 (D. Md. 1968).

A final factor which this Court considers relevant to the determination of the obviousness question again anticipates the ruling concerning infringement, *infra*: I find that the defendants have essentially copied the Tannert device in their West 840 and West 1000 thread feeders. I believe that this brings the case within the rule that the HN15[¹⁵] defendants' imitation of an allegedly obvious patent suggests that the invention is not obvious. [Diamond Rubber Co. v. Consolidated Rubber Tire Co.](#), 220 U.S. 428, 441, 55 L. Ed. 527, 31 S. Ct. 444 (1911); [Shaw v. E.B. & A.C. Whiting Company](#), 417 F.2d 1097, 1107 (2d Cir. 1969); [Ling-Temco-Vought, Inc. v. Kollsman Instrument Corp.](#), 372 F.2d 263, 269 (2d Cir. 1967); [Strong-Scott Mfg. Co. v. Weller](#), 112 F.2d 389, 395 (8th Cir. 1940); [Trico Products Corp. v. Ace Products Corp.](#), 30 F.2d 688, 691 (D. Conn. 1929).

Considering all of these factors together, I find that they establish that the Tannert patent has had considerable commercial success. Under the test in [Graham, supra](#), this is a secondary factor. It cannot counter obviousness. On the other hand, in an otherwise close case, this commercial success suggests nonobviousness.

I also mention two other factors which I have weighed in this critical determination, to acknowledge that the parties have raised these legitimate points.

First, each side has presented a well-credentialed expert witness: Mr. Arthur Chadwick for the plaintiffs, and Dr. Amed Tayebi for the defendants. Each man is an established expert in his field, having far more extensive knowledge of these technical matters than this member of the Court possesses. While I mean no criticism of Dr.

Tayebi, in my evaluation of the evidence in this case, I am more attracted to the opinions presented by Mr. Chadwick, especially on the question of obviousness. [**72] I found particularly that his long practice in the field of textile machinery development gives him a greater degree of credibility on these issues.

Second, decisions from German and Italian courts have been cited to the Court. These have given me cause, but they have played very little in the determination of this case. This Court has no experience with the patent laws of those foreign countries, and no resources with which to evaluate them.

K. CONCLUSION: THE TANNERT PATENT IS NONOBVIOUS AND VALID.

Having carefully reviewed the many documentary exhibits and the extensive testimony which both parties have submitted on this question, I conclude that the presumption of validity which attaches to a patent is not disturbed; that the Tannert invention is not anticipated by prior art; that there are significant differences between the Tannert device and prior art; that the Tannert device has achieved significant commercial success. From these conclusions, I am led to a further conclusion, that the Tannert invention would not have been obvious to one of ordinary skill in the art at the time of the invention. Therefore, I conclude that the defendants have not shown that the plaintiff's [**73] patent is invalid as [***259] obvious under [35 U.S.C. § 103](#). I further conclude that the plaintiff's patent is valid and enforceable.

II.

INFRINGEMENT OF THE TANNERT PATENT

Having determined that the Tannert patent is valid, and therefore enforceable against those who infringe, I turn to the question of infringement.

A. THE CLAIMS OF THE TANNERT PATENT.

The Tannert patent in suit (P. Exh. 1) contains forty-one (41) claims. Many of these claims cover forms of the invention which are not at issue here, however. Iro has charged Roj and Otex with infringement of only Claims 1, 9, 10, 11, 12, 28 and 39 of the Tannert patent. "It is elementary patent law that one looks to the claims to find out what 'the invention' is." [Application of Kirchner, 49 C.C.P.A. 1234, 305 F.2d 897, 900 \(1962\)](#); accord [Aro Manufacturing Co. v. Convertible Top Replacement Co., 365 U.S. 336, 339, 5 L. Ed. 2d 592, 81 S. Ct. 599](#) reh. denied 365 U.S. 890, 81 S. Ct. 1024, 6 L. Ed. 2d 201 (1961) ("the claims made in the patent are the sole measure of the grant"); [Continental Paper Bag Company v. Eastern Paper Bag Co., 210 U.S. 405, 419, 52 L. Ed. 1122, 28 S. Ct. 748 \[*444\]](#) (1908); [Lockheed Aircraft \[**74\] Corporation v. United States, 213 Ct. Cl. 395, 553 F.2d 69 \(1977\)](#); [Technitrol, Inc. v. Control Data Corp., 550 F.2d 992, 998 \(4th Cir.\)](#) cert. denied, 434 U.S. 822, 54 L. Ed. 2d 79, 98 S. Ct. 65 (1977); [Richen-Gemco, Inc. v. Heltra, Inc., 540 F.2d 1235 \(4th Cir. 1976\)](#); [Duplan Corp. v. Deering Milliken, Inc., 370 F. Supp. 769 \(D.S.C. 1973\)](#); [Maschinenfabrik Rieter, A.G. v. Greenwood Mills, 340 F. Supp. 1103, 1118 \(D.S.C. 1972\)](#); [Welch v. General Motors Corporation, 330 F. Supp. 80 \(E.D. Va. 1970\)](#); [Powell Manufacturing Company, Inc. v. Long Mfg. Company, 319 F. Supp. 24, 31 \(E.D.N.C. 1970\)](#); [Wilcox Mfg. Co. v. Eastern Gas & Fuel Associates, 278 F. Supp. 34 \(S.D.W. Va. 1967\)](#), aff'd, 400 F.2d 960 (4th Cir. 1968), cert. denied, 393 U.S. 1051, 89 S. Ct. 691, 21 L. Ed. 2d 693 (1969); [Triumph Hosiery Mills, Inc. v. Alamance Industries, Inc., 191 F. Supp. 652, 659 \(M.D.N.C. 1961\)](#), aff'd, 299 F.2d 793 (4th Cir.), cert. denied, 370 U.S. 924, 8 L. Ed. 2d 504, 82 S. Ct. 1566 (1962). Therefore, I set forth Claims 1, 9, 10, 11, 12, 28, and 39, displayed in a format which will facilitate evaluation of these claims, plaintiff Iro's contentions of infringement, [**75] and Roj and Otex's defenses.

Claim 1) A thread feeder adapted to be interposed between a supply source and textile machine in which the thread feeder is adapted to accumulate at least several coils of thread for storage purposes axially along a winding body,

said coils of thread forming a store of coils,

the thread feeder being constructed to add coils at one end of the store from the supply source,

and the textile machine adapted to strip coils from the second end of the store,

the thread feeder adapted to have the coils shifted in the direction from the one end of the store to the second end thereof,

said thread feeder comprising:

- A. a support for mounting on a textile machine,
- B. a winding body being fixed to said support and
 - i. being stationary relative thereto and
 - ii. adapted to have coils of thread wound thereon to form a store of coils extending side by side along the length of said winding body,
 - iii. the winding body being elongated and generally circular in cross section, and
 - iv. the store forming a geometrical arrangement symmetrically about and coaxial with the axis of said winding body,
- C. a rotating thread-laying **[**76]** guide mounted on said support for rotation coaxially with the axis of the winding body
 - i. the thread adopted to be fed from the supply source to said thread-laying guide,
 - ii. said thread-laying guide being located to lay a coil of thread onto said winding body at a location constituting the beginning and one end of said store,
 - iii. said location remaining fixed at all times during the operation of said thread feeder,
- D. means for axially shifting said coils in a direction away from said location while said thread-laying guide is rotating to form said store,
 - i. the coil furthest from said location comprising the second end of said store,
 - ii. the number of coils in the store and hence the position of said second end being variable,
- E. means for driving said rotating thread-laying guide,
- F. a control device for controlling said driving means and **[**260]**
 - i. operated in response to the length of said store, and
- G. a passageway through said winding body approximately at the axis thereof and
 - i. means for guiding said thread during the operation of said thread feeder to move through said passageway in a direction **[**77]** opposite to the direction in which said coils are shifted.

[*445] Claim 9) The thread feeder as claimed in claim 1 in which

- A. the thread from said supply source is adapted to be fed directly to said thread-laying guide and enters said passageway after being stripped off said winding body.

Claim 10) The thread feeder as claimed in claim 9 in which

- A. the structure forming said passageway is fixed to said support.

Claim 11) The thread feeder as claimed in claim 1 in which

- A. the coils of thread are stripped from said store in the same direction as said coils of said store are shifted in the forming of said store and
- B. bead-like means are provided to guide the thread of said stripped-off coils into said passageway on to said textile machine.

Claim 12) The thread feeder as claimed in claim 1 in which

- A. said means for axial shifting of said coils comprise a positive axial feed device
 - i. coupled with said means for driving the said thread-laying guide.

Claim 28) The thread feeder as claimed in claim 1 in which

- A. the winding body and store are frusto-conical.

Claim 39) In a thread feeder for **[**78]** feeding thread from a supply source to a textile machine and which includes a support,

a winding body carried on said support, means for winding a plurality of coils on said winding body to form a store of axially arranged side by side coils connected between the supply source and the textile machine, means for progressively shifting the coils of said store from one end thereof to the second end in the direction that the coils are being shifted:

the invention herein comprising:

A. the winding body being fixed to said support and being stationary,

B. said winding means including

i. driven rotating means journaled on said support and

ii. driving means for operating said driven means,

iii. a rotating thread-laying guide coupled with said driven means and rotated thereby for laying thread onto said winding body to form said store

iv. means for leading thread from said supply source to said thread-laying guide,

C. Control means for controlling the operation of said driving means in response to the length of said store

D. means fixed relative to said support and winding body forming a passageway passing through the winding [**79] body axially of the coils forming said store, and

E. bead-like means for guiding the thread being stripped off said second end of the store to pass through said passageway in a direction opposite the direction in which the coils are shifted and thereafter to pass said textile machine.

It is these claims which the plaintiff Iro asserts are infringed by the defendants' thread feeders.

B. PLAINTIFF IRO'S PRIMA FACIE CASE OF INFRINGEMENT.

To establish its infringement case, the plaintiff relied on the testimony of its expert witness, Mr. Arthur Chadwick, whose expertise the Court acknowledges. Mr. Chadwick studied a West 1000 feeder, and conjunctively studied the West 1000 Instruction and Spare Parts Book, (P. Exh. 29) and a schematic diagram of the West 1000 thread feeder originally prepared by Roj (P. Exh. 30, which is appended hereto). (Tr. 166-67.) In his studies, Mr. Chadwick identified thirteen features on the West 1000 thread feeder which he regarded as covered by the various claims listed above. For ease of presentation, Mr. Chadwick set forth these thirteen features in charts (P. Exh. 19A-19D), and then drew up a second series of charts showing that each of the [**80] thirteen identified features of the West [*446] 1000 feeder was described in the patent claims (P. Exh. 20A-20H). Mr. Chadwick testified that, based on his examination of the West 1000 feeder and the supporting materials for that machine, he found that claims of the Tannert patent set forth above described the various features described in his charts (Tr. 168-76, 182-202); that is the West features read on the Tannert patent claims.

For ease of understanding, I have combined the description found in Plaintiffs' Exhibits 19 and 20, and set forth the resulting comparison here: [***261]

Claim Limitations	West 1000 Features	
1) A thread feeder adapted to be interposed between a supply source and a textile machine in which the thread feeder is adapted to accumulate at least several coils of thread for storage purposes axially along a winding body, said coils of thread forming a store of coils, the thread feeder being constructed to add coils at one end of	is adapted to be interposed between a thread supply source and a textile machine;	Feature 1

Claim Limitations	West 1000 Features
the store from the supply source and the textile machine adapted to strip coils from the second end of the store, the thread feeder adapted to have the coils shifted in the direction from the one end of store to the second end thereof, said thread feeder comprising:	
A. a support for mounting on a textile machine,	Feature 2
B. a winding body being said support and	Feature 3
i. being stationary thereto	Feature 3a
ii. adapted to have coils of thread wound thereon to form a store of coils extending side by side along the length of said winding body,	Feature 8b
iii. the winding body being elongate and generally circular in cross section, and	Feature 3c
iv. the store forming geometrical arrangement symmetrically about and coaxial with the axis of said winding body,	Feature 8c
C. a rotating thread laying guide mounted on said support for rotation coaxially with the axis of the	Feature 6
	includes a support for mounting on a textile machine;
	includes a winding body fixed to the support;
	stationary relative thereto;
	that coil of thread laid by the thread-laying mechanism onto the winding body constitutes the beginning and one end of a store of several coils extending side by side along the length of the winding body to a coil farthest from the plane comprising the second end of the store;
	with the winding body being elongate, generally circular in cross-section, and frusto-conical in shape;
	the store forms a frusto-conical geometric arrangement symmetrically about and coaxial with the axis of the winding body;
	includes a thread-laying guide coupled with the driven means, mounted on the support for rotation coaxial

Claim Limitations	West 1000 Features	
winding body,	ally with the axis of the winding body, and rotated by the driven means;	
i. the thread adapted to be fed from the supply source to said thread-laying guide,	includes means for leading thread from the supply source to the thread laying guide;	Feature 7
ii. said thread laying being located to lay a coil of thread onto said winding body at a location constituting the beginning and one end of said store,	is constructed and arranged wherein the thread-laying guide is located in such a position relative to the winding body that as the thread-laying guide rotates it takes or is fed thread directly from the supply source and lays a coil of thread onto the winding body in a never changing circular path lying in a plane extending perpendicular to the axis of said winding body; and that coil constitutes the beginning and one end of a store of several coils extending side by side along the length of the winding body to a coil farthest from the plane comprising the second end of the store;	Feature 8 Feature 8b
iii. said location remaining fixed at all times during operation of said thread feeder,	the location of the plane is fixed relative to the axis and therefore the location of the circular path and the coil being laid on the winding body is fixed relative to the axis;	Feature 8a
D. means for axially shifting said coils	Feature 9	

Claim Limitations	West 1000 Features	
in a direction away from said location		Feature 9a
while said thread-laying guide is rotating to form said store,	includes a positive axial feed device which is coupled with the driving means; and while the thread laying guide is rotating to form the store the feed device progressively shifts the coils in the store axially of the winding body in a direction away from the aforementioned plane and from the one end of the store to the coil furthest from the plane comprising the second end of the store;	
i. the coil furthest from said location comprising the second end of said store,	while the thread laying guide is rotating to form the store the feed device progressively shifts the coils in the store axially of the winding body in a direction away from the aforementioned plane and from the one end of the store to the coil furthest from the plane comprising the second end of the store;	Feature 9a
ii. the number of coils in the store and hence the position of said second end being variable,	the number of coils in the store and hence the position of the second end is variable.	Feature 13a
E. means for driving said rotating thread-laying guide, [***262]	includes driven rotating means journaled on the support;	Feature 4
	includes driving means for operating the driven means;	Feature 5
	includes a thread-laying guide coupled with the	Feature 6

Claim Limitations	West 1000 Features	
	driven means, mounted on the support for rotation coaxially with the axis of the winding body, and rotated by the driven means;	
F. a control device for controlling said driving means and i. operated in response to the length of said store, and		Feature 13
G. a passageway through said winding body approximately at the axis thereof and	includes a control device for controlling the operation of the driving means in response to the axial length of the store of coils.	Feature 13
i. means for guiding said thread during the operation of said thread feeder to move through said passageway in a direction opposite to the direction in which the said coils are shifted.	includes means fixed relative to the support and winding body forming a passageway axially through the winding body and coils forming the store approximately at the axis of the winding body;	Feature 10
	operates in such a manner that the coils at the second end of the store are freely stripped off the winding body store in the direction that the coils of the store are being shifted on the winding body in forming the store;	Feature 11
	includes bead-like means which lift the thread in each coil as it is stripped off the winding body radially outwardly of the winding body and,	Feature 12
	guides the stripped-off thread in such a manner as to reverse its direction of	Feature 12a

Claim Limitations	West 1000 Features	
9) The thread feeder as claimed in claim 1 in which	travel and guide it into the passageway on the way to the textile machine, in a direction opposite the direction in which the coils are being shifted on the winding body.	Feature 8
A. the thread from said supply source is adapted to be fed directly to said thread laying guide and enters said passageway after being stripped off said winding body.	is constructed and arranged wherein the thread-laying guide is located in such a position relative to the winding body that as the thread-laying guide rotates it takes or is fed thread directly from the supply source and lays a coil of thread onto the winding body in a never changing circular path lying in a plane extending perpendicular to the axis of said winding body;	Feature 12
10) The thread feeder as claimed in claim 9 in which	includes bead-like means which lift the thread in each coil as it is stripped off the winding body radially outwardly of the winding body.	Feature 12a
A. the structure forming said passageway is fixed to said support.	guides the stripped-off thread insuch a manner as to reverse its direction of travel and guide it into the passageway on the way to the textile machine, in a direction opposite the direction in which the coils are being shifted on the winding body.	Feature 10
	includes means fixed relative to the support and winding body forming a passageway axially through the winding body and coils forming the store approximately at the axis of the winding body;	

Claim Limitations	West 1000 Features	
11) The thread feeder as claimed in claim 1 in which	operates in such a manner that the coils at the second end of the store are freely stripped off the winding body store in the direction that the coils of the store are being shifted on the winding body in forming the store;	Feature 11
A. the coils of thread are stripped from said store in the same direction as said coils of said store are shifted in the forming of said store and		
B. bead-like means are provided to guide the thread of said stripped-off coils onto said passageway on the way to said textile machine	includes bead-like means which lift the thread in each coil as it is stripped off the winding body radially outwardly of the winding body and,	Feature 12
	guides the stripped-off thread in such a manner as to reverse its direction of travel and guide it into the passageway on the way to the textile machine, in a direction opposite the direction in which the coils are being shifted on the winding body.	Feature 12a
12) The thread feeder as claimed in claim 1 in which		Feature 9
A. said means for axial shifting of said coils comprise a positive axial feed device	includes a positive axial feed device which is coupled with the driving means; and	
i. coupled with said means for driving the said thread-laying guide.	while the thread laying guide is rotating to form the store the feed device progressively shifts the coils in the store axially of the winding body in a direction away from the aforementioned plane and from the one end of the store to coil furthest from the plane comprising the second end of the store;	Feature 9a
29) The thread feeder as claimed in claim 1 in which	with the winding body being	Feature 3c

Claim Limitations	West 1000 Features	
A. the winding body and store are frustoconical. [***263]	elongate, generally circular in cross-section, and frustoconical in shape;	
39) In a thread feeder for feeding thread from a supply source to a textile machine and which includes a support, a winding body carried on said support, means for winding a plurality of coils on said winding body to form a store of axially arranged side by side coils connected between the supply source and the textile machine, means for progressively shifting the coils of said store from one end thereof to the second end thereof, the coils at the second end adapted to be freely stripped off said second end in the direction that the coils are being shifted, the invention herein comprising:	the store forms a frustoconical geometric arrangement symmetrically about and coaxial with the axis of the winding body;	Feature 8c
A. the winding body being fixed to said support and being stationary,	is adapted to be interposed between a thread supply source and a textile machine;	Feature 1
B. said winding means including	includes a winding body fixed to the support;	Feature 3
i. driven rotating means journaled on said support and	includes a thread-laying guide coupled with the driven means, mounted on the support for rotation coaxially with the axis of the winding body, and rotated by the driven means;	Feature 6
ii. driving means for	includes a winding body fixed to the support;	Feature 3
	stationary relative thereto;	Feature 3a
	includes driven rotating means journaled on the support;	Feature 4
		Feature 5

Claim Limitations	West 1000 Features	
operating said driven means, iii. a rotating thread laying guide coupled with said driven means and rotated thereby for laying thread onto said winding body to form said store,	includes driving means for operating the driven means;	Feature 6
	includes a thread-laying guide coupled with the driven means, mounted on the support for rotation coaxially with the axis of the winding body, and rotated by the driven means;	
		Feature 8
	is constructed and arranged wherein the thread-laying guide is located in such a position relative to the winding body that as the thread-laying guide rotates it takes or is fed thread directly from the supply source and lays a coil of thread onto the winding body in a never changing circular path lying in a plane extending perpendi- cular to the axis of said winding body; and	
		Feature 8a
	the location of the plane is fixed relative to the axis and therefore the location of the circular path and the coil being laid on the wind- ing body is fixed relative to the axis;	
		Feature 8b
	that coil constitutes the beginning and one end of a store of several coils extending side by side along the length of the winding body to a coil farthest from the plane comprising the	

Claim Limitations	West 1000 Features	
iv. means for leading thread from said supply source to said thread laying guide,	second end of the store;	Feature 7
C. control means for controlling the operation of said driving means in response to said length of said store,	includes means for leading thread from the supply source to the thread laying guide,	Feature 13
D. means fixed relative to said support and winding body forming a passageway passing through the winding body axially of the coils forming said store, and	includes a control device for controlling the operation of the driving means in response to the axial length of the store of coils;	Feature 10
E. bead-like means for guiding the thread being stripped off said second end of the store to pass through said passageway in a direction opposite the direction in which the coils are shifted and thereafter to pass to said textile machine.	includes means fixed relative to the support and winding body forming a passageway axially through the winding body and coils forming the store approximately at the axis of the winding body;	Feature 12
	includes bead-like means which lift the thread in each coil as it is stripped off the winding body radially outwardly of the winding body and,	Feature 12a
	guides the stripped-off thread in such a manner as to reverse its direction of travel and guide it into the passageway on the way to the textile machine, in a direction opposite the direction in which the coils are being shifted on the winding body.	

[**81]

In preparing this table, I have made certain changes in the wording used to describe the feature found by Mr. Chadwick in order to clarify the language. Except for these minor modifications, this table is a verbatim reproduction of Plaintiffs' Exhibits 19 and 20. I believe these changes only clarify and do not alter Mr. Chadwick's meaning.

[*454] The plaintiff Iro contends that, having found the features described by Mr. Chadwick on the West feeder and shown that these features correspond to claims in the Tannert patent, it has shown patent infringement.

Countering, the defendants contend that Mr. Chadwick's testimony and charts are not a direct comparison of the defendants' device and the patent claims as required by law, and are therefore inadequate to show infringement. Having reviewed the testimony and the documentary exhibits, I find the defendants' argument untenable. The defendants begin their argument by noting that the plaintiffs did not introduce a West 1000 thread feeder into evidence [**82] as an exhibit. They suggest that without introducing an actual thread feeder the plaintiffs cannot make valid evaluations as to what features are found on this device. I do not believe this argument is sound. The law requires direct [***264] comparison, not literal introduction. With massive machinery, such a requirement would be impossible; with super-miniaturized products, it would be pointless; with volatile chemicals, it would be hazardous. In this case, it was not required.

The defendants' argument might have merit if the evidence before the Court was inadequate to allow full evaluation of the defendants' device. The defendants do not argue that the evidence is inadequate. I find it is quite sufficient. While the Court does not have an actual West 1000 thread feeder in evidence, it does have technical drawings, originally prepared by the defendants (P. Exh. 30), the accuracy of which is not disputed; the Instruction and Spare Parts Book (P. Exh. 29), which was prepared by defendants; and numerous other exhibits including photographs, brochures, drawings, and descriptions. I also note that in response to a Request for Admissions, the defendants stated that

Defendants admit [**83] that the West 1000 thread feeder and the West 840 thread feeder have been manufactured and sold by Roj and Otex, respectively, in accordance with brochures and other technical data which has already been supplied by defendants herein to the plaintiff from which plaintiff should be fully informed and capable of drawing its own conclusions concerning infringement. . . .

(Defendants' Response to Plaintiff Iro's Request for Admission #5, P. Exh.79.) Further William L. Lehmann, Executive Vice-President of OTEX, Incorporated, indicated in his deposition that the Instructions and Spare Parts Book was sufficient to familiarize users of West 1000 feeders with the working of the device. Referring to that book and the drawing (P. Exh. 30), Mr. Lehmann was able to discuss fully the features of the device. (See Deposition of William L. Lehmann, P. Exh. 30, at 55-73.) Finally, I note that in presenting their case contending that the West 1000 feeder stemmed from prior art rather than the Tannert patent, the defendants did not introduce an actual thread feeder, but like the plaintiffs, relied on diagrams, drawings, and descriptions. I find the evidence of record was sufficient to allow [**84] this Court to discern the features of the West 1000 feeder (and the earlier version West 840 thread feeder), and to determine whether those features infringe the Tannert patent.

[*455] Defendants criticize Mr. Chadwick's evaluations as an *ex parte* examination, citing *Reynolds Metals Company v. Aluminum Company of America*, 457 F. Supp. 482 (N.D. Ind. 1978), and *Popeil Bros., Inc. v. Schick Electric, Inc.*, 356 F. Supp. 240, 250 (N.D. Ill. 1972), aff'd 494 F.2d 162 (7th Cir. 1974). I find these cases, and *Illinois Tool Works, Inc. v. Foster Grant Company, Inc.*, 547 F.2d 1300 (7th Cir. 1974), cert. denied, 431 U.S. 929, 53 L. Ed. 2d 243, 97 S. Ct. 2631 (1977) which is cited in *Reynolds Metals, supra*, inapposite. Each case deals with patents covering process as distinguished from a mechanical device as in this case. On close reading of these cases, I believe that the objection to the tests was not that they were performed outside the presence of the court or the opposing party, but that they were one-sided and of questionable validity. In *Illinois Tool Works, supra*, for example, the Court noted that the tests left to chance many variables which could [**85] influence the results. See *547 F.2d at 1314*. Similarly, in *Popeil Bros., supra*, the court discounted the credibility of tests in which a party could not assure the court that the tests had followed the process in issue. See *356 F. Supp. at 250*.

In this case, this Court has reviewed the process by which Mr. Chadwick gathered the information which set forth in the table above. Mr. Chadwick examined a West 1000 feeder and documents of undisputed reliability (Tr. 174, 175). He prepared the various charts which have been introduced into evidence (P. Exhs. 19 & 20) in order to facilitate an understanding of the questions in issue in a complicated, technical matter. I have reviewed the relevant exhibits and Mr. Chadwick's testimony, and I find no indication that his articulation of the various features introduced any inaccuracy or bias which would undercut the validity of his opinions.

The defendants contend this is not a direct comparison of the defendants' device with the plaintiffs' patent claims. I disagree. I find that the features of the defendants' West 1000 (and West 840) thread feeders fall clearly within the

language of the enumerated claims. There is thus [**86] infringement under the test set forth by the Supreme Court in *Graver Tank Company v. Linde Air Products Company*, 339 U.S. 605, 607, 94 L. Ed. 1097, 70 S. Ct. 854 (1950):

HN16[¹⁵] In determining whether an accused device or composition infringes a valid patent, resort must be had in the first instance to the words of the claim. If accused material falls clearly within the claim, infringement is made out and that is the end of it.

This is the accepted test for cases of this sort. *Studiengesellschaft Kohle v. Eastman Kodak Company*, 616 F.2d 1315, 1324 (5th Cir. 1980); *Cardinal of Adrian, Inc. v. Peerless Wood Products, Inc.*, 515 F.2d 534, 540 (6th Cir. [**265] 1975); *Laser Alignment, Inc. v. Woodruff & Sons, Inc.*, 491 F.2d 866, 872 (7th Cir.), cert. denied, 419 U.S. 874, 42 L. Ed. 2d 113, 95 S. Ct. 135 (1974); *Ziegler v. Phillips Petroleum Company*, 483 F.2d 858, 868 (5th Cir.), cert. denied, 414 U.S. 1079, 94 S. Ct. 597, 38 L. Ed. 2d 485 (1973); *Orthman Manufacturing v. Chromalloy American Corporation*, 512 F. Supp. 1284, 1295 (C.D. Ill. 1981); *B & J Manufacturing Company v. Hennessy Industries, Inc.*, 493 F. Supp. 1105, 1125 (N.D. Ill. 1979); *Swift* [**87] *Chemical Company v. Usamex Fertilizers, Inc.*, 490 F. Supp. 1343 (E.D. La. 1980); *Duplan Corporation v. Deering Milliken, Inc.*, 370 F. Supp. 769, 772 (D.S.C. 1973); *Lundy Electronics & Systems, Inc. v. Optical Recognition Systems, Inc.*, 362 F. Supp. 130, 159 (E.D. Va. 1973), aff'd 493 F.2d 1222 (4th Cir. 1974); *Phillips Electronic and Pharmaceutical Industries Corporation v. Thermal and Electronics Industries, Inc.*, 311 F. Supp. 17, 40 (D.N.J. 1970); *Eagle Iron Works v. McLanahan Corporation*, 303 F. Supp. 1029, 1044 (W.D. Pa. 1969).

The evidence also shows and I find that subsequent to March 12, 1974, the issue date of the Tannert patent in suit, and prior to the filing of this action for infringement, defendant Otex, Inc. sold West 840 and West 1000 thread feeders in South Carolina. (Defendants' Responses to Plaintiffs' Requests for Admissions, #1 and #1, P. Exh. 79.) During that same period defendant, Roj Electrotex, s.p.a. used the West 840 and West 1000 thread feeders at trade shows in [*456] South Carolina. (Lehmann deposition at 22-24; P. Exh. 55.) During this period, and while selling West 840 and West 1000 thread feeders in South Carolina, Otex [**88] acted as Roj's agent in the United States pursuant to an Agency Agreement. (P. Exh. 27.) Roj referred to Otex as their agent. Roj set the prices Otex would charge. Roj personnel came on regular visits to South Carolina to assist Otex in maintenance of the thread feeders which Otex sold. Otex said in a letter to Roj that it wanted to remain an agent of Roj rather than a distributor until it determined whether the Roj unit (West 840 at that time) infringed any U.S. patents. (P. Exh. 28.) Otex alleges the agreement was changed in approximately February, 1976, so that Otex would purchase thread feeders from Roj and resell them in the U.S. There is, however, no evidence of record which establishes such a change.

I conclude that these facts make out a *prima facie* case of patent infringement against both defendants, which, unless refuted by the defendants, entitle the plaintiff Iro to relief on its patent claim.

C. THE DEFENSE OF NON-INFRINGEMENT.

The plaintiffs allege that the defendants' West 840 and West 1000 thread feeders infringe claims 1, 9, 10, 11, 12, 28, and 39 of the Tannert patent. Claims 9 through 11 and Claim 28 are dependent claims, that is, they incorporate [**89] by reference earlier independent claims. Claim 1 is incorporated by reference into Claims 9, 11, 12, and 28. Claim 10 in turn incorporates by reference Claim 9.

For the defendants' devices to infringe the dependent claims, they must infringe the independent claims. This rule of law is clearly stated in *Lundy Electronics & Systems, Inc. v. Optical Recognition Systems, Inc.*, 362 F. Supp. 130, 164 (E.D. Va 1973), aff'd 493 F.2d 1222 (4th Cir. 1974):

35 U.S.C. § 112 HN17[¹⁵] provides that a claim may be written in independent or dependent form. If written in dependent form, it must be construed to include all limitations of the claim incorporated by reference into the dependent claim The dependent claims are, therefore, limited to the same extent as the claims that they incorporate by reference. A dependent claim can be infringed only if the independent claim (which is incorporated by reference therein) is infringed.

Weatherhead v. Coupe, 147 U.S. 322, 333, 37 L. Ed. 188, 13 S. Ct. 312 (1893); Dresser Industries, Inc. v. United States, 193 Ct. Cl. 140, 432 F.2d 787, 792 n. 1 (1970); Autogiro Company of America v. United States, 181 Ct. Cl. 55, I**90] 384 F.2d 391, 408 (1967); Application of Schutte, 44 C.C.P.A. 922, 244 F.2d 323 (1957); Cardiac Pacemakers, Inc. v. Coratomic, Incorporated, 535 F. Supp. 280, 284 (D. Minn. 1982); Leesona Corporation v. Varta Batteries, Inc., 522 F. Supp. 1304, 1314 n. 23 (S.D.N.Y. 1981).

Further, each of the independent claims, Claims 1 and 39, contains numerous elements in combination. These independent claims are infringed only if the defendants' device contains each of these elements or its substantial equivalent. To state the converse of this proposition, the defendants can demonstrate non-infringement by showing that their device does not contain the substantial equivalent of any one element of each of the two independent claims. Deepsouth Packing Company v. Laitram Corporation, 406 U.S. 518, I***266] 32 L. Ed. 2d 273, 92 S. Ct. 1700 (1972); Weatherhead v. Coupe, 147 U.S. 322, 333, 37 L. Ed. 188, 13 S. Ct. 312 (1893); Prouty v. Draper Ruggles, 41 U.S. (16 Pet.) 336, 10 L. Ed. 985 (1842); Decca Limited v. United States, 225 Ct. Cl. 326, 640 F.2d 1156, 1168 (1980); Strumskis v. United States, 200 Ct. Cl. 668, 474 F.2d 623, 628 (1973), cert. denied, 414 U.S. 1067, I**91] 38 L. Ed. 2d 472, 94 S. Ct. 576 (1973), reh'g denied, 414 U.S. 1147, 39 L. Ed. 2d 103, 94 S. Ct. 902 (1974); Morpul, Incorporated v. Glen Raven Knitting Mill, Inc., 357 F.2d 732, 734 (4th Cir. 1966); Marston v. J.C. Penney Co., 353 F.2d 976, 985 (4th Cir. 1965), cert. denied, 385 U.S. 974, 17 L. Ed. 2d 437, 87 S. Ct. 515 (1966); Power Curbers, Inc. v. E.D. Etnyre & Company, 298 F.2d 484 (4th Cir. 1962); Welch v. General Motors Corporation, 330 F. Supp. 80, 82 (E.D. Va. 1970).

Relying on these principles, the defendants base their defense of non-infringement on contentions that their device contains [*457] nothing substantially equivalent to three elements in Claims 1 and 39, limitations C and D of Claim 1 and limitation E of Claim 39. These limitations are as follows:

1) A thread feeder adapted to be interposed between a supply source and a textile machine in which the thread feeder is adapted to accumulate at least several coils of thread for storage purposes axially along a winding body, said coils of thread forming a store of coils, the thread feeder being constructed to add coils at one end of the store from the supply source and the textile machine [**92] adapted to strip coils from the second end of the store, the thread feeder adapted to have the coils shifted in the direction from the one end of the store to the second end thereof, said thread feeder comprising:

- C. a rotating thread laying guide mounted on said support for rotation coaxially with the axis of the winding body,
 - i. the thread adapted to be fed from the supply source to said thread-laying guide,
 - ii. said thread-laying guide being located to lay a coil of thread onto said winding body at the location constituting the beginning and one end of said store,
 - iii. said location remaining fixed at all times during operation of said thread feeder,
- D. means for axially shifting said coils in a direction away from said location while said thread-laying guide is rotating to form said store,
 - i. the coil furthest from said location comprising the second end of said store,
 - ii. the number of coils in the store and hence the position of said second end being variable.

39) In a thread feeder for feeding thread from a supply source to a textile machine and which includes support, a winding body carried on said support, means for winding a plurality of coils [**93] on said winding body to form a store of axially arranged side by side coils connected between the supply source and the textile machine, means for progressively shifting the coils of said store from one end thereof to the second end thereof, the coils at the second end adapted to be freely stripped off said second end in the direction that the coils are being shifted, the invention herein comprising:

- E. bead-like means for guiding the thread being stripped off said second end of the store to pass through said passageway in a direction opposite the direction in which the coils are shifted and thereafter to pass to said textile machine.

Having reviewed the claims made out in the patent, the testimony of the competing expert witnesses, the documentary exhibits to which the parties have referred, and the relevant law on the question, I find the defendants' argument unpersuasive.

It is a basic principle of patent law that the claims of a patent define the patentee's invention. *Graver Tank and Manufacturing Company v. Linde Air Products Company*, 339 U.S. 605, 94 L. Ed. 1097, 70 S. Ct. 854 (1950); *Smith v. Snow*, 294 U.S. 1, 11, 79 L. Ed. 721, 55 S. Ct. 279 (1934); [**94] *Continental Paper Bag Company v. Eastern Paper Bag Company*, 210 U.S. 405, 419, 52 L. Ed. 1122, 28 S. Ct. 748 (1908); *Technitrol, Incorporated v. Control Data Corporation*, 550 F.2d 992, 998 (4th Cir.), cert. denied, 434 U.S. 822, 54 L. Ed. 2d 79, 98 S. Ct. 65 (1977); *Richen-Gemco, Incorporated v. Heltra, Incorporated*, 540 F.2d 1235, 1239 (4th Cir. 1976); *Duplan Corporation v. Deering Milliken, Inc.*, 370 F. Supp. 769 (D.S.C. 1973); *Lundy Electronics & Systems, Inc. v. Optical Recognition Systems, Inc.*, 362 F. Supp. 130 (E.D. Va. 1973); *Maschinenfabrik Rieter A.G. v. Greenwood Mills*, 340 F. Supp. 1103 (D.S.C. 1972).

HN18 [↑] The Patent Code requires that the patentee, in his specifications, disclose structural and operational information which will support the language of the claims and will illustrate the application of the invention, [35 U.S.C. § 112](#); *Application of Cescon*, 474 F.2d 1331, 1335 (C.C.P.A. 1973). [*458] The Code and the cases require only that the specifications disclose a single application of the claimed invention. [***267] **HN19** [↑] The language of the claims, not the language of the supporting specifications, defines the invention, and includes all applications [**95] within the scope of the claims. The specifications are not limitations, and the invention is not limited or restricted to the language of the specifications. As Judge Learned Hand said on this question:

A claim must of course read upon the specifications, but the specifications unless so declared, are only an example of what the claim is intended to cover; it is a species of a broader genus, else no claims would cover anything not literally described in the specifications.

Reiner v. I. Leon Company, 285 F.2d 501, 504 (2d Cir. 1960). Along the same lines, the Supreme Court in *Continental Paper Bags Co., supra*, wrote:

An inventor must describe what he conceives to be the best mode, but he is not confined to that. If this were not so most patents would be of little worth. "The principle of the invention is a unit, and invariable; the modes of its embodiment in the concrete invention may be numerous and in appearance very different from each other." 2 Robinson, Patents, § 485. The invention, of course, must be described and the mode of putting it to practical use, but the claims measure the invention. [210 U.S. at 418-19](#).

Smith v. Snow, supra [**96] , 294 U.S. at 11, 16; *CTS Corp. v. Piher International Corp.*, 527 F.2d 95, 100 (7th Cir. 1975), cert. denied, 424 U.S. 978, 47 L. Ed. 2d 748, 96 S. Ct. 1485 (1976); *Application of Cescon, supra*; *Maxon v. Maxon Construction Co.*, 395 F.2d 330, 334-35 (6th Cir. 1968); *King-Seeley Thermos Co. v. Tastee Freez Industries*, 357 F.2d 875 (7th Cir.), cert. denied, 385 U.S. 817, 17 L. Ed. 2d 56, 87 S. Ct. 38 (1966); *Arnold Pipe Rentals Co. v. Engineering Enterprises, Inc.*, 350 F.2d 885 (5th Cir. 1965); *Edward Valves, Inc. v. Cameron Iron Works, Inc.*, 286 F.2d 933, 944 (5th Cir.), modified on other grounds, 289 F.2d 355 (5th Cir.), cert. denied, 368 U.S. 833, 82 S. Ct. 55, 7 L. Ed. 2d 34 (1961); *Deere & Co. v. International Harvester Co.*, 460 F. Supp. 523, 534 (S.D. Ill. 1978), rev'd on other grounds without opinion, 618 F.2d 110 (7th Cir. 1980); *Dart Industries, Inc. v. E.I. du Pont de Nemours & Co.*, 348 F. Supp. 1338, 1356 (N.D. Ill. 1972), rev'd on other grounds, 489 F.2d 1359 (7th Cir. 1973), cert. denied, 417 U.S. 933, 41 L. Ed. 2d 236, 94 S. Ct. 2645 (1974) ("Having described his invention and shown its principle, a patentee is deemed [**97] to claim every form in which his invention may be copied"); *Maschinenfabrik Rieter A.G., supra*, 340 F. Supp. 1103; *Eversharp Inc. v. Fisher Pen Company, Inc.*, 204 F. Supp. 649, 672 (N.D. Ill. 1961).

The patent holder had made out a claim of literal infringement, by showing that an accused device falls within the language of the claim. The defendants cannot defeat this contention of infringement by showing that its device represents an application of the patent different from that shown in the particular specifications and drawings of the patent. If the accused device falls within the language of the claims infringement is proven. *Smith v. Snow, supra*, 294 U.S. at 20; *CTS Corp. v. Piher International Corp., supra*; *Reiner v. I. Leon Co., supra*; *Deere & Co. v. International Harvester Company, supra*; *Maschinenfabrik Rieter A.G., supra*, 340 F. Supp. at 1118-19 and cases cited therein; see also *Graver Tank, supra*.

Applying these principles of patent law to the defendants' claim of non-infringement, I find that the defense must fail. As discussed above, the plaintiffs have presented, through expert testimony and supporting exhibits, evidence showing that the defendants' **[**98]** West series thread feeder embodies every limitation of claims 1, 9, 10, 11, 12, 28 and 39 of the Tannert patent. (Chadwick testimony, Tr. 183-202.) In rebuttal, through the testimony of their expert, Dr. Amad Tayebi, the defendants have focused the Court's attention on limitations C and D of Claim 1 and limitation E of Claim 39. Reviewing Dr. Tayebi's testimony, however, I find that he did not testify that the West series thread feeder was outside the literal **[*459]** language of these limitations. Dr. Tayebi explained that the actual structure and operation of certain parts of the West series feeder differed from their counterparts set forth in the specifications and drawings of the Tannert patent. (Testimony of Dr. Amad Tayebi, Tr. 386-95). After a careful review of this testimony, I find that the differences between the West series feeder and the construction set forth in the specifications and drawings of the Tannert patent do not take the West series feeder out of the claims of the Tannert patent.

With respect to limitations C and D of Claim 1 of the Tannert patent, Dr. Tayebi noted that the West thread feeders use an oscillating disc to move the thread coils along the **[**99]** yarn feeder, while the Tannert patent, as it is illustrated in the figures in the patent, relies on a tapered cone working in conjunction with the tension of the thread. **[**268]**

Referring to the language of the limitations, however, I find no mention of the tapered cone, a passive mechanism for moving the coils of thread, or of an active mechanism such as the defendants' oscillating disc. Limitation C indicates only that there will be a thread-laying guide which, while fixed in a coaxial, plane rotates around the winding body. This plane will define the beginning and one end of the thread store. Limitation D of Claim 1 indicates only that there will be "*means for axially shifting said coils*" [emphasis added] away from the thread-laying guide. There is nothing in either limitation which indicates that these means will be active or passive.

Because of this, I believe that this issue falls squarely within the rule enunciated by Judge Learned Hand in *Riener v. I. Leon Company, supra*. As in the instant case, Judge Hand confronted a defense of non-infringement in which the defendant contended that it had not infringed the patent because its device employed an embodiment of the patent **[**100]** from that used by the patentee. Dismissing this contention, the Court said:

It is also plain that its language reads, not only on the specification, but upon the defendant's "clamp." The distinction suggested that the "resilient integral extension" i.e., the springs, pulls instead of pushes, the members together as in the defendant's "clamp" is irrelevant. Claim three does not contain as an element either method, and covers both. [285 F.2d at 504](#).

In the same way, I find that Claim 1 of the Tannert patent covers both passive and active means for moving the coils of thread along the winding body. The defendants use an active means, an oscillating disc, as opposed to the passive means illustrated in the drawings in the Tannert patent. This does not take them out of the coverage of the patent claim. In terms of the patent, this change is inconsequential.

I note also that in his deposition, Mr. Edward Lehmann acknowledged that the oscillating disc came within the literal terms of the limitations of Claim 1 (see Lehmann deposition, P. Exh. 55 at 62-69, 76), and this admission is not directly contradicted or overcome by the testimony of Dr. Tayebi (Tr. 386-90).

Limitation **[**101]** E of claim 39 calls for a bead-like mechanism to guide the thread from the second end of the store into the passageway and to the textile machine. In his testimony, Mr. Chadwick testified that the West thread feeder does have a bead-like mechanism and thus comes within the terms of the claim. (Chadwick testimony, Tr. 202.)

The defendants stress the fact that on the West 100 thread feeder, the collar, as they label the element, does not have a raised edge as is shown in the Tannert device as illustrated in the patent (P. Exh. 1). Therefore, the collar on the West series feeders does not perform the thread-lifting function which Mr. Chadwick attributed to the bead-like means on the Tannert device. (Tayebi testimony, Tr. 390-94). The language of the claim however, makes no mention of a thread-lifting function, nor does it indicate that the bead-like mechanism must be raised in the manner illustrated in the **[*460]** Tannert patent. The precise configuration of the mechanism is unspecified, and the single

required function this mechanism is to control is to guide the thread. As Mr. Chadwick testified, although the structures are somewhat different, the "collar" of the West series [**102] thread feeder and the raised rim of the Tannert illustrations produce the same result. (Chadwick testimony, Tr. 202.) Mr. Lehmann acknowledged that the collar performed this function. (Lehmann deposition, Plts' Exh. 55 at 69, 70, 72.) In his testimony, Dr. Tayebi does not specifically refute that this structure falls within the scope of this limitation. (Tayebi testimony, Tr. 390-94.)

In their briefs, the defendants stress a second function performed by the collar of the West series thread feeders: that it secures the rods which form the winding body of the feeder. This it does. This does not alter the fact that the collar also performs the specific function of the bead-like mechanism of the Tannert claim, and the fact that it has some auxiliary function does not take it out of that claim. As the Supreme Court noted in [Graver Tank and Manufacturing Company, supra](#), it is a "dull and very rare type of infringement" in which the patented device is duplicated exactly. [339 U.S. at 607](#). The defendants' device falls within the scope of the claims of the Tannert patent, and any differences between the defendants' device and the illustrations of the Tannert patent notwithstanding, [**103] it infringes that patent.

The defendants stress the fact that the oscillating disc and the collar found on the West series thread feeders are also found on prior art. That this is so does not make out a defense of non-infringement. In the Tannert patent, there is no claim that the tapered winding body or the raised edge are novel or unique devices. The singular warrant for the patent is that the various elements occur in a combination in which there is a novel invention. It is this novel combination that is claimed by the patent and entitled to protection from infringement. [Deepsouth Packing I***2691 Company v. Laitram Corp., supra; Prouty v. Ruggles, supra.](#)

I have examined the various cases which the defendants cite, and find that they are inapposite to this factual situation. In [Stewart-Warner Corp. v. Lone Star Gas Company, 195 F.2d 645 \(5th Cir. 1952\)](#); [Nash Motors Company v. Swan Carburetor Company, 105 F.2d 305 \(4th Cir. 1939\)](#); and [Specialty Equipment and Machinery Corporation v. Zell Motor Car Company, 113 F. Supp. 161 \(D. Md. 1953\)](#), the reviewing court in each case found that the patent did not cover the accused device. In this case, the patent covers the defendants' [**104] device. In [Morpul, Inc. v. Glen Raven Knitting Mill, Inc., 357 F.2d 732 \(4th Cir. 1966\)](#); and [General Plywood Corporation v. Georgia-Pacific Corp., 362 F. Supp. 700 \(S.D. Ga. 1973\), aff'd, 504 F.2d 515 \(5th Cir. 1974\)](#), the court in each case found in prosecuting the application for his patent, the patentee had specifically claimed only narrow limitations for his patent, foregoing broad readings of the claims. In subsequent litigation, each patentee sought to revive the expansive claims foregone in securing the patent, and the court ruled in each case that the patentee was estopped from reviving these expansive readings of his claims. These rulings rest on the doctrine of file wrapper estoppel. In the instant case, I have found no indication that there was any file wrapper estoppel, any narrowing of claims in the pursuit of the patent which would now restrict the patentee to an especially narrow reading of the claims of the Tannert patent, and the defendants have not cited any clear evidence that there was file wrapper estoppel. Accordingly, these cases are inapplicable.

Thus, I find that the defendants have not shown that the West series feeders fall beyond the scope [**105] of the claims of the Tannert patent, and therefore infringement is established.

III.

DEFENDANTS' ANTITRUST COUNTERCLAIM

By their Amended Answer, defendants have charged that plaintiff Iro has, in conspiracy with Wesco, committed various violations [*461] of [sections 1 and 2](#) of the Sherman Antitrust Act. [15 U.S.C. §§ 1 and 2](#). Thereafter, Wesco was joined in this action as an involuntary plaintiff.

In evaluating the antitrust contentions, the facts are determinative. In the briefs, each side has cited numerous cases, but the applicability or inapplicability of this case authority depends on the facts of each case taken as a whole. Because of this, I undertake an extended discussion of the facts of this case as they bear on the various contentions the defendants have advanced.

A. AB IRO'S ACQUISITION OF THE TANNERT PATENT.

The underlying litigation in this case is Iro's suit against the defendants to enjoin their alleged infringement of the Tannert patent, U.S. Patent No. 3,796,386. Iro acquired that patent from the original inventor, Karl Tannert, in 1977. (See Contract between Mr. Karl Tannert and AB Iro, AB Iro, March 14/16, 1977; D.Exh. 18). Defendants allege [**106] that Iro had an illicit predatory motive in acquiring this patent and that the acquisition was part of the Iro/Wesco conspiracy to destroy defendants.

I find that the evidence does not support this claim. Iro initially acquired a non-exclusive license in 1973. Under this license, Iro did not have the right to bring suits in its own name to enjoin infringement. (See Agreement between the company Ab Iro and Mr. Karl Tannert, May 30 -- June 8, 1973; D.Exh.16.) This was over two full years before defendants first entered the yarn-feeder market. Iro expended resources developing and marketing its IWF yarn feeder, and paid royalties to Tannert under the licensing agreement. (Hermann testimony, Tr. 651-54).

Under these circumstances, Iro was left with two options: seek release from its license with Tannert, looking to continue developing its yarn feeders free from royalty obligations; or enjoin Roj's patent infringement. Because it could not bring suit in its own name, Iro negotiated with both Tannert and Wesco, seeking to have a suit brought. Wesco indicated that it was willing to bring the suit and Iro initially offered to cover the cost of a patent enforcement action.²

[**107] Eventually Iro concluded that its interests required that it acquire the right to bring suit in its own name. The evidence does not disclose whether Iro reached this conclusion before or after October 8, 1976, when Karl Tannert offered to sell the Tannert patent to either Wesco or Iro. (Letter of Karl Tannert, Oct. 8, 1976, doc. 4 to Defendants' Memorandum [***270] in Opposition to Wesco's Motion for Summary Judgment). Given this letter, Wesco was aware of the possibility that Iro might purchase the rights to the Tannert patent. Further, on February 23 and 28, 1977, Mr. Sven Uddenburg of Iro sent Mr. Geiger of Wesco telex messages (Feb. 23, 1977, Uddenberg to Geiger, telex message, Feb. 23, 1977 docs. 10 and 11 respectively, Defendants' Memorandum in Opposition to Motion for Summary Judgment). These telex messages, particularly that of February 23, suggest that Iro was contemplating litigation independent of Wesco. The language of the message is, however, somewhat ambiguous, and it does not compel this reading.³ Even giving these messages, the reading most favorable to defendants' position, the greatest involvement in Iro's acquisition of the Tannert patent which can be attributed [**108] to Wesco is that Wesco may have been able to infer that Iro was acquiring the Tannert patent.⁴ There is absolutely no evidence [*462] that Wesco played any role in this acquisition.

[**109] Considering all of the evidence, I find, first, that plaintiff Iro had a legitimate and non-predatory purpose in seeking the Tannert patent in 1977; and, second, that Wesco played no role in Iro's acquisition of this patent.

B. AB IRO/WESCO'S ALLEGED REFUSAL TO GRANT LICENSES.

Defendants contend with great vigor, that the plaintiffs have individually and collectively refused to grant licenses under the Tannert patent to defendants. I find that the record does not support this allegation.

² The Court specifically does not address the question whether a suit brought under these terms would violate any antitrust laws. The suit was not brought under these terms, and any questions relative to them are therefore moot.

³ The telex of February 23 reads in pertinent part: "Before we start litigation against Roj we must have a binding confirmation that you will fulfill the conditions of your exclusive license for at least a certain period of time."

⁴ And cf. Kinkeldey testimony, Tr. 638 (Iro did not consult with Wesco concerning its acquisition of the Tannert patent); Geiger testimony, Tr. 679 (Q [by counsel for Wesco]: Did Wesco play any part in the acquisition of the Tannert patent by Iro? A: No, none. In fact, we didn't even learn of it until well after it was finalized, apparently.)

Even assuming *arguendo* that Wesco knew that Iro was acquiring the Tannert patent in February, 1977, knowledge without more does not make Wesco a conspirator in the acquisition of this patent. *Peck v. United States*, 470 F. Supp. 1003 (S.D.N.Y. 1979); *Byrd v. Local Union No. 24, International Brotherhood of Electrical Workers*, 375 F. Supp. 545 (D. Md. 1974). Certainly where there is no participation by Wesco in Iro's acquisition, there can be no basis for finding that Wesco joined a conspiracy to acquire the patent.

Dr. Hermann Kinkeldey, a patent attorney from the Federal Republic of Germany, testified concerning what I discern to be the normal course of conduct followed in disputes of this sort. He testified that the normal course of conduct is that the patent holder believing there is infringement contacts the alleged infringer, announces that it holds the patent, and requests that the infringer cease its offensive activity. The alleged infringer may then choose among three courses of action: it may cease its offensive activity; it may seek a license from the patent holder; or it may, by continuing its infringing activity and, making no response to the patent holder's request, indicate that it intends [**110] to contest the claim of infringement and/or the validity of the patent. (Kinkeldey testimony, Tr. 635, 653, 658-59, 663-64). The defendants have not contended that this is not the normal course of dealing in patent infringement contests, nor have they offered evidence suggesting a different course was followed in this case; nor have they suggested that, as sophisticated and experienced business people advised by counsel, they did not understand that this was the course of conduct which they faced.

Dr. Kinkeldey testified that before this action was filed, he, as patent counsel for Iro, contacted Roj and advised Roj that the marketing of the West Feeder was an infringement of the Tannert patent. Roj never responded. (Kinkeldey testimony, T. 653-54). Dr. Kinkeldey testified further that after the suit was filed, Mr. Uddenburg, Iro's general manager, telephoned Roj to discuss the possibility of settling the suit on the basis of a license. Roj refused to discuss any license under which it would pay royalties.⁵ (Kinkeldey testimony, Tr. 651-52)

[**111] In like manner, officers of Wesco contacted officials of Otex, advised them that Wesco felt the West feeders which Otex was marketing infringed the Tannert patent, and asked them to desist. "(Lehmann testimony, Tr. 283; [***271] Geiger testimony, Tr. 691-93). Otex officials elected not to seek a license from Wesco (Lehmann testimony, Tr. 278079)." Again, Otex does not contend that the course of conduct in the trade is other than as outlined above, or that they did not understand it to be so."

From this evidentiary record, I find that plaintiffs Iro and Wesco initiated contacts [*463] by which they reasonably presented the possibility of granting licenses to the defendants, and in the normal course of conduct left defendants with the opinion of responding and the obligation to respond if they wished to avoid litigation. The defendants, by their failure to exercise these options, indicated that they were not interested in acquiring a license from Iro or Wesco, but preferred to litigate. Given these facts, I find the contention that the plaintiffs individually or collectively refused to grant a license to the defendants is without merit.⁶

[**112] C. IRO BONA FIDE BELIEF IN THE VALIDITY OF THE TANNERT PATENT.

Much of defendants' argument on the antitrust counterclaim is premised on the contention that plaintiffs have known from the outset of this case that the Tannert patent is invalid. The defendants contend that Iro cannot be acting in good faith in bringing this suit because they earlier filed an opposition to Karl Tannert's application for a patent in Britain, which would have been the equivalent of the Tannert patent, U.S. Patent No. 3,796,386, D. Exh. 12. From the fact that Iro filed this opposition, defendants would have this Court infer that Iro does not believe that the

⁵ In their brief, defendants suggest that this offer to license came so belatedly that it was not an action taken in good faith. (Defendants' Reply Brief, at 6). I find this contention without merit. Roj's failure to respond to Dr. Kinkeldey's initial message indicated its election to contest Iro's position on the Tannert patent. Under these circumstances, I find nothing to suggest that Mr. Uddenburg's offer was anything less than a good faith offer to settle the controversy without litigation.

Defendants also suggest, though citing no authority, that to resolve this dispute by taking a license would have required that they join an illegal conspiracy in violation of the antitrust laws. (Defendants' Reply Brief, at 6.) I regard this suggestion as specious.

⁶ In view of this finding, I do not address the question, whether, as patent holders the plaintiffs or either of them could refuse to grant Roj or Otex licenses under these patents. Cf. *E. Bement & Sons v. National Harrow Co.*, 186 U.S. 70, 46 L. Ed. 1058, 22 S. Ct. 747 (1902) (agreement between patent holder and exclusive licensee that any other requests for licenses will be refused does not violate **antitrust law**); *United States v. Huck Manufacturing Company*, 227 F. Supp. 791, 804 (E.D. Mich. 1964) (patent holder has the right to refuse to grant licenses to prospective licensees); *United States v. E.I. Du Pont De Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953); *Hercules Powder Co. v. Rohm & Haas Co.*, 66 F. Supp. 899 (D. Del. 1946).

Tannert patent is valid. (Defendants' Brief at 13-14). Officials for Iro explained that the initial filing of the opposition to the British patent was a tactical maneuver taken to enhance their bargaining position with Karl Tannert concerning license and patent rights. (Kinkeldey testimony, Tr. 633-34, 644-45). I find this explanation credible and reasonable. Further once this opposition was filed, even though it was subsequently withdrawn, British patent authorities were presumably on notice of the possible invalidity of the patent. Because **[**113]** the opposition was withdrawn, these questions were not litigated as completely as they might have been. The fact that the question was raised and subsequently resolved in favor of granting the patent however, suggests that the validity of the patent is an open-and-shut question.

Having heard and considered all of the evidence, I believe it is clear that reasonable minds can differ on this question. Persons of impeccable credentials have appeared for either side and pressed their respective positions vigorously. In considering the patent issues, I have found that question very closely drawn. Having reviewed the evidence, I find that Iro believed that the Tannert patent was valid. Plaintiff Iro consulted with American counsel concerning the Tannert patent before bringing this suit, and was advised that the patent was valid. (Kinkeldey testimony, Tr. 642-43, 660-61; opinion letter of Richard Lione, January 2, 1977, D. Exh. 59C). Further, the litigation which Iro has undertaken is a direct contest against the alleged infringer, in which they would expect from the outset that the validity of the patent would be fully contested. This is in contrast with cases in which parties asserting **[**114]** patents of questionable validity have carefully brought suits only against those whom they expected would compromise rather than undertake full-scale litigation. See e.g., [Automated Building Components, Inc. v. Trueline Truss Co.](#), 318 F. Supp. 1252 (D. Ore. 1970); [United States v. Krasnov](#), 143 F. Supp. 184 (E.D. Pa. 1956). Further, plaintiffs have never threatened suit against any customer of Roj or Otex, have never otherwise sought to enforce their patent except through this litigation. Defendants acknowledge there has been no such activity **[*464]** (Lehmann testimony, Tr. 274, 279). Again, this contrasts with the tactics used by those seeking to assert patents of questionable validity while trying to avoid litigation which would actually test their patents. See, e.g., [Kobe, Inc. v. Dempsey Pump Co.](#), 198 F.2d 416 (10th Cir. 1952); [United States v. Krasnov, supra](#).

After a thorough review of this record, I find that there is no basis for the contention that plaintiffs have not acted in good faith in bringing this suit. This conclusion is not affected by any finding adverse to plaintiffs as to the Tannert patent itself. **[***272]**

D. DEFENDANTS' CONTENTION THAT WESCO **[**115]** SHOULD BE REGARDED AS IRO'S COMPETITOR FOR PURPOSES OF ANTITRUST ANALYSIS.

It is elementary to **antitrust law** that "horizontal" arrangements, arrangements between competitors, are treated differently from "vertical" arrangements, such as those between a producer and its distributor. The leading case illustrating this proposition is [United States v. General Electric Co.](#), 272 U.S. 476, 71 L. Ed. 362, 47 S. Ct. 192 (1926). Therein the Supreme Court approved arrangements by which General Electric licensed Westinghouse to make, use, and sell electric lamps, with all retail prices and terms of sale fixed by G.E. Needless to say, such explicit price-fixing would have illegal *per se* under **section 1** of the Sherman Act had it been between horizontal competitors. The arrangement was permissible because the relationship was vertical: Westinghouse was a licensee under G.E. patents.

In this case, defendants argue that Wesco would compete with Iro but for the alleged conspiracy into which they have entered to destroy Roj and Otex. I find this contention unwarranted. The single fact which supports the idea that Wesco would compete with Iro is that Wesco at one time spent more than \$500,000 **[**116]** trying to develop a yarn feeder. (Geiger testimony, Tr. 677-78). This fact alone does not make Wesco a competitor with Iro. Wesco was able to market a few of its own yarn feeders, (Geiger testimony, Tr. 708), but it was unable to enter this market as a viable producer. The evidence shows that Wesco became and remains Iro's distributor independent of any considerations concerning Roj and Otex. There is no evidence suggesting that any conspiracy played any part in Wesco's decision to become Iro's distributor.

E. DEFENDANTS' CONTENTION THAT WESCO MADE PAYMENTS TO IRO TO SUPPORT THIS LITIGATION.

In this case, the attorneys for all parties have pressed their various positions forcefully. The case is highly technical, and I express admiration and appreciation for the manner in which these complex matters have been presented so as to educate the Court on matters which are certainly beyond its prior knowledge.

At times, however, the attorneys have allowed their fervor to oversway their objectivity. A certain contentiousness is tolerable, but truth sets an outer limit to the scope of adversarial license. I believe that on one matter, the defendants have unfortunately, overstepped [**117] that limit. In their brief, the defendants assert:

Moreover the terms of a proposed written agreement (D-19), . . . included an obligation on the part of Wesco to pay IRO approximately eighty five thousand dollars (\$85,000.00) ostensibly as minimum royalties but obviously to defray the costs of patent acquisition and the bringing of this suit. Wesco admitted that they made this payment.

Defendants' Brief, at 14-15

There is no citation to the trial record or to evidentiary materials other than the proposed agreement, an agreement which, as defendants concede, was never consummated. In its Reply Brief, plaintiff Wesco strongly protested that these allegations were false. Supporting its position with numerous citations to the evidentiary record, it noted that the \$85,000 payment was a royalty payment which Wesco owed to the [*465] owner of the Tannert patent under the Wesco-Tannert agreement of 1974. Wesco paid Iro only because Iro had acquired the Tannert patent in 1977. Wesco made these royalty payments to retain its exclusive licensing rights under the Wesco-Tannert agreement. Wesco dismissed defendants' contention that the payment was in support of [**118] this litigation as unsupported. (Post-Trial Reply Brief of Wesco, 67).

In their Reply Brief, defendants reiterated their contentions:

The conspiracy herein is made even more aggravated than in *Singer United States v. Singer Mfr. Co.* by the fact that Wesco conspired and contributed by payments to IRO in its litigation costs (Defendants' Opposition to Summary Judgment Motion, documents 10, 11 and Geigier, pp. 705-07).

I have carefully examined Defendants' Exhibit 19, the two documents cited in defendants' reply brief, and Mr. Geiger's testimony. Defendants' Exhibit 19 contains the Registered Letter of Jan-Ake Johannesson, August 30, 1977, to which were attached the two draft agreements which Wesco officials had signed and submitted to Iro, but had then withdrawn.

The primary agreement, concerning a patent infringement suit to be brought against Roj, reads, at page 4, paragraph numbered 6:

All expenses incurred in prosecuting the infringement action or actions pursuant to this Agreement shall be borne by Iro, except that Wesco shall pay the expenses of its own counsel's participation in any such action. In this connection, all arrangements entered [**119] into with lawyers and others involved in prosecuting said infringement action shall clearly provide that all payments [***273] to be made in connection with said action shall be Iro's sole responsibility. In the event such action or actions result in an award of attorney's fees or other penalties against Wesco, Iro shall pay such award as a part of the expenses of the litigation. Iro hereby indemnifies Wesco against all awards, damages, or any other charges or penalties which may be assessed against Wesco as a result of any infringement action instituted pursuant to this Agreement.

Under the agreement Wesco does not assume any financial obligation towards Iro.

The other draft agreement attached to the Uddenburg letter, also signed by Geiger for Wesco, and also subsequently withdrawn, is a Second Amendment to the original Wesco-Tannert agreement of July, 1974. It recites initially that Tannert and Wesco entered into the original agreement, that the agreement was amended in 1975, that Iro has now acquired all of the rights earlier held by Tannert, and that the present amendment will modify the original Wesco-Tannert agreement. By this draft, Wesco would have agreed not to convert [**120] from an exclusive to a non-exclusive license. Because of this, Wesco would remain obligated to make minimum royalty payments. The second paragraph of the draft amendment recites the basis for computation of the minimum royalty payments.

This amendment declared a commitment by Wesco not to exercise its right to convert from an exclusive to a non-exclusive license.⁷ The minimum royalty payments were established under the original Wesco-Tannert agreement, and are not created or charged by this agreement. There is nothing in the draft amendment even suggesting that the payments were in support of the litigation.

[**121] Wesco's obligation to make minimum royalty payments continued absent the conversion of its license to a non-exclusive license. [*466] Wesco did not convert its license, though they remained free to do so at all times. Documents 10 and 11 to Defendants' Opposition are the telex messages of February 22 and February 28, 1977. They are barren of any suggestion that Wesco was to make payments to support this litigation. The testimony of Mr. Geiger does mention the \$85,000 payment, but both the questions by defense counsel and Mr. Geiger's answers show unquestionably that these payments were royalty payments which Wesco was obligated to make under the original Wesco-Tannert licensing agreement.

Given this evidence, can it be reasonably said that the payments made by Wesco were "obviously to defray the costs of patent acquisition and the bringing of this suit?" If there is any evidence to support this contention, I am at a loss to discover it. Indeed, this contention is at odds with Iro's acknowledged and consistently documented position that it would fund this litigation.

Having considered this matter, I find no basis for the defendants' assertions that Wesco made payments to [**122] support this litigation. I am compelled by the record to agree with plaintiff Wesco that this contention is unsupported.

F. DEFENDANTS' CLAIM THAT PLAINTIFFS HAVE VIOLATED SECTION 1 OF THE SHERMAN ANTITRUST ACT.

The primary thrust of the defendants' antitrust counterclaim is that the plaintiffs have brought this suit pursuant to an agreement to use the Tannert patent as a vehicle for driving Roj and Otex from the yarn-feeder market. They contend that plaintiffs' agreement to force them from the market violates section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

HN20 [↑] In order to make out a violation of section 1 of the Sherman Act, the defendants must show that there was an agreement involving a plurality of actors. Poller v. Columbia Broadcasting System, 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962). This agreement must be one to achieve illegal ends or to achieve its end through illegal means. American Tobacco Company v. United States, 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125 (1945). While the defendants are not required to show an express agreement between the plaintiffs, United States v. General Motors Corporation, 384 U.S. 127, 16 L. Ed. 2d 415, [**123] 86 S. Ct. 1321 (1966), the defendants must produce evidence which shows that the plaintiffs came to a meeting of the minds. Windsor Theatre Company v. Walbrook Amusement Co., 94 F. Supp. 388 (D. Md. 1950), aff'd, 189 F.2d 797 (4th Cir. 1951). If there is no meeting of the minds -- or if the resultant agreement is one which would achieve only legally permissible ends through legally permissible means -- then there is no violation of section 1, and the plaintiffs are free to act as they will. [***274]

Attempting to show an agreement between plaintiffs, the defendants rely primarily on the draft agreement of July, 1977, under which Wesco promised Iro that there would be no license granted to Roj or its distributors. (Defendants' Exhibit 19). While this document is not without probative significance, it shows no combination for the simple reason that it was never consummated. The plaintiffs negotiated the agreement; Wesco prepared the draft and signed it; but Wesco then withdrew the draft before Iro officials could sign it. Defendants' Exhibit 19 contains a copy of this agreement, showing only the signatures of the Wesco representative. The cover letter, from Jan-Ake

⁷ The first substantive paragraph of the amendment states:

Wesco agrees that it shall not exercise its right under paragraphs 5.(a) and 5.(b) of the agreement of July 5, 1974, as first amended, to convert its exclusive license to a non-exclusive license on the third anniversary (July 5, 1977) and on November 1, 1977, whereby Wesco shall be obligated to pay minimum royalties for the calendar years 1977 and 1978 in the manner defined in paragraphs 4.(a) and 4.(b), respectively, of the agreement of July 5, 1974, as first amended.

Johannesson [**124] to Robert Geiger aptly describes this agreement: "Proposed . . . signed by you on behalf of Wesco . . . but not thereafter consummated."

Defendants argue that while this formal document was not signed, there was a "*de facto*" agreement between the plaintiffs, under which Iro and Wesco adhered to all of the terms of the July, 1977 pact despite Wesco's withdrawal. (Defendants' Brief, at 15). A determination of whether or not there was a "*de facto* agreement" along the lines of the proposed agreement between Iro and Wesco requires a review of the [*467] various documents which passed between plaintiffs.

The earliest document which defendants contend is relevant to this issue is a telex from Sven Uddenburg of Iro to Paul Kashden of Wesco, dated August 19, 1976. (Defendants' Memorandum in Opposition to Summary Judgment, Document 2). This message indicates that at this time, Iro wanted litigation brought against Roj and was negotiating to have Wesco bring a suit. In the first Paragraph of the message, Uddenburg recites the various agreements signed by the two parties, and states that Wesco has now been given the U.S. Distributorship for Iro products. The second and third [**125] paragraphs which the defendants regard as particularly significant, read:

In my opinion we have thus given you more than was originally agreed to be given by us in return for our right to go after Roy [sic] Electrotex by means of the Tannert patent.

I therefore now ask you to confirm by telex that we now have this right.

While this telex lends support to the contention that there was some connection between Wesco's acquisition of the Iro distributorship and Iro's suit against the defendants, it does not show that there was a meeting of the minds concerning the bringing of a suit. Certainly, there is no suggestion of Wesco guaranteeing that it would not grant sublicenses. Any suggestion that there was an agreement at this time is destroyed by subsequent events. In March of 1977, Iro bought the rights to the Tannert patent, acquiring the right to sue in its own name. It thereafter did not need Wesco's permission to pursue the defendants had there been an agreement even along the lines suggested by the August 19 telex, Iro's purchase of the Tannert patent would have been a pointless and unnecessary expense. This leads me to the conclusion that there was no [**126] agreement between the plaintiffs at this time.

The next document which defendants cite is a letter from Sven Uddenburg, dated April 1, 1977 to Norman Cook. (Defendants' Memorandum in Opposition to Summary Judgment, Document 12). By this time, Iro had acquired the rights to the Tannert patent, and the Torrington Company had acquired or was acquiring Wesco. The letter discusses a number of problems arising from Torrington's entry into the Iro-Wesco relationship. Defendants emphasize certain material at page 2 of the letter. I find that this material is significant, because it characterizes this litigation along the lines Iro has represented it to this Court: this is a patent infringement litigation, brought against Roj (and Otex) to stop their infringement of the Tannert patent. I note that in their briefs, defendants contended that there was no evidence that patent infringement was the actual reason for this case. (Defendants' Reply Brief, 7-8, 10-11; see also Defendants' Proposed Order, Findings of Fact, para. 47, p. 25; Conclusion of Law para. 11, p. 30):

At negotiations with Bob Geiger regarding the possibility of stopping Roj Electronics' sales in USA due to [**127] patent-infringement, we were all the time of the the opinion that you had the rights to this patent, and that it was your intention to transfer the rights to Iro so that we could take legal actions against Roj. We also took it for granted that if we started these legal actions, it should not be possible to dissolve or even turn these patent-rights into a license for Roj Electronics. We therefore expected you to fulfill all eventual obligations in your agreement with Tannert. Correspondence as well as discussions with Bob Geiger reflects this understanding. Therefore, I have to stress that I am really surprised, perhaps even shocked over what I heard from you concerning your ideas on selling these rights to any of our existing or presumptive competitors. In order to avoid being completely eliminated, we have, however, meanwhile acquired the patent rights from Tannert, i.e. that Iro and not Tannert is the licensor in your corresponding license-agreement. In connection with this acquisition we took it for granted that [**275] you either would maintain the exclusive license-rights with a minimum license reimbursement to Tannert/Iro or [*468] withdraw from the contract. A possible granting [**128] of an under-license to any of our competitors must under these circumstances be regarded by us as an unfriendly action from your side that cannot be accepted.

These two indications, a possible sale of the patent-rights and your request for selling Storage Feeders outside the territory, underline our suspicion that you seriously consider a liquidation of the Wesco-activities.

The defendants emphasize the comments at the end of the second quoted paragraph. Given the context in which they occur, however, I do not find them at all unusual. The Torrington Company's acquisition of Wesco forced a reassessment of the extent Iro-Wesco relationship, and for Iro to regard a possible sale of a license to the defendants as unacceptable is not surprising. The firm tone of Uddenburg's letter does not reflect agreement between Iro and Wesco. Rather, it suggests that relations between the two companies were at this point quite strained.

The next document, a letter from Uddenburg to Robert Geiger of April 14, 1977, (Defendants' Memorandum in Opposition to Summary Judgment, Document 13), reflects this same tone of strain and possible disagreement between the two companies. The statement **[**129]** "For me it is very hard to believe that our present cooperation will be satisfactory in case you sell a license to e.g. Roj Electronics," emphasized by defendants, seems little more than a statement of Iro's view of its own best interest. It was contemplating a patent infringement suit against Roj. It could hardly approve of Wesco licensing Roj's infringement. Had Wesco granted a license to Roj under these circumstances, Iro's franchises would hardly have been an unreasonable response.⁸

The next document cited by the defendants is the letter from Robert Geiger to Jan-Arta Anderson of June 16, 1977. (Defendants' Opposition to Summary Judgment, Document 16). This letter discusses various technical problems related to using IWF yarn-feeders in American installations. The language which the defendants find so telling is a single sentence in a paragraph dealing **[**130]** with the marketing of these yarn feeders. Defendants emphasize this sentence shows clearly the predatory nature of the plaintiffs' conduct but considered in its context, it is simply so ambiguous that it cannot be regarded as especially significant. "Stopping Roj-Electrotex will also help us." It can be viewed either as announcing an illicit purpose or relating to a completely legitimate suit to stop patent infringement. Absent some indication to the contrary, I believe that the Court should read it as reflecting a permissible rather than an illicit purpose.

Next, defendants cite the letter of July 22, 1977, from Hermann Kinkeldey to Henry Lerner. (Defendants' Memorandum in Opposition to Summary Judgment, Document 17). As with the earlier Uddenburg-to-Cook letter, this document reflects the fact that Iro was interested in bringing this suit to stop patent infringement:

The Wesco-Tannert agreement is not explicit on the question whether the licensee is entitled to sub-license a party that has been sued for infringement under Article 8.a(3) of the agreement. It appears to be doubtful whether it would be equitable for the licensee to jeopardize the licensor's chances of **[**131]** winning a lawsuit that the licensee previously has refused to join. I think that we can leave this question open for the moment. With Iro and Wesco being both desirous of closely cooperating on the US Market, I take it for granted that Wesco would consult with Iro before considering to sublicense Roj

Defendants' key contention is that Wesco agreed with Iro that it would not give Roj (or Otex) a license. Yet in this letter, Iro's German attorney and Wesco's attorney in New York left the question open rather than requiring an explicit agreement between the companies. That Dr. Kinkeldey **[*469]** also indicated that he would "take it for granted that Wesco consult with Iro before" granting a license to defendants indicates that he felt that Wesco understood that withholding a license under these circumstances was in Wesco's best interests. Thus, it appeared to Kinkeldey that there was no need for an express agreement whereby Wesco would forego their right to grant sublicenses: they would decline to grant a sublicense to Roj for their own interests, independent of an agreement with Iro.

The defendants next refer to a letter of August 3, 1977, from Henry Lerner to Dr. Kinkeldey, **[**132]** written in response to Dr. Kinkeldey's letter of July 22. (Defendants' Memorandum in Opposition to Summary Judgment, Document 18). In the first substantive paragraph of this letter, Mr. Lerner indicates that Wesco is aware of Iro's

⁸ Cf. testimony of Robert Geiger, Tr. 694 (Wesco officials believed that Iro would have terminated Wesco as its distributor had Wesco licensed Roj).

intention to sue Roj, and states that, given the non-consummation [***276] of the Iro/Wesco agreement (D. Exh. 19), whether Wesco wishes to have this litigation proceed is an academic question, but that Wesco does wish Iro success. The next paragraph reads:

As we view the agreement, paragraph 9 grants Wesco the unqualified right during the life of this agreement to sublicense others. We would think, however, that Wesco would only exercise such right if it felt it to be in its own best interest and we do know that at the moment it is to Wesco's interest to maintain the best possible relations with Iro.

I do not believe that this letter can be read as expressing agreement by Wesco that it would not grant a license to Roj or Otex. Rather, I believe it is simply a statement of fact. Wesco was aware that Iro planned to sue Roj. It was aware of its own interests in a continuing favorable relationship with Iro. Wesco needed no unusual insight to [**133] realize that to grant a license to Roj or Otex under these circumstances would destroy the relationship with Iro.

Finally, defendants cite the letter of Dr. Kinkeldey to Iro, August 10, 1977, of which I find only a portion in the records of this case. (Defendants' Opposition to Summary Judgment, Document 19). The critical language of this letter is a sentence which reads: "Furthermore, I have the impression that at the moment no danger exists of Wesco granting Roj a license."

The Webster's Third New International Dictionary defines "impression" as (definition 7) "a usually indistinct or imprecise notion, remembrance, belief, or opinion." Defendants contend that Dr. Kinkeldey's letter of August 10, along with Mr. Lerner's letter to Kinkeldey of August 3, clearly show that there was an agreement between the two parties. (Defendants' Reply Brief at 2). While I would agree that at this point Iro's impression that Wesco would grant no license to Iro was sufficiently strong that Iro felt secure in bringing suit against Roj and Otex, I am not certain that there was an agreement between them. Dr. Kinkeldey did not report that Wesco had made any commitment that it would not grant a license [**134] to Roj. He did not indicate that Wesco had agreed to grant no license to Roj. He used the word "impression," and I am compelled to evaluate this document based on his use of that word. I believe that this document indicates a failure of the parties to come to a clear cut agreement on the question of possible license to Roj. It does not, as defendants contend, strongly evince the prior existence of an agreement.

Weighed against these documents is the testimony of the various persons involved. I approach this testimony with a certain healthy scepticism: the witnesses are involved in the controversy and are interested in the outcome. Giving due regard to this, I nevertheless, draw from a careful review of the testimony the same conclusion that I reached on considering the documentation: there was no specific agreement between Iro and Wesco whereby Wesco in fact joined in any conspiracy to refuse to grant a license to Roj or Otex during the pendency of this litigation.⁹

[**135] [*470] In their briefs, defendants stress two facts as showing that plaintiffs violated the antitrust laws: Iro asked Wesco not to grant Roj a license under the Tannert patent during the pendency of this suit; Wesco has not granted Roj or Otex a license under the Tannert patent. From these two facts, defendants would have this Court conclude that Wesco agreed that it would withhold a license.

I find that this line of reasoning is unsound both factually and legally. As to the facts, as indicated above, this Court has heard uncontradicted testimony that the normal course of dealings in a patent infringement contest is that once the patent holder contacts the alleged infringer and announces the claim of infringement, the infringer has the option of selecting the course it wishes to pursue. For an infringer to do as Roj and Otex did in refusing to discuss licenses indicated that they preferred litigation to licensing. There is no suggestion in the record that the defendants did not understand the normal course of conduct, or that they thought that the normal course of conduct was otherwise. Thus, they realized that their course invited litigation, and they are hardly in a position [**136] to

⁹ Kinkeldey test, 656-56, 662-63 (Wesco never agreed to forego its right to grant sublicenses); Geiger testimony, 680-91, 698-99 (Iro sought to restrict Wesco's licensing rights; to protect its own business interest, Wesco refused).

complain that this is what they got. On the factual record, this Court does not believe that the defendants can reasonably suggest that either Wesco or Iro ever refused to grant them a license.

Additionally, legally, I find that this case falls into the area of "conscious parallelism."¹⁰ As courts have often noted in cases [***277] alleging conspiracy, action of several parties may be the result of joint behavior pursuant to an agreement, or it may be the result of independent actions with no common agreement. Where plural parties maintain parallel courses, this parallelism is circumstantial evidence which may support a finding of agreement. It does not, however, compel such a finding. As the Supreme Court said in [*Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41, 98 L. Ed. 273, 74 S. Ct. 257 \(1954\)](#):

To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. [citations omitted]. But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial [**137] evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely. [footnote omitted].

[**138] [*471] The leading modern case applying the ideas set forth in [*Theatre Enterprises is Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 \(3rd Cir. 1977\)](#); cert. denied, 434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978). Therein, Chief Judge Seitz said:

The law is settled that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tactic or express, can be inferred but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference or rational, independent choice less attractive than that of concerted action. Compare [*Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 83 L. Ed. 610, 59 S. Ct. 467 \(1939\)](#), with [*First National Bank v. Cities Service Co.*, 391 U.S. 253, 274-88, 20 L. Ed. 2d 569, 88 S. Ct. 1575 \(1968\)](#). We recently articulated those circumstances in [*Venzie Corp. v. United States Mineral Products, Co.*, 521 F.2d 1309 \(3d Cir. 1975\)](#):

"(1) a showing of acts by defendant in contradiction of their own economic interests . . .; and

"(2) satisfactory demonstration of a motivation to enter an agreement . . ." [*Id. at 1314*](#) (citation [**139] omitted).

[561 F.2d at 446.](#)

¹⁰ Defendants rely primarily on [*United States v. Singer Manufacturing Company*, 374 U.S. 174, 10 L. Ed. 2d 823, 83 S. Ct. 1773 \(1963\)](#), as the controlling authority. I find *Singer* distinguishable from the instant situation. In *Singer*, the actors who joined in a conspiracy, were competitors. As discussed in [*Part D, supra*](#), Iro and Wesco are not competitors. In *Singer*, the Court found that there was a conspiracy among the parties. As I conclude infra, defendants have failed to prove the existence of a conspiracy.

HN21 [↑] Conspiratorial cross-licensing and patent pooling by one group of competitors attempting to exclude others go far beyond the limited monopoly that a valid patent affords. See A. Neale & D. Godyer, *The Antitrust Laws of the U.S.A.: A Study of Competition Enforced By Law* 300-02 (3d ed. 1980). The Supreme Court unequivocally condemned an attempt to abuse patent rights in this way in *Singer*. The Court made clear, however, that its ruling did not preclude a patent holder from the legitimate enforcement of his rights under a patent: There is no claim . . . that it is illegal for one merely to acquire a patent in order to exclude his competitors; or that the owner of a lawfully acquired patent cannot use the patent laws to exclude all infringers of the patent, or that a licensee cannot lawfully acquire the covering patent in order better to enforce it or his own account, even when the patent dominates an industry in which the licensee is a dominant firm.

[374 U.S. at 189.](#)

This language is *dicta* in *Singer* in the sense that it did not address the actual facts therein. The language is however pertinent to the situation herein, whereas the specific holding of *Singer* resting on distinguishable facts, is inapposite to this case.

Bogosian has been widely cited and is the leading modern statement of this issue.¹¹

[**140] I find one of the cases which the Court of Appeals relied on in *Bogosian, supra*, is particularly instructive with respect to the present situation. The factual situation in *Venzie Corporation v. United States Mineral Products Co.*, 521 F.2d 1309 (3rd Cir. 1975), is quite close to that in the instant case. Mineral Products manufactured a fireproofing compound (DC/F), and used Armstrong as its exclusive licensee in the Philadelphia area. Plaintiff Venzie Corporation held a fireproofing contract which they found required the use of DC/F. Venzie approached Mineral Products seeking a license. Mineral Products refused to grant a license, and Venzie's other efforts to obtain DC/F proved unavailing. [**278] Eventually, Venzie had to withdraw from its contract, which was then awarded to Armstrong.

Venzie sued Mineral Products and Armstrong alleging a conspiracy to refuse to sell DC/F. As defendants do in the instant case, Venzie based its contentions on the fact that both Mineral Products and Armstrong refused to deal with Venzie.¹² Discussing the standard to be used to evaluate the significance of such circumstances, the court said there were "two elements generally considered critical [**141] in establishing conspiracy from evidence of parallel business behavior (521 F.2d at 1314): action against the alleged conspirators from evidence of parallel business behavior" (521 F.2d at 1314): action against the alleged conspirator's own best economic interest, and motivation [*472] to enter a conspiracy. The court continued, saying:

The absence of action contrary to one's economic interests renders consciously parallel behavior "meaningless and in no way indicates agreement" Turner, *The Definition of Agreement Under The Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 681 (1962).

521 F.2d at 1314.

[**142] The lesson of Dr. Turner's seminal article and of the conscious parallelism cases is clear: to make out a showing of conspiracy on their counterclaim, the defendants must do more than present a fact situation in which conspiracy might be inferred; they must present evidence which cannot be reconciled with a contrary innocent explanation. If the evidence, taken as a whole, is consistent with innocent nonconspiratorial behavior -- even if it is also consistent with conspiracy then the defendants have not met their burden. L. Sullivan, *Handbook of the Law of Antitrust* 315-19 (1977). Behavior contrary to plaintiffs' economic interests would be, of course, irreconcilable with innocence. Reviewing the record, I find no evidence which is compatible with a theory of independent behavior.¹³

¹¹ *Ambook Enterprises v. Time Inc.*, 612 F.2d 604 (2d Cir. 1979), cert. dismissed, 448 U.S. 914, 101 S. Ct. 35, 65 L. Ed. 2d 1179 (1980); *De Jong Packing Co. v. U.S. Dep't of Agriculture*, 618 F.2d 1329 (9th Cir. 1980), cert. denied, 449 U.S. 1061, 66 L. Ed. 2d 603, 101 S. Ct. 783 (1980) (finding conspiracy); *Schoenkopf v. Brown & Williamson Tobacco Corporation*, 637 F.2d 205, 208 (3d Cir. 1980); *Federal Prescription Service v. American Pharmaceutical Association*, 214 U.S. App. D.C. 76, 663 F.2d 253, 267 (Cir. 1981), cert. denied, 455 U.S. 928, 102 S. Ct. 1293, 71 L. Ed. 2d 472 (1982); *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 494 (5th Cir. 1982) ("Inference of conspiracy is always unreasonable when it is based solely on parallel behavior that can be explained as the result of the independent business judgment of the defendant."); *Proctor v. State Farm Mutual Auto Ins. Co.*, 218 U.S. App. D.C. 289, 675 F.2d 308, 327 (D.C. Cir. 1982), cert. denied, 459 U.S. 839, 103 S. Ct. 86, 74 L. Ed. 2d 81 (1982); *Zenith Radio Corporation v. Matsushita Electric Industrial Co., Ltd*, 513 F. Supp. 1100, 1172-76 (E.D. Pa. 1981); see also *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd.*, 416 F.2d 71, 84-85 (9th Cir. 1969), cert. denied, 396 U.S. 1062, 24 L. Ed. 2d 755, 90 S. Ct. 752 (1970).

¹² In *Venzie Corporation v. United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975), the facts were more favorable to Venzie Corporation than are the facts for the defendants in the instant counterclaim: Venzie made several good faith offers to acquire a license on terms favorable to Mineral Products Corporation and Armstrong. By contrast, defendants herein refused to discuss any licensing agreement under which they would have to pay royalties.

¹³ I note that a comparable standard prevails in conspiracy cases outside the antitrust field. To show conspiracy, a party must produce evidence which is not only consistent with a theory of conspiracy, but evidence which is inconsistent with a theory of innocent behavior. *Rutledge v. Electric Hose and Rubber Company*, 327 F. Supp. 1267 (C.D. Cal. 1971); *Fink v. Sheridan Bank of Lawton, Oklahoma*, 259 F. Supp. 899 (W.D. Okla. 1966); *Seneca Falls Machine Company v. McBeth*, 246 F. Supp. 271 (W.D.

[**143] Evaluating the circumstances of this case, the testimony of the witnesses, and the various documents cited, I find that the defendants have failed to demonstrate the existence of a conspiracy. While some of the evidence is consistent with the idea that the plaintiffs conspired to destroy the defendants, there is a great deal of evidence which cannot be reconciled with the theory. Particularly the correspondence between officials at Iro and those at Wesco shows something far less than a meeting of the minds. By contrast, I find that virtually none of the evidence is inconsistent with a theory of independent parallel actions. Iro decided to bring this suit to try to stop what it believed to be infringement of a valid patent. Wesco, though deciding not to join in this litigation, found it in its independent best interest not to offer Roj or Otex a license. Though the results were parallel courses of action, I conclude, there was no conspiracy, and there was therefore no violation of [section 1](#) of the Sherman Antitrust Act.
14

[**144] G. DEFENDANTS' CONTENTION THAT IRO HAD ATTEMPTED TO MONOPOLIZE THE YARN-FEEDER MARKET.

Defendants contend that Iro, by its bringing of this action, has attempted to drive Roj [***279] from the yarn-feeder market. [HN22](#)¹⁴ Defendants argue that this is an attempt to monopolize that market, [section 2](#) of the [*473] Sherman Antitrust Act, [15 U.S.C. § 2](#). To make out an attempt to monopolize in violation of [section 2](#), defendants must show that in the relevant market Iro had economic capacity which came dangerously close to monopoly power and had a specific intent to monopolize.¹⁵

Penn. 1965), vacated in part on other grounds, [368 F.2d 915 \(3d Cir. 1965\)](#); *Johnson v. Branch*, [242 F. Supp. 721, 732 \(E.D.N.C. 1965\)](#), rev'd and remanded on other grounds, [364 F.2d 177 \(4th Cir. 1966\)](#), cert. denied, [385 U.S. 1003, 87 S. Ct. 706, 17 L. Ed. 2d 542 \(1967\)](#) ("When proof establishes a factual situation which would just as well justify defendants' conduct as to lead to an inference of conspiracy, then plaintiff has failed to carry her burden.").

¹⁴ Even assuming *arguendo* that there was between Iro and Wesco some measure of agreement, Iro clearly never obtained a veto over possible future sublicenses. Where there is no control over licensing, coordination and cooperation in *bona fide* efforts to enforce patent rights against infringement are permissible under the [antitrust law](#). *United States v. L.D. Caulk and Company*, [126 F. Supp. 693, 703 \(D. Del 1954\)](#) ("Not only does this seem to be unobjectionable, but necessary and proper"); see also *Grantham v. McGraw-Edison Company*, [444 F.2d 210 \(7th Cir. 1971\)](#) (approving cooperative efforts by patent holder and licensee as necessary to protect patent rights); *United States v. E.I. Du Pont de Nemours and Company*, [118 F. Supp. 41, 229 \(D. Del. 1953\)](#), affirmed, [351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#); see generally A. Neale & D. Godyer, *supra*, at 288-96 (though scrutinizing arrangements closely, courts permit arrangements necessary to allow the patent holder the legitimate benefits of his invention).

¹⁵ *Lorain Journal Co. v. United States*, [342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 \(1951\)](#); *United States v. Columbia Steel Company*, [334 U.S. 495, 532, 92 L. Ed. 1533, 68 S. Ct. 1107 \(1948\)](#); *American Tobacco Company v. United States*, [328 U.S. 781, 785, 809, 814, 90 L. Ed. 1575, 66 S. Ct. 1125 \(1946\)](#); *United States v. Griffith*, [334 U.S. 100, 107, 92 L. Ed. 1236, 68 S. Ct. 941 \(1948\)](#); *Swift & Company v. United States*, [196 U.S. 375, 396, 402, 49 L. Ed. 518, 25 S. Ct. 276 \(1905\)](#) (Justice Holmes' seminal statement of the elements of attempt to monopolize); *White Bag Co. v. International Paper Co.*, [579 F.2d 1384, 1387 \(4th Cir. 1974\)](#); *Yoder Bros., Inc. v. California-Florida Plant Corp.*, [537 F.2d 1347, 1368 \(5th Cir. 1976\)](#), cert. denied, [429 U.S. 1094, 51 L. Ed. 2d 540, 97 S. Ct. 1108 \(1977\)](#); *United States v. Empire Gas Corp.*, [537 F.2d 296 \(8th Cir.\)](#), cert. denied, [429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 \(1977\)](#); *Central Savings & Loan Association of Chariton, Iowa v. Federal Home Loan Bank Board*, [422 F.2d 504 \(8th Cir. 1970\)](#); *American Football League v. National Football League*, [323 F.2d 124 \(4th Cir. 1963\)](#); *United States v. Aluminum Company of America*, [148 F.2d 416, 432 \(2d Cir. 1945\)](#); *Kinnett Dairies, Inc. v. Dairymen, Inc.*, [512 F. Supp. 608, 641-42 \(M.D. Ga. 1981\)](#); *Joe Westbrook, Inc. v. Chrysler Corp.*, [419 F. Supp. 824, 844 \(N.D. Ga. 1976\)](#); *Bowl America Incorporated v. Fair Lanes Inc.*, [299 F. Supp. 1080, 1093-95 \(D. Md. 1969\)](#); *United States v. American Oil Company*, [249 F. Supp. 799, 808-09 \(D.N.J. 1966\)](#). As Professor Sullivan notes in his Handbook of the Law of Antitrust 134 (1977), through these two elements, specific intent and dangerous probability, make up the normal test of attempt to monopolize, "yet, the scope of the offense remains unclear, in part because it is usually charged conjunctively with monopolization, conspiracy to monopolize, or conspiracy in restraint of trade, and in the course of adjudication analytical focus is placed elsewhere, and in part because of conflicting attitudes about policy and the uses of economic concepts in antitrust adjudication."

The most comprehensive discussion of attempts to monopolize is Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 373 (1974).

[**145] I find that the relevant market in this case is the market for shuttleless weaving looms in the United States. In this market, the dominant firm is Sarfarti, which controlled some 50 to 60% of the market as of April, 1979, the last point for which market figures have been presented to the Court.¹⁶ Iro controls approximately 10 to 20% of this same market, and the evidence shows its market share has declined since Roj introduced the West-series feeders.¹⁷ These figures indicate that plaintiff Iro's economic power does not dangerously approach monopoly power in the relevant market.

In some courts, specific intent to monopolize has been read expansively to include "intent to indulge in means that are in some sense untoward,"¹⁸ and some cases have suggested that untoward practices may support a finding [**146] of attempt to monopolize even in the absence of dangerous probability of the actual monopolization.¹⁹ [*474] What Iro has done by bringing this litigation is to assert its right to enforce its patent. Under that patent, Iro is granted a legal monopoly, a legal right to exclude others from the use of the invention embodied in the patent. For this Court to rule that the assertion of patent right is an attempt to monopolize would render the patent worthless. Indeed, because there were here and will be in almost any instance, costs in acquiring a patent, the result of such a ruling would be to make a patent a liability. [***280]

[**147] The defendants state in their Reply Brief that Iro had the right to develop yarn feeders under the Tannert patent under its original non-exclusive license.²⁰ The defendants argue from this fact that there was no legitimate purpose in Iro's acquisition of the Tannert patent itself or in the bringing of this litigation.²¹ It is true that Iro, as a non-exclusive licensee, had the right to develop yarn feeders under the Tannert patent. As the inventor, however, Mr. Karl Tannert, or his successors to the patent had and has more than a right to develop a yarn feeder under this patent. [HN23](#)²² The patent holder has the right to exclude all others from the development of this invention, or to admit them to the use of the patent under whatever licensing terms the patent holder wishes to impose.²²

¹⁶ Plaintiffs' Exhibit 61A, Deposition of William L. Lehmann, May 1, 1979, at 7-9, 14-15; Plaintiffs' Exhibit 64, Deposition of John L. Conn, II, April 23, 1979, at 86.

¹⁷ Plaintiffs' Exhibit 64, at 85-86.

¹⁸ Cooper, *supra* note 13, at 395.

¹⁹ See, e.g., *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1219 (9th Cir. 1977); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964); *Huron Valley Publishing Co. v. Booth Newspapers, Inc.*, 336 F. Supp. 659, 662 (E.D. Mich. 1927).

In *Ray v. United Family Life Insurance Company, Inc.*, 430 F. Supp. 1353 (W.D.N.C. 1977), Judge McMillan endorsed this view, stating:

Although proof of the defendants' market power may be an alternative to direct evidence of intent to monopolize, it is not necessarily an element of an attempt to monopolize. A showing of anti-competitive acts accompanied by a specific intent to monopolize should be sufficient to make out a case of attempt. See P. Areeda, *Antitrust Analysis*, 241-49, 258 (2d Ed. 1974). [430 F. Supp. at 1358](#) (emphasis in original).

In view of the Court of Appeals apparent adherence to the more traditional view that dangerous probability is a necessary element of attempt to monopolize, I am not certain that this could be described as the rule of this circuit. See *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974).

I accept this more liberal standard here for purposes of discussion to make clear that even under this standard, the defendants have not made the showing necessary to establish an attempt to monopolize.

²⁰ Defendants' Reply Brief at 7; see also Defendants' Proposed Orders at 30.

²¹ Defendants' Brief at 14; Defendants' Reply Brief at 3, 7-8, 10-11; see also Defendants' Proposed Order at 25, 30, 31-33.

²² "The special feature of the patent is a right to exclude others from practicing the invention

"Every patent is a grant of monopoly power by the state and, as such, is necessarily immune from the prohibitions of antitrust; for if it were a case of illegal monopolization to take out a patent, there would be no point in the patent system Not only the

[**148] Courts are rightly careful to scrutinize assertions of patent rights to insure that these do not exceed the legitimate bounds of patent law.²³ Accordingly, I have carefully examined this record, and I find that in acting as it has, plaintiff Iro has not gone beyond the legitimate rights accorded by the patent laws. Further, I believe that a contrary ruling, one which would find in a course of action such as this a violation of section 2 of the Sherman Antitrust Act, would so restrict the range of actions permitted to a patent holder that it would have an unworkable result.

Therefore, I conclude that on the record before this Court, defendants have failed to establish that the plaintiffs, by acquiring or asserting the Tannert patent, has attempted to monopolize in violation of section 2 of the Sherman Antitrust Act.

IV.

CONCLUSION

Based on the foregoing analysis, three general conclusions shape the result in this case: First, the Tannert patent is valid and nonobvious; [**149] second, the defendants' West series thread feeders infringe on the Tannert patent; third, the plaintiffs have not violated the antitrust laws in pursuing this action.

Accordingly, the plaintiffs are entitled to and are hereby granted a permanent injunction against the defendants prohibiting the further infringement of the Tannert patent, and an award of damages to be determined by an accounting. Judgment will be entered for the plaintiffs on the defendants' counterclaim.

The parties are directed to collaborate in the preparation of the accounting, and are to submit these materials to the Court thirty (30) days after the issuance of this Order.

[*475] When the parties reassemble for the presentation of the final accounting and the injunction, they may also make submissions and present argument concerning the questions of whether the defendants' conduct warrants either treble damages or the award of attorney fees. These questions are held in abeyance pending these submissions and argument.

IT IS SO ORDERED.

APPENDIX

As an aid to understanding the working of the various devices described in this opinion, I have attached drawings of the devices which figure most prominently [**150] in the discussion. The first six pages are a full set of drawings from the Tannert U.S. patent 3,796,386, plaintiffs' exhibit 1. Following this are technical drawings showing the Pfarrwaller, Pourtier, and Rosen devices, and the defendants' West device.



[*481] A single red X mark, likely indicating a redacted section of the document.

Taken from Plaintiffs' Exhibit 4, this figure shows the Pfarrwaller device, U.S. patent 3,411,548. As shown in this figure, thread is taken from a bobbin (1), and passes through a rotating shaft (2). As rotating arm (3), then lays the thread onto a winding body (4). This winding body is mounted on the rotating shaft and is rotatable. It is held stationary through the action of devices such as an armature and magnet arrangement (5), or eccentric weights. The rotation of the thread-laying arm is controlled by a light source and light-sensing device (6 & 7).

monopoly in the patented article, but also certain kinds of restrictive agreements made by the patent holder may be no more than a legitimate exercise of rights inseparable from the grant of the patent." A. Neale & D. Godyer, *The Antitrust Laws of the U.S.A.: A Study of Competition Enforced by Law* 288 (3d ed. 1980).

²³ See generally, [id. at 288-309](#).

[*482] This drawing, taken from Defendants' Exhibit 5, shows the Pourtier device, West German patent 1,191,197. For clarity of presentation, the feature numbers shown on the original drawing have been deleted and the features renumbered. In this device, wire is taken from a manufacturing [**151] machine, not shown. The wire travels from right to left in this drawing, as shown by the signal WT. The wire is taken up by a continuously rotating arm (1), and laid on a non-rotating drum (2). The coil store travels as shown by the signal CT. Wire is circumferentially lifted from the drum by a second rotating arm (3), passes over a guide (4), and through a shaft (5). The wire-lifting arm rotates intermittently, and this rotation is controlled by signal generated from two photo-electric cells (6 & 7), which are activated by an external light source (8).



[*483] This figure is taken from the Rosen U.S. patent 3,720,384, plaintiffs' exhibit 4, and is identical to figures in Rosen U.S. patent 3,796,384, defendants' exhibit 10. The device illustrated consists of a shaft (1), which is rotatably mounted on bearings. A winding body (2) is mounted rotatably on this shaft. The winding body is kept from rotating (or, so to speak, counter-rotated relative to the shaft) by a system of gear rings (3 & 4) and a pair of sprockets and a connecting pin (5 & 6). A rotating arm (7) lays coils of thread (T) onto the winding body. The coil store is moved along [**152] the winding body by the action of an inclined toothed disk (8), which does not rotate relative to the winding body, but is made to oscillate by the rotation of a mounting plate (9). As the coil store builds up, the frictional resistance overpowers the spring (10), causing the pin (11) to disengage and interrupting the laying of thread by the arm (7).



This figure, taken from defendants' exhibit 9 shows the defendants' West 1000 series device. Thread (T) passes through an outer hood, and is then laid on the cage-like winding body (1) by means of a rotating arm (2). The thread is moved positively [*484] along the winding body by means of an oscillating disc (3), with the coil-store moving in the direction CT. The thread is then pulled over the end of the winding body and passes to the weaving machine.





Committee for Independent P-I v. Hearst Corp.

United States Court of Appeals for the Ninth Circuit

December 17, 1982, Argued and Submitted ; April 21, 1983, Decided

Nos. 82-3488, 82-3493, 82-3523

Reporter

704 F.2d 467 *; 1983 U.S. App. LEXIS 28672 **; 1983-1 Trade Cas. (CCH) P65,334; 9 Media L. Rep. 1489

COMMITTEE FOR AN INDEPENDENT P-I, PEOPLE OPPOSED TO A ONE-NEWSPAPER TOWN, COMMITTEE FOR A FREE PRESS, LONGVIEW PUBLISHING CO., et al., Plaintiffs-Appellees-Cross-Appellants, v. THE HEARST CORP. AND THE SEATTLE TIMES CO., Defendants-Appellants-Cross-Appellees, and WILLIAM FRENCH SMITH, ATTORNEY GENERAL FOR THE UNITED STATES, Defendant-Appellant-Cross-Appellee

Prior History: **[**1]** Appeal from the United States District Court for the Western District of Washington. The Honorable Barbara J. Rothstein, Presiding.

Disposition: AFFIRMED IN PART and REVERSED IN PART.

Core Terms

newspaper, district court, Preservation, antitrust, fact finding, recommendation, exemption, operating agreement, probable danger, purchasers, editorial, ownership, Merger, probability, anti trust law, buyer, financial failure, approving, circulation, deference, legislative history, new management, closure, parties, entity, arbitrary and capricious, financially sound, burden of proof, affiliations, advertising

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

HN1 [down arrow] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

See [15 U.S.C.S. §§ 1801-1804.](#)

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

HN2 [down arrow] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

The Newspaper Preservation Act (the Act), [15 U.S.C.S. §§ 1801-1804](#), gives the United States Attorney General the authority to approve joint operating agreements (JOAs) between competing newspapers. This approval provides the agreement with a limited antitrust immunity. The Attorney General is required to make two findings as

704 F.2d 467, *467L^A 1983 U.S. App. LEXIS 28672, **1

a condition to approving a JOA under the Act: first, one of the newspapers must be "failing," defined as a publication which, regardless of its ownership or affiliations, is in probable danger of financial failure, [15 U.S.C.S. §§ 1802\(5\), 1803\(b\)](#); second, the JOA must effectuate the policy and purpose of the Act. [15 U.S.C.S. § 1803\(b\)](#).

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Administrative Law > Judicial Review > Standards of Review > General Overview

[HN3](#) Standards of Review, De Novo Standard of Review

The court's review of the district court's decision under the Newspaper Preservation Act, [15 U.S.C.S. §§ 1801-1804](#), is de novo. District court review of agency action is entitled to no particular deference from the appellate court; being limited to the agency record, the district court is in no better position to review agency action than the appellate court.

Administrative Law > Judicial Review > Standards of Review > General Overview

[HN4](#) Judicial Review, Standards of Review

The Administrative Procedure Act mandates that the reviewing court decide all relevant questions of law and interpret constitutional and statutory provisions. [5 U.S.C.S. § 706](#).

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Administrative Law > Judicial Review > Standards of Review > General Overview

[HN5](#) Standards of Review, Deference to Agency Statutory Interpretation

The courts must grant great deference to the interpretation of a statute by the agency charged with its administration.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

[HN6](#) Agency Rulemaking, Rule Application & Interpretation

A court is obliged to accept the administrative construction of a statute only so far as it is reasonable, and consistent with the intent of Congress in adopting the statute.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

704 F.2d 467, *467L^A 1983 U.S. App. LEXIS 28672, **1

Governments > Legislation > Interpretation

HN7 [down arrow] **Public Enforcement, State Civil Actions**

Exemptions to the antitrust laws are to be narrowly construed.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN8 [down arrow] **Judicial Review, Standards of Review**

When the agency disagrees with the administrative law judge (ALJ), deference still runs in favor of the agency; the ALJ's contrary findings will simply be weighed along with the other evidence opposing the agency's decision.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

HN9 [down arrow] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

The probable danger standard under the Newspaper Preservation Act, [15 U.S.C.S. §§ 1801-1803](#), is, by the plain meaning of its words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed? The existence of interested buyers may be relevant to this determination. Also, poor management practices may show that, with managerial improvement, the paper's economic problems can be overcome.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

HN10 [down arrow] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

The ultimate burden of persuasion under the Newspaper Preservation Act, [15 U.S.C.S. §§ 1801-1804](#), lies with the proponents of the joint operating agreement (JOA). [28 C.F.R. § 48.10\(4\) \(1982\)](#). Generally, however, that burden only entails a showing of (1) the economic fact of probable failure (downward spiral, irreversible losses), and (2) reasonable management practices. In an adversarial situation, parties opposed to the JOA may rebut the evidence by showing the paper's losses did not in fact exist or were due to unreasonable management practices.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

HN11 [down arrow] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

Under the Newspaper Preservation Act, [15 U.S.C.S. §§ 1801-1804](#), a newspaper is defined as failing if it is in probable danger of financial failure regardless of its ownership or affiliations. [15 U.S.C.S. § 1802\(5\)](#).

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Communications Law > Overview & Legal Concepts > Ownership > General Overview

HN12[Exemptions & Immunities, Exempt Cartels & Joint Ventures

Generally, ownership is not to be a factor in considering whether a newspaper is failing under the Newspaper Preservation Act, [15 U.S.C.S. §§ 1801-1804](#); an exception to the general rule is that ownership may be analyzed to ensure the owner has not created a failing company through creative bookkeeping.

Counsel: William L. Dwyer, Esq., Culp and Dwyer, Seattle, Washington, for Appellant/Petitioner.

Jonathan E. Thackeray, Esq., Baker and Hostetler, Cleveland, Ohio, Douglas Letter, Esq., Dept of Justice, Washington, District of Columbia, for Appellee/Respondent.

Judges: Anderson, Hug and Poole, Circuit Judges.

Opinion by: ANDERSON

Opinion

[*469] J. BLAINE ANDERSON, Circuit Judge:

This action presents issues of first impression concerning the scope and operation of the Newspaper Preservation Act. This Act permits competing newspapers that meet certain qualifications to enter into joint arrangements which otherwise would be violative of the antitrust laws. In a memorandum opinion, the district court overturned the Attorney General's action approving a joint operating agreement proposed between the Seattle Post-Intelligencer and the Seattle Times. We reverse and reinstate the Attorney General's decision.

I. BACKGROUND

On March 27, 1981, the Seattle Times Company, owner of the Seattle Times (the "Times"), [*2] and The Hearst Corporation, owner of the Seattle Post-Intelligencer (the "P-I"), applied to the United States Attorney General for approval of a joint operating agreement ("JOA") pursuant to the Newspaper Preservation Act (the "Act"), [15 U.S.C. §§ 1801-1804](#).¹ The Times, founded [*470] in 1896, and the P-I, founded in 1891, have been the only

¹ **HN1**[The Newspaper Preservation Act provides:

[§ 1801](#). Congressional declaration of policy

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

[§ 1802](#). Definitions

As used in this chapter --

(1) The term "**antitrust law**" means the Federal Trade Commission Act and each statute defined by section 4 thereof as "Antitrust Acts" and all amendments to such Act and such statutes and any other Acts in pari materia.

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That

metropolitan daily newspapers in Seattle for some time. For approximately the last 15 years, the P-I has been losing ground to the Times in terms of circulation and advertising revenue. From 1969 through 1980, the P-I lost over \$14 million.

[**3] The Newspaper Preservation Act gives the United States Attorney General the authority to approve joint operating agreements between competing newspapers. This approval provides the agreement with a limited antitrust immunity. The Attorney General is required to make two findings as a condition to approving a JOA under the Act: first, one of the newspapers must be "failing," defined as a "publication which, regardless of its ownership or affiliations, is in probable danger of financial failure," [15 U.S.C. §§ 1802\(5\), 1803\(b\)](#); second, the JOA must "effectuate the policy and purpose" of the Act. [15 U.S.C. § 1803\(b\)](#). Pursuant to Department of Justice regulation,

there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

(3) The term "newspaper owner" means any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.

(4) The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

(6) The term "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

§ 1803. Antitrust exemptions

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: *Provided*, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

§ 1804. Reinstatement of joint operating arrangements previously adjudged unlawful under antitrust laws

(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under [section 1803\(a\)](#) of this title.

(b) The provisions of [section 1803](#) of this title shall apply to the determination of any civil or criminal action pending in any district court of the United States on July 24, 1970, in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

the Attorney General is to refer the JOA application to the Assistant Attorney General in charge of the Antitrust Division. The Assistant Attorney General then recommends either approval of the JOA or that a hearing be held before an administrative law judge ("ALJ"). 28 C.F.R. § 48.7 (1982). If a hearing is held, the Antitrust Division becomes a party to the proceeding, *id.* at § 48.10(b), and other interested parties may intervene, *id.* at § 48.11. The Attorney General must base his decision on the hearing record, **[**4]** the ALJ's recommendation, and any exceptions filed thereto. *Id.* at § 48.13(b).

In this case, the Attorney General followed the Antitrust Division's recommendation to hold a hearing. The Committee and **[*471]** other interested organizations were allowed to intervene. The hearing before Administrative Law Judge Daniel Hanscom lasted through most of November, 1981.

After reviewing the lengthy hearing record, ALJ Hanscom issued his decision recommending approval of the JOA in January of 1982. The ALJ supported his recommendation with 162 findings of fact and several conclusions of law. These findings will be discussed more thoroughly below in the context of the issues to which they pertain. For now, a brief summary will suffice. The ALJ first discussed the dominant position attained by the Times in the Seattle newspaper market. He then described the trend in this country away from competition in many major markets. Newspapers have been folding at an alarming rate; many areas which had two competing newspapers now only have one.

The ALJ then analyzed what he found to be the P-I's poor financial condition. He believed the P-I had been caught in the phenomena that **[**5]** is called the "downward spiral effect," in which a newspaper's declining circulation and lessening advertising revenue feed off one another, eventually forcing it to close. ALJ Hanscom did not find the evidence to support the allegations that mismanagement of the P-I by the Hearst Corporation ("Hearst") had caused the P-I's difficulties. Instead, it was the economics of the newspaper industry, highlighted by the "downward spiral effect," which led to the P-I's failing financial health. Finding the P-I's financial difficulties to be irreversible, the ALJ concluded that Hearst and the Times Company had met their burden of proving the P-I was in a state of "probable financial failure." He therefore recommended approval of the JOA. Importantly, ALJ Hanscom made this recommendation even though he found that, although Hearst had not attempted to sell the P-I and had rebuffed inquiries about a sale, the paper could in all probability be sold to a third party who would continue its independent existence.

The Attorney General followed Judge Hanscom's recommendation in spite of the opposition of the intervenors and the Antitrust Division. Smith adopted all of the ALJ's findings, except **[**6]** for the one stating the P-I could in all probability be sold, which he did not believe to be supported by the evidence. The Attorney General's order approving the agreement was entered on June 15, 1982, and was scheduled to take full effect 10 days later.

The Committee for an Independent P-I ("the Committee" or "plaintiffs"), et al., intervenors below, immediately filed suit against Hearst, the Times Company, and the Attorney General to strike down the approval for the agreement. The district court granted the Committee's motion to stay the effective date of the Attorney General's approval of the JOA. Each side moved for summary judgment. The district court found for defendants on all issues except one. The district court concluded that the Attorney General could not validly approve the JOA when the evidence showed the alternative of a sale to a third party was possible. Judgment for the Committee was entered on August 30, 1982.

Hearst and the Times appeal. The Attorney General filed a separate appeal and the Committee cross-appeals. The three appeals were consolidated and expedited by an order of this court.

II. DISCUSSION

There are four substantive issues presented **[**7]** by this action. First, what role, if any, is proof of interested third-party purchasers to play in the determination that a newspaper is in probable danger of financial failure? Second, must it be shown that the failing newspaper would probably close if the proposed joint operating agreement is not allowed? Third, must the Attorney General determine that the proposed JOA is not unnecessarily competitive and that it would not impair the editorial voices of smaller newspapers in the affected market? Fourth, is the Newspaper Preservation Act unconstitutional under the first amendment?

A. Standard of Review

Each side agrees that our [HN3](#)[↑] review of the district court's decision is *de novo*. District [\[*472\]](#) court review of agency action is entitled to no particular deference from this court; being limited to the agency record, the district court is in no better position to review agency action than the appellate court. [*Asarco, Inc. v. U.S. Environmental Protection Agency*, 616 F.2d 1153, 1161 \(9th Cir. 1980\)](#). The parties dispute, however, the proper standard of review of both the factual and legal determinations of the Attorney General. The dispute, as one might anticipate, [\[**8\]](#) involves how much deference the factual and legal findings of the Attorney General deserve.

We do not believe the issue of the standard of review of factual findings to be critical to our decision. The parties debate whether the arbitrary and capricious standard or the substantial evidence standard of review applies. The Attorney General argues that the Administrative Procedure Act's arbitrary and capricious standard governs our review because the Newspaper Preservation Act does not require that a hearing be held. See [5 U.S.C. §§ 554, 556, 706\(2\) \(E\); 28 C.F.R. § 48.8\(c\)](#). The Committee asserts that, nevertheless, a hearing was *held* and the regulations require that all hearings be conducted pursuant to [5 U.S.C. § 556](#) of the APA. [28 C.F.R. § 48.10\(4\)](#). In turn, the APA's substantial evidence standard applies to all "case[s] subject to [section . . . 556](#)." [5 U.S.C. § 706\(2\) \(E\)](#). The Second and Seventh Circuits have held that, in the area of administrative rulemaking, the arbitrary and capricious standard of review applies when the agency conducts a hearing by virtue of its regulations rather than required by statute. [*Automobile Club of New York, Inc. v. Cox*, 592 F.2d 658, 664 \(2d Cir. 1979\)](#); [*Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1149-1152 \(7th Cir. 1982\)](#). However, we find it unnecessary to resolve this issue, as our analysis will indicate.

Review under either standard is narrowly prescribed. We do not need to decide this issue, however, because our review of the record as a whole persuades us the Attorney General's decision is supported by substantial evidence, i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456, 462 \(1951\)](#). Since we find that the Attorney General's decision was supported by substantial evidence, which allows broader appellate review than the arbitrary and capricious test, there is no question that the Attorney General did not act in an arbitrary and capricious fashion. K. Davis, *Administrative Law Treatise*, § 29.00 at 519 (1982 Supp.); see [*Abbott Laboratories v. Gardner*, 387 U.S. 136, 143, 18 L. Ed. 2d 681, 688, 87 S. Ct. 1507 \(1967\)](#).

The standard of review of legal issues presents somewhat more difficult questions. [HN4](#)[↑] The APA mandates [\[**10\]](#) that the reviewing court "decide all relevant questions of law [and] interpret constitutional and statutory provisions. . . ." [5 U.S.C. § 706](#). Conceding this to be the general rule, the Attorney General argues that [HN5](#)[↑] the courts must nonetheless grant great deference to the interpretation of a statute by the agency charged with its administration. [*Udall v. Tallman*, 380 U.S. 1, 16, 13 L. Ed. 2d 616, 625, 85 S. Ct. 792 \(1965\)](#). We agree. The Committee correctly points out that there has not been a long-standing interpretation of the Newspaper Preservation Act. But a long-term interpretation is not a necessary precondition to our deferring to an agency's construction of a statute. [*Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 600 \(9th Cir. 1981\)](#). Also, the assertion that we should not defer to the Attorney General's interpretation of the Act because, in the Committee's view, he lacks substantial expertise in the antitrust field is without merit.² [*Doyon, Ltd. v. Bristol* \[\\[*473\\]\]\(#\)](#) [*Bay Native Corp.*, 569 F.2d 491, 497 \(9th Cir.\), cert. denied, 439 U.S. 954, 58 L. Ed. 2d 345, 99 S. Ct. 352 \(1978\)](#).

[\[**11\]](#) Assuredly, our deference to the views of the Attorney General is tempered by the factors noted above. We do not imply that deference to an agency's interpretation of the law equates with blind faith. [HN6](#)[↑] A court is obliged to accept the administrative construction of a statute only so far as it is reasonable, [*Columbia Basin*, 643 F.2d at 600](#), and consistent with the intent of Congress in adopting the statute. [*Espinoza v. Farah Manufacturing*](#)

² The Committee also argues that we should not defer to the Attorney General's interpretation of the Newspaper Preservation Act when there has been a prior interpretation inconsistent with his present view of the Act. See [*United States v. Leslie Salt Co.*, 350 U.S. 383, 396, 100 L. Ed. 441, 451, 76 S. Ct. 416 \(1956\)](#); [*Power Brake Company v. United States*, 427 F.2d 163, 164 \(9th Cir. 1970\)](#). We agree with that proposition but, as will be discussed below, we do not believe the prior interpretation is substantially different from what Attorney General Smith presently believes to be a proper interpretation of the Act.

Co., 414 U.S. 86, 94-95, 38 L. Ed. 2d 287, 295, 94 S. Ct. 334 (1973). Our review of the Newspaper Preservation Act and its interpretation by the Attorney General is guided by an additional rule developed out of the court's recognition of the fundamental importance of the antitrust laws -- HN7[[↑]] exemptions to the antitrust laws are to be narrowly construed. See, e.g., Group Life and Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231, 59 L. Ed. 2d 261, 280, 99 S. Ct. 1067 (1979).

B. Background of the Newspaper Preservation Act

The Newspaper Preservation Act was passed in July of 1970 as Public Law No. 91-353. An understanding of the circumstances leading to its passage provides substantial insight into the intent of the Act. What [**12] follows is distillation of its history, taken primarily from the House and Senate Reports. S. Rep. No. 535, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 1193, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 3547.

In 1964, the Department of Justice began investigating joint newspaper operating arrangements. At that time, approximately 22 JOA's were in force, some dating from the 1930's. The investigation resulted in an antitrust action being filed against one such arrangement in Tucson, Arizona. The district court held the arrangement to be a violation of § 1 of the Sherman Act (price fixing, profit pooling and market allocation), § 2 of the Sherman Act (monopolization), and § 7 of the Clayton Act (illegal merger). United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968).

Soon after the Citizen Publishing case was filed, a number of bills were introduced in Congress to exempt then-existing JOA's from the antitrust laws. The foremost of these was S. 1312, the Failing Newspaper Act, introduced in March, 1967, by Senator Hayden and 14 cosponsors. A similar bill, H.R. 7446, was introduced in the House by Representative Matsunaga.

[**13] In 1968, the Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary held 21 days of hearing on S. 1312. The Subcommittee reported the bill favorably with amendments. Due to time constraints, the bill was never acted upon by the 90th Congress. The House also held hearings on its version of the bill, but did not act upon it.

In January of 1969, Representative Matsunaga and 108 cosponsors introduced another bill, H.R. 279, now called the Newspaper Preservation Act. In March of 1969, the Supreme Court affirmed the district court in Citizen Publishing v. U.S., 394 U.S. 131, 22 L. Ed. 2d 148, 89 S. Ct. 927 (1969). Within two weeks, Senator Inouye introduced S. 1520 on behalf of 33 cosponsors. Three more days of hearings were held in the Senate in June of 1969. The House held hearings in September and October of 1969. Both the Senate and House Committees reported the bills favorably with amendments.

The House and Senate versions of the bill were similar in many respects. The reports emphatically state that the primary intent of the bills was to reverse the result of the Supreme Court's holding in *Citizen Publishing*, which strictly applied the [**14] "failing company" doctrine to newspaper JOA's. This doctrine provides a defense to otherwise illegal mergers and agreements when it is shown that one of the businesses is a "failing" [*474] company," which means it is on the brink of collapse, its prospects for reorganization are dim or nonexistent, and no other noncompeting buyers are available. 394 U.S. at 137-138, 22 L. Ed. 2d 155-156. The Court, in other words, applied the failing company defense quite narrowly; the JOA had to be, in the words of Justice Douglas' opinion, "the last straw." *Id.* *Citizen Publishing* did not prove it was in such dire financial straits and the JOA was held to be a clear violation of the antitrust laws. Congress attempted to reverse the result of *Citizen Publishing* by allowing newspapers to enter into a JOA prior to the time the financially troubled newspaper is on its deathbed. As stated by Senator Bennett: "The Court failed to articulate a doctrine which recognized the fundamental importance of placing a failing newspaper on a sound financial basis in order to preserve these two voices before there is a grave possibility of failure." 116 Cong. Rec. 1786 (1970).

Both the House and the [**15] Senate believed that authorizing certain joint action between newspapers would serve the best interest of the people of the United States and the first amendment. This interest is served by preserving the independent editorial voice of the newspaper in financial distress. Unique economic forces were

considered to be at work in the newspaper industry. These forces necessitated allowing newspapers to enter joint agreements before they reached the point of distress required by *Citizen Publishing*. The permissible scope of a JOA is limited, however. Although the House and Senate bills allow the competing newspapers to share the business aspects of newspaper publication (printing, circulation, production facilities, advertising, revenue), the editorial and reportorial functions of the two newspapers must remain separate. See [15 U.S.C. § 1802\(2\)](#).

The two bills diverged in an area that is of critical importance here. This divergence involves the question of the extent of Congress' repudiation of *Citizen Publishing*'s failing company standard. Originally, the Senate bill defined a "failing newspaper" simply as one "not likely to remain or become financially sound." This [**16] standard was applicable to both existing JOA's and those to be entered in the future. Later, the Senate added the test that the paper be either not "financially sound" or in "probable danger of failure." See S. Rep. No. 535 at 1-2. The House considered this disjunctive definition too loosely drawn for prospective JOA's. Instead, for the purposes of future JOA's, a failing newspaper was defined as one in "probable danger of financial failure." This was the standard that was enacted into law. See [15 U.S.C. § 1802\(5\)](#). The Newspaper Preservation Act, modeled largely on H.R. 279, easily passed both houses in July of 1970.

This brief background of the Act provides a starting point for determining whether the Attorney General acted properly by approving the JOA at issue here. More legislative history will be discussed below, but at this point it is evident that the standard "in probable danger of financial failure" falls somewhere in between the failing company standards of *Citizen Publishing* and the "not likely to remain or become financially sound" definition used in the rejected Senate version of the Act.

C. The Prospective Buyers Issue

The rejected standard of [**17] *Citizen Publishing* contained an element that required the failing company to show no prospective purchasers were available. [394 U.S. at 137, 22 L. Ed. 2d at 155](#). This required not only that the failing company accept and act on offers to purchase, but also that it make affirmative attempts to sell. [394 U.S. at 137, 22 L. Ed. 2d at 156](#). In this context, the district court found the Attorney General had acted improperly for two reasons: first, he incorrectly rejected the ALJ's proposed Finding of Fact 158, which stated in essence that the P-I could in all probability be sold at fair market value to a third party who [*475] would continue to operate it;³ second, the Attorney General failed to construe the Act to require that non-anticompetitive alternatives to a JOA be explored. The facts showed the existence of interested and able purchasers, but Hearst never pursued that course. The Committee, of course, agrees with the district court. The Attorney General and Hearst believe the court erred both on the factual issue regarding the existence of ready, willing and able buyers and on the legal standard utilized. We agree with the district court to the extent it held that alternatives [**18] to a JOA are relevant to the determination that a newspaper qualifies under the Act. We find, however, that Hearst met its burden of showing that the alleged alternatives did not offer a solution to the P-I's difficulties.

We do not find the dispute concerning Finding of Fact 158 crucial to our resolution of the buyer issue. On the one hand, we agree with the Attorney General's argument that the evidence did not require him to [**19] adopt Finding of Fact 158.⁴ While the evidence showed that six individuals or entities inquired into the possible sale of the P-I, it

³ Finding of Fact 158 provides:

Considering that the Post-Intelligencer is not, and has not been for sale, and that all inquiries regarding possible purchase have been rebuffed by The Hearst Corporation with statements to that effect, and that responsible prospective purchasers nevertheless continue to appear and express an interest in buying the Post-Intelligencer, it must be concluded that the Post-Intelligencer could in all probability be sold at fair market value to a person or firm who could, and would, continue it in operation as an independent metropolitan daily.

⁴ We must emphasize that in this situation our review is of the Attorney General's decision, not the ALJ's. [HN8↑](#) When the agency disagrees with the ALJ, deference still runs in favor of the agency; the ALJ's contrary findings will simply be weighed along with the other evidence opposing the agency's decision. See, e.g., [NLRB v. Brooks Cameras, Inc.](#), 691 F.2d 912, 915 (9th Cir. 1982).

did not show that the P-I could in all probability be sold to a buyer who would continue its operation as an independent newspaper. The "inquiries" were just that: they were not offers.⁵ **[**20]** We recognize that Hearst responded to most of these inquiries with the simple statement that the "P-I was not for sale." Hearst's failure to offer the paper for sale and to favorably respond to such inquiries does not, however, compel the conclusion made by the ALJ in Finding of Fact 158.⁶

[*476] Our affirmation of the Attorney General on the Finding of Fact 158 issue does not, as he and Hearst seem to argue, end our analysis. The facts are undisputed that purchase inquiries did occur and that Hearst did not cultivate these inquiries. See Findings of Fact 156 and 157. A close reading of the district court's decision shows that it was premised on these underlying facts and not simply on Finding of Fact 158. While we disagree with the district court's conclusion that an attempt to sell the paper is necessary to prove no reasonable alternatives to the JOA exist, we do agree that reasonable alternatives to a JOA are relevant to our analysis.

The starting point **[**21]** for our analysis must begin with the Congressional intent to repudiate *Citizen Publishing*'s application of the failing company defense. We believe that Congress intended a total rejection of the failing company defense as used in *Citizen Publishing*, including the requirement that the applicant attempt to sell the newspaper. See, e.g., S. Rep. No. 535, *supra, at 4*; H. Rep., *supra*, 1970 U.S. Code Cong. & Ad. News at 3547, 3555; Remarks of Sen. Inouye, 116 Cong. Rec. 1785; Remarks of Sen. Bennett, *Id.* at 1786-1787; Remarks of Rep. Railsback, *Id.* at 23,154. The Federal Trade Commission opposed the Act because, among other reasons, it did not require the "search for an available purchaser." S. Rep. No. 535, *supra, at 10*. Holding that there is no per se sale requirement does not mean, however, that proof of interested purchasers is irrelevant.

The district court agreed that Hearst need not have attempted to sell the paper. But the court held that without such an attempt, Hearst had failed to carry its burden of proving that no reasonable alternatives to the JOA were available. The court's determination that reasonable alternatives must be explored **[**22]** was based on the recommended decision of Administrative Law Judge Donald Moore in a prior application under the Newspaper

⁵ There was evidence of seven purchase inquiries. Apparently, all the inquiries were by individuals or groups who had the potential means to back up any offers they might have made. Briefly, the nature of these inquiries and Hearst's response were as follows:

- (1) In 1975, a Mr. Bailey asked the P-I's Seattle attorney what the asking price of the P-I was. The P-I privately advised Mr. Bailey that the paper was not for sale.
- (2) In 1976, Mr. Eller made a similar inquiry and received a similar response.
- (3) Mr. Cunningham made an inquiry in 1977. He was also told the paper was not for sale.
- (4) In 1978, Mr. Guzzo, on behalf of another party, asked Hearst whether the paper was for sale. Hearst replied it was not.
- (5) In May of 1981, after the proposed JOA was announced, Mr. Cunningham made another inquiry. While Hearst replied it had no present intention of selling, it did state it would carefully consider any responsible bona fide offer. No offer was ever submitted.
- (6) In October of 1981, Rupert Murdoch stated that if the JOA failed to go through, he would like to be considered as a buyer.
- (7) On November 24, 1981, a Mr. Snellman made it known that he was interested in buying the P-I at a price to be set by an appraiser. This inquiry was made on the last day testimony was to be taken at the hearing and after the close of the intervenor's case. The closing date for the hearing was set for November 28. The ALJ allowed the letter indicating Mr. Snellman's interest into evidence but, due to the last minute nature of the offer and time constraints, did not allow Mr. Snellman to testify. Apparently, Hearst never responded to this late inquiry.

Findings of Fact 156 and 157.

⁶ Our review on this point is narrow: Was it proper to reject Finding of Fact 158? We will discuss in more detail below the ramifications of Hearst's failure to hold the paper up for sale and its rebuff of potential buyers. For now, we should note that the requirement of attempting to sell the financially distressed company was one of the *Citizen Publishing* requirements rejected by the Newspaper Preservation Act.

Preservation Act involving the Cincinnati Post. *Recommended Decision of Administrative Law Judge Moore on the Application of the Cincinnati Enquirer and the E.W. Scripps Co.*, Department of Justice Docket No. 43-03-24-4 (1979). ALJ Moore recognized that the significance of evidence of prospective buyers was not clearly set forth in the Act's legislative history. *Recommended Decision of ALJ Moore* at 120. He believed, however, that Congress did intend the "probable danger of financial failure standard" to be interpreted with reference to the Bank Merger Act and the gloss put upon it by the Supreme Court in [United States v. Third National Bank, 390 U.S. 171, 19 L. Ed. 2d 1015, 88 S. Ct. 882 \(1967\)](#). [Id. at 121](#). Judge Moore correctly pointed out that the Senate Report refers to the Bank Merger Act and *Third National Bank* for guidance in interpreting the probable danger of financial failure standard, S. Rep. No. 535, [supra, at 2](#), as did Representative Kastenmeier, the floor leader, during the debates on the House bill, 116 Cong. Rec. 23,146. [**23](#) ⁷ [Id. at 121-122](#). Judge Moore recognized that the actual standards used to judge the permissibility of bank mergers are quite different than the standards for newspaper JOA's. See [12 U.S.C. § 1828\(c\)\(5\)](#). He believed it was reasonable, however, to conclude that Congress intended the Supreme Court's interpretation of the Bank Merger Act in *Third National Bank* to be applicable to newspaper JOA's. [Id. at 122-123](#). We agree.

[**24](#) The Bank Merger Act creates an antitrust exemption for certain bank mergers. The Act utilizes a balancing test, weighing the anticompetitive effects of the proposed [*477](#) merger against the public interest. [12 U.S.C. § 1828\(c\)\(5\)](#). In *Third National Bank*, the Court interpreted this balancing test to require the proponents of the merger to "reliably establish the unavailability of alternative solutions." [390 U.S. at 190, 19 L. Ed. 2d at 1029](#). Where it had been shown that managerial deficiencies were the crux of the bank's financial difficulties, the possibility of a sale or the infusion of new management must be considered. 390 U.S. at 190-191, 19 L. Ed. at 1029-1030.

Based on *Third National Bank*, ALJ Moore fashioned the following test to judge whether a newspaper qualifies as failing under the Act:

Accordingly, an applicant which has not sought or considered a noncompeting buyer must establish that it would be futile to require attempts to sell, either because of an unavailability of qualified purchasers or because it is unlikely that the paper's condition would be materially improved by the infusion of new ownership and new management.

Recommended [**25](#) *Decision of ALJ Moore* at 127.

Both the Attorney General and Hearst argue against Judge Moore's analysis. Specifically, they maintain that the Act utilizes a purely intrinsic economic test; alternatives in general and the presence of interested purchasers in particular are relevant, if at all, only to the extent they establish the newspaper operation is not probably failing. They contend primarily that ALJ Moore's analysis need not be considered because it was not expressly adopted by then Attorney General Civiletti. It is true that the Civiletti decision adopted only those conclusions of law necessary to the determination that the Cincinnati Post was a failing newspaper. Just what portions of Judge Moore's recommendations were necessary to his approval of the JOA is not easily answered. Nonetheless, Judge Moore presents a reasonable construction of the somewhat nebulous statements in the legislative history. While we do not adopt in whole the test he utilized, we nevertheless find that his analysis of the failing newspaper standard provides a sound foundation for our interpretation of the Act. And, as will be discussed below, our interpretation is not much different, if at [**26](#) all, than that proffered by the Attorney General.

As noted earlier in the discussion of the background of the Newspaper Preservation Act, the House modified the proposed Senate definition of a failing newspaper applicable to future JOA's. The probable danger standard was intended to be "far more stringent" than the financially sound standard. Statement of Rep. Kastenmeier, 116 Cong.

⁷ In reference to the amendment which disjunctively added the danger of probable failure standard to the unlikely to remain financially sound definition of a failing paper, the report states: "This phrase is taken from the Bank Merger Act and has been the subject of a Supreme Court opinion in *U.S. v. Third National Bank*."

Rep. Kastenmeier, in response to the objection that the probable danger standard was loosely drawn, stated: "The term . . . is one that has a legislative history. It comes out of the Bank Merger Act. It is understood by the courts in the field, and happens to be a term that is well known."

Rec. 23,146. Representative McCulloch, a cosponsor of the House bill, stated that the antitrust exemption for future JOA's is "carefully circumscribed. . . . [It] should be limited only to those situations where a joint newspaper operating arrangement is demonstrably essential to prevent a newspaper failure. . . ." *Id.* at 23,148. Requiring the Attorney General to consider alternatives to the JOA effectuates the intent of Congress to create a tougher standard. We also find support for that analysis in the statements of the sponsors of the Act who described the factors one should analyze to determine if a newspaper meets the financially sound standard. These statements strongly imply that this standard was to be based solely on economic considerations. See, e.g., Remarks of Sen. Bennett, [\[**27\]](#) *Id.* at 1787; Remarks of Rep. Lloyd, *Id.* at 23,155; S. Rep. No. 535, [supra, at 5](#). Hearst and the Attorney General nonetheless contend that this stricter test is still a purely economic standard; Congress intended only to require an applicant to make a stronger showing of the likelihood of failure. We disagree with that argument only to the extent that it rejects the consideration of economic factors which are arguably extrinsic to the newspaper operation.⁸ We base our disagreement with this [\[*478\]](#) argument not only on the legislative history and our evaluation of the reasonableness of the foregoing analysis, but also on the well-recognized rule that antitrust exemptions must be narrowly construed. [*Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. at 231, 59 L. Ed. 2d at 280 \(1979\).](#)

[\[**28\]](#) The Act should receive a commonsense construction. [HN9](#)[] The probable danger standard is, by the plain meaning of its words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed? The existence of interested buyers may be relevant to this determination. Also, poor management practices such as concerned the Supreme Court in *Third National Bank* may show that, with managerial improvement, the paper's economic problems can be overcome. We noted earlier in this discussion that the Attorney General and Hearst conceded that interested purchasers *may* be relevant to the determination a newspaper is failing. In particular, the Attorney General does not argue strongly against either ALJ Moore's or the district court's analysis. Significantly, the Attorney General's order approving the JOA application stated that "evidence of purchaser offers or negotiations may be pertinent in assessing the financial conditions and prospects of the allegedly failing newspaper." Attorney General's Order No. 979-82 at 11. The pertinence of interested purchasers, as the Attorney General apparently concedes, may require a JOA applicant to prove that [\[**29\]](#) the "new ownership and management could not convert the [paper] into a profitable enterprise without resort to a joint operating arrangement." *Recommended Decision of ALJ Moore* at 127; see [*Third National Bank*, 390 U.S. at 189, 19 L. Ed. 2d at 1029](#). This interpretation of the Act is not burdensome. Its primary effect is to prevent newspapers from allowing or encouraging financial difficulties in the hope of reaping long-term financial gains through a JOA. A JOA applicant should not be allowed to engage in poor business practices or maintain inept personnel in anticipation that it may later qualify for an antitrust exemption in the future. See S. Rep. No. 535, [supra, at 5](#); Remarks of Sen. Bennett, 116 Cong. Rec. 1788. In this respect, "alternatives" to a JOA are relevant to both the causes of a newspaper's financial decline and its future prospects.

Our discussion is in substantial agreement with the district court's opinion. We do not agree, however, that the facts are insufficient to support the Attorney General's order. The critical question is whether it was shown that the P-I's financial condition was such that new management might be successful in reversing [\[**30\]](#) the P-I's difficulties. There is sufficient evidence in the record supporting a negative answer.

ALJ Hanscom made detailed findings on the condition of the P-I and the Seattle newspaper market. He found the P-I had lost over \$14,000,000 since 1969, Finding of Fact 59, and that the P-I was in a "downward spiral," see Finding of Fact 130. The ALJ also rejected the argument that Hearst had mismanaged the P-I. Instead, he found the P-I management had acted competently and reasonably in an effort to return the newspaper to profitability. Finding of Fact 94. Judge Hanscom also explored numerous positive prospects and possible remedial measures

⁸There are few, if any, things that affect a business's success which can truly be characterized as noneconomic. A good example is the political viewpoint of a publisher. That viewpoint certainly shows up in the editorial policies of a newspaper. Those policies in turn may either attract or reduce readership. We do not wish to imply that a newspaper must explore the alternative of changing its editorial policies prior to entering a JOA. The Attorney General and Hearst tend to argue that any factors extrinsic to the newspaper operation are "noneconomic." That, however, is a shortsighted view, and we reject it so far as it leads to the conclusion that proof of interested purchasers is "noneconomic" and therefore irrelevant under the Act.

proposed by the intervenors in their effort to show the P-I can be returned to profitability. He rejected them as being "ungrounded in reality." Finding of Fact 146; see also Findings of Fact 137-155. Based on these findings, we believe there is ample support in the record for the Attorney General's adoption of Finding of Fact 109, which stated:

[*479] Although some of the witnesses in this proceeding were critical of the handling of the Post-Intelligencer, the evidence does not establish that new management would be **[**31]** any more successful than Hearst and current management of the Post-Intelligencer in returning it to profitability.

Despite Finding of Fact 109, the district court held that Hearst had not sustained its burden of proving new management could not succeed in turning the P-I around, apparently because Hearst did not respond favorably to purchase inquiries. In light of the existence of substantial evidence in support of Finding of Fact 109, this was in error. In the absence of a showing that there is a likelihood new management would succeed, Hearst's failure to consider purchase inquiries lost importance. We therefore reverse the district court's holding.

Also, the district court misperceives the proper scope of the burden of proof under the Act. It is true that [HN10](#) the ultimate burden of persuasion lies with the proponents of the JOA. [28 C.F.R. § 48.10\(4\) \(1982\)](#). Generally, however, that burden only entails a showing of (1) the economic fact of probable failure (downward spiral, irreversible losses), and (2) reasonable management practices. In an adversarial situation such as here, parties opposed to the JOA may rebut this evidence by showing the paper's losses did not **[**32]** in fact exist or were due to unreasonable management practices.⁹ **[**33]** The opponents also might offer, as they did here, proof of parties interested in purchasing the newspaper. This evidence might show the paper is not actually in probable danger of failure because reasonable changes can return the paper to profitability.¹⁰ When the proponents of the JOA established, as they did here, that the paper was managed reasonably and its trend toward failure is irreversible *under any management*, we have no difficulty concluding that the burden of proof has been met. Cf. [Third National Bank, 390 U.S. at 189, 19 L. Ed. 2d at 1029](#) (where proof adduced at trial showed "failing" bank's problems were due to mismanagement, bank had burden of showing reasonable attempts to solve management difficulties were made, or that they would be unlikely to succeed).

[34] D. Proof of Probable Closure**

⁹ We note that the Antitrust Division will always be a party when a hearing is held. Other interested parties may intervene. [28 C.F.R. § 48.10\(b\)](#). Also important is the requirement that the applicants for a JOA must provide substantial financial documentation concerning their newspapers to the Attorney General. [28 C.F.R. § 48.4](#). This information is generally open to public view and could be used to rebut an applicant's evidence. In fact, the intervenors did rely on that information in attacking the proposed JOA. Also, interested buyers could have used this information to come up with a reasonable plan to return the paper to profitability.

¹⁰ The Committee argues that because parties are interested in purchasing the P-I, it cannot actually be failing. Various bits of legislative history are cited in support of this contention. We disagree, however, with this argument which, in effect, states that a newspaper that meets the definition of failing under the Act cannot be sold. The statements of various congressmen more closely relate to the belief that once a newspaper reaches the point of financial difficulty required by *Citizen Publishing*, the paper may very well have little value as an acquisition or as a party in a proposed JOA; it may very well be more advantageous for the dominant paper to let the ailing paper die and enjoy the benefits of a natural monopoly rather than entering a joint agreement. See, e.g., House of Representatives Hearings before the Antitrust Subcommittee on H.R. 279, 91st Cong., 1st Sess. 12 (1969); S. Rep. No. 535, [supra, at 4](#); Remarks of Sen. Inouye, 116 Cong. Rec. 1786, Remarks of Rep. Annunzio, *Id.* at 23,168; cf. Remarks of Rep. Feighan, *Id.* at 23,156 (objects to the Act for the reason it will allow a paper to be considered failing even though it could be sold).

Also, on December 15, 1982, the Committee requested this court to take judicial notice of the sale of a Hearst newspaper, the Boston Herald-American, allegedly in "probable danger of failure," to the News America Publishing Company. We deny this request. Based on our interpretation of the Act, this sale is not relevant to the determination that the Post-Intelligencer is in probable danger of financial failure.

As an alternative ground for overturning the approval of the Post-Intelligencer/Times [***480**] joint operating agreement, the Committee contends that the Attorney General failed to interpret the Act to require proof the P-I would be closed if the JOA application were disapproved. The district court held for defendants on this issue. It found it sufficient the Attorney General concluded that, but for the ownership of Hearst, the P-I would probably be closed. We agree.

For purposes of this issue, we accept the Committee's assertion that Hearst never considered closing the P-I, even should the joint operating agreement not be allowed. Our focus, however, is on other language in the failing newspaper definition not yet discussed. **HN11** A newspaper is defined as failing if it is in probable danger of financial failure "regardless of its ownership or affiliations." **15 U.S.C. § 1802(5)**. This language supports the ALJ's and the Attorney General's conclusion that the financial strength of Hearst need not be considered in determining whether the P-I is failing. We therefore agree with the district court's resolution of this issue: substantial evidence [****35**] establishes that the P-I is in dire financial trouble and, without the backing of Hearst, it would probably close.

We do not dispute the Committee's assertions that a primary intent of the Newspaper Preservation Act was to promote the diversity of editorial voices among newspapers. Congress was of the opinion that unique economic forces operate in the newspaper industry, forces which caused the decline and closure of numerous newspapers since the turn of the century. S. Rep. No. 535, *supra at 2-3*; H.Rep. No. 1193, *supra*, at 3548-3549. In order to maintain editorial diversity, it is beyond question that the purpose of the Act is to prevent the *closure* of the ailing newspaper. See, e.g., Remarks of Sen. Goldwater, 116 Cong. Rec. 1795; Remarks of Sen. Ellender, *Id.* at 1785; Remarks of Sen. Inouye, *Id.* at 1786; Remarks of Rep. Matsunaga, *Id.* at 23,153; Remarks of Rep. McCulloch, *Id.* at 23,148. We note, however, that Congress was just as concerned with the loss of an independent editorial voice through a merger, as with an actual closure of a newspaper. Remarks of Rep. Matsunaga, *supra*.

We do not accept Hearst's argument that requiring proof [****36**] of probable closure is the same as requiring the paper be on the brink of collapse, an element of the "failing company" defense which was clearly repudiated by the Newspaper Preservation Act. We adhere to our belief that Congress intended the phrase "probable danger of failure" to mean a probability that the paper would be closed and an editorial voice lost. We do not agree, however, with the Committee's assertion that proof of probable closure is a per se rule applicable to all JOA applications. Our conclusion that Congress intended that there be a showing the newspaper will likely close must be interpreted in light of the language that a newspaper's failing status should be determined without regard to its ownership or affiliations.

We believe the intent of the "regardless of ownership" language is quite clear. It means simply that the ailing newspaper should be analyzed as a free-standing entity, as if it were not owned by a corporate parent. The legislative history does not contradict the plain meaning of this language. The Senate Report concisely describes the purpose of this language:

The phrase "regardless of its ownership or affiliations" was included to focus [****37**] the attention of the court on the business entity before it rather than the related business enterprises. Whether a newspaper is failing should be determined on the basis of the operation in the particular city rather than on the basis of the sweep of the newspaper owner's business interests. However, the phrase shall not preclude court examination of transactions between the newspaper seeking exemption and related companies which supply goods and services or which are customers. If such examination were precluded, it would make it possible to create [a] "failing newspaper" by artificial bookkeeping entries and that is not intended.

[***481**] S. Rep. No. 535, *supra, at 5*. Similarly, Senator Hruska stated the purpose of this language was to insure that judicial interpretation on the question whether a paper is failing be "based upon the financial operations of that paper, and not upon the presence or absence of financial support from other newspaper business activities in other cities or from other financial activities of the owners of the failing newspaper." 116 Cong. Rec. 2006; see also Remarks of Reps. Eckhardt and Kastenmeier, *Id.* at 23,147; cf. [****38**] Letter from Paul Rand Dixon to Sen. James Eastland (July 25, 1969), *attached to* S. Rep. No. 535, *supra, at 9-11* (Mr. Dixon, then the Chairman of the Federal Trade Commission, objected to the passage of the Act because, among other reasons, "every failing newspaper

may enter a joint operating arrangement without reference to the identity or financial resources of its owner or owners.")

We find that the above-quoted portion of the Senate Report sums up the importance of the phrase "regardless of ownership or affiliations" quite well: [HN12](#)¹¹ generally, ownership is not to be a factor in considering whether a newspaper is failing; an exception to the general rule is that ownership may be analyzed to ensure the owner has not created a failing company through creative bookkeeping. The Committee apparently does not dispute that the P-I as a separate entity is in financial trouble. It instead asserts that, based on an "incremental analysis," Hearst is receiving net benefits from the P-I's financial problems for tax and other reasons. As the Attorney General held, these arguable benefits to Hearst do not counter that the P-I, as a separate entity, is in severe financial trouble and would [**39](#) likely close if not owned by Hearst. We affirm the district court on this issue.

E. Harm to Competing Newspapers

The Committee also argues that the order approving the JOA must be overturned because the Attorney General did not consider the potential injury to other newspapers in the market and did not limit the terms of the JOA to the least anticompetitive approach possible. The argument is that these conditions are implied in the requirement that the Attorney General find that the JOA "effectuate[s] the policy and purpose of the Act." The district court held against the Committee on this issue. For the following reasons, we affirm.

The policy of the Act is stated in its first section. That policy is to maintain editorial and reportorial independence among newspapers through the preservation of newspaper publication in areas "where a joint operating agreement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter." [15 U.S.C. § 1801](#). This declaration and the legislative history compel the conclusion that the Act itself is a policy determination that the preservation of editorial diversity [**40](#) through joint operating agreements outweighs any potentially anticompetitive effects this antitrust exemption might cause. Congress struck the balance in favor of the Act notwithstanding opposition that decried the potential harm to smaller, usually suburban newspapers competing in the market area. As stated in the House Report: "Although commercial competition may have been affected to some extent by these arrangements, they have achieved the more important objective of preserving separate editorial voices." H. Rep. No. 1193, *supra*, at 3549. Representatives MacGregor and Mikva objected to the Act because "it will preserve certain newspapers but will stifle competition in ideas by crippling the growth of competing dailies." *Id.* at 3558; see also Remarks of Rep. MacGregor, 116 Cong. Rec. 23,149-50; Remarks of Sen. McIntyre, *Id.* at 1815-1817.

The Act itself contains an important safeguard which prevents the parties to a JOA from engaging in any conduct which would violate the antitrust laws if done by a single entity. [15 U.S.C. § 1803\(c\)](#). As explained in the Senate Report, this section is designed "to protect the competitive position of newspapers which share the [**41](#) market with a joint operating arrangement." S. Rep. [\[*482\]](#) No. 535, *supra, at 5*. It can easily be garnered from this and the other language cited above that Congress considered the question of harm to other newspapers and resolved it in favor of the antitrust exemption.¹¹

¹¹ The Committee's only support for its position is a statement by Senator Dirksen during the Senate hearings. Senator Dirksen's amendment added the requirement of Attorney General approval for prospective JOA's. He explained: "In this way, the interest of the suburban papers and the unions will be considered by the Justice Department before any new arrangements are authorized." Senate Hearings before the Antitrust and Monopoly Subcommittee on S. 1520, 91st Cong., 1st Sess. 5 (1969). Senator Dirksen later explained his intent in proposing this amendment: "Before authorizing such arrangements in the future, the Department could hear from other interested parties -- competing papers, unions, etc. -- as well as make its own investigation, in order to be certain the new arrangement is essential and justified." *Id. at 9*. Although Senator Dirksen's statements do not refer to the requirement that the JOA "effectuate the policy and purpose of the Act," it is evident he intended primarily to allow interested parties a chance to voice their views. The regulations adopted by the Attorney General permit this and that is what in fact happened in the proceedings below.

[**42] We reject the argument that the terms of the proposed JOA do not effectuate the policy and purpose of the Act.¹² Title [15 U.S.C. § 1802\(2\)](#) discloses the proper subjects of a newspaper joint operating agreement. Joint action with respect to the following is allowed: sharing printing and production facilities; joint business, advertising and circulation departments; the setting of circulation and advertising rates; and revenue distribution. The express limit on this joint activity is that editorial and reportorial functions must remain separate and independent. The Attorney General found and the Committee does not seriously dispute that the proposed JOA meets these restrictions. It is evident that Congress determined what it considered to be the permissible scope of a newspaper JOA. Again, opponents of the Act argued against it because they felt it was an unnecessary and broad exemption from the antitrust laws. See S. Rep. No. 535, [supra, at 7](#) and 10 for the FTC's objections that the Act placed no time limits on potential JOA's. Representatives MacGregor and Mikva voiced a similar objection. H. Rep. No. 1193, [supra, at 3557](#).

[**43] We conclude that the district court correctly rejected the Committee's claims on this issue. Congress recognized that the approval of a JOA may have anticompetitive ramifications. This was a national policy choice Congress was free to make. It believed those possibly harmful effects were outweighed by other considerations and sufficiently alleviated by the requirements of the Act. The JOA is not inconsistent with the Act.

F. [First Amendment](#) Issues

The Committee also argues the Newspaper Preservation Act as a whole is invalid by virtue of the [first amendment](#). The challenge is two-pronged: first, that the Act is invalid as applied because approval of the JOA would impair the [first amendment](#) rights of smaller newspapers in the market; second, that the Act is invalid on its face as an overbroad and vague delegation of power in an area affecting [first amendment](#) rights. Although these arguments are imaginative, they lack substantial merit.

The district court rejected the claim that the Act is unconstitutional as applied, basing its decision largely on two district court decisions dealing with the same argument. [Bay Guardian v. Chronicle Publishing Co., 344 F. Supp. 1155 \(N.D. Cal. 1972\)](#); [City and County of Honolulu v. Hawaii Newspaper Agency, Inc., 7 Media L. Rep. \(BNA\) 2495 \(D. Hawaii 1981\)](#). We agree with the district court's rejection of the Committee's assertion that these cases are distinguishable because the plaintiffs there were challenging preexisting joint operating agreements. In either situation, the courts are faced with the claim that this antitrust [*483] exemption may cause economic injury to smaller newspapers, which might lessen circulation, which in turn affects the "breadth" of one's freedom of press.

It is obvious that the Newspaper Preservation Act's antitrust exemption will not affect the *content* of speech of these smaller newspapers. The Act is an economic regulation which has the intent of promoting and aiding the press. At most, the Act *may* affect the number of "readers" a newspaper has. But that the Act may have such an effect is no different, in our view, than any other economic regulation of the newspaper industry. [Associated Press v. NLRB, 301 U.S. 103, 132-133, 81 L. Ed. 392 \(1937\)](#); [Mabee v. White Plains Publishing Co., 327 U.S. 178, 184, 90 L. Ed. 607, 613, 66 S. Ct. 511 \(1946\)](#); [**45] [Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 193-194, 90 L. Ed. 614, 620-621, 66 S. Ct. 494 \(1946\)](#).

[Grosjean v. American Press Co., 297 U.S. 233, 80 L. Ed. 660, 56 S. Ct. 444 \(1935\)](#), is cited by the Committee in support of its [first amendment](#) argument. In *Grosjean*, the Supreme Court struck down a statute which imposed a special tax on newspapers having a circulation of over 20,000 copies. The court overturned the statute not because it had an economic impact on newspapers but because it was designed to stifle opposition to the Louisiana political machine. Simply put, this facially neutral statute was intended to regulate the content of speech. Nor is [Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 \(1945\)](#), on point. There the Court held only that the [first amendment](#) does not insulate news-gathering organizations from the antitrust laws.

¹² The Committee's primary objection is that the agreement is too long (50 years) and that it will not cease to exist even if the P-I becomes profitable in the future.

Whether or not the Newspaper Preservation Act's limited antitrust exemption should be considered a license, as the Committee argues, we do not find *first amendment* rights implicated. While we recognize the importance of the antitrust laws in our economic system, one cannot lose sight that **[**46]** these laws are the creation of Congress. They are not mandated by the *first amendment* or anywhere else in the Constitution. What Congress has passed, it may repeal. Apparently, the Committee's actual dissatisfaction with the Act is based on its belief that certain newspapers are treated differently, i.e., preferentially. But there is no question that other newspapers in the Seattle area, large or small, may participate in a joint operating agreement if they qualify.

Finally, we see no "vague and overbroad" delegation of power to the Attorney General. First of all, as discussed above, we fail to see any clearly defined *first amendment* injury. Secondly, our interpretation of the Act rejects the argument that it is overly vague. The Attorney General must base his approval of a proposed JOA on the requirements in the Act as we have interpreted them in this opinion. Nothing more definite is required. See, e.g., [*Arnett v. Kennedy*, 416 U.S. 134, 159, 40 L. Ed. 2d 15, 36, 94 S. Ct. 1633 \(1974\)](#).

III. CONCLUSION

We agree with the district court to the extent it held that the alternatives to a joint operating agreement, including sale to a capable noncompeting buyer, are relevant **[**47]** to the determination that a newspaper qualifies for an antitrust exemption under the Newspaper Preservation Act. It is evident, however, that the Times Company and Hearst sufficiently negated the possibility that any such alternatives were available in this case. We reverse the district court for that reason.

The other arguments in support of overturning the Attorney General's approval of the Post-Intelligencer's joint operating agreement are better placed before Congress. The Newspaper Preservation Act was not intended to create antitrust immunities for any newspapers which simply allege they are having difficulties. However, neither does it contain an array of implied conditions which in effect would reinstate the *Citizen Publishing* standards. Simply put, we will not emasculate the Act in the guise of narrowly construing it. We therefore affirm the district court on the issues raised by the Committee's cross-appeal.

[*484] Costs are awarded to appellants.

The decision of the district court is

AFFIRMED IN PART and REVERSED IN PART.

End of Document



Interface Group, Inc. v. Gordon Publications, Inc.

United States District Court for the District of Massachusetts

April 25, 1983

Civil Action No. 83-92-G

Reporter

562 F. Supp. 1235 *; 1983 U.S. Dist. LEXIS 17456 **; 1983-1 Trade Cas. (CCH) P65,466

THE INTERFACE GROUP, INC., Plaintiff, v. GORDON PUBLICATIONS, INC., Defendant

Core Terms

advertising, distributed, Dealer, trade show, trade publication, attend, exhibitors, space, booth, exhibition, exposition, monopoly power, antitrust, prevail, Sherman Act, injunction, products, rates, monopolize, rental, relevant market, newspapers, attendees, hotels, preliminary injunction, sufficient showing, magazines, contends, monopoly, violates

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN1 [down arrow] Injunctions, Preliminary & Temporary Injunctions

In order for a party to obtain a preliminary injunction, the court must find that the party has satisfied four criteria: (1) that the party will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the opposing party; (3) that the party has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction.

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

HN2 [down arrow] Monopolies & Monopolization, Actual Monopolization

The purpose of the prohibitions of [15 U.S.C.S. § 2](#) of the Sherman Act is to go beyond [15 U.S.C.S. § 1](#)'s proscription of contracts, combinations, or conspiracies in restraint of trade, which applies to conduct by two or more actors, in order to proscribe conduct by a single economic entity which may stifle competition. The first step in

a court's analysis of a claim of monopolization or an attempt to monopolize must be an examination of the relevant market to determine if the alleged monopolizer's conduct is likely to affect competition adversely.

[Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[HN3](#) [] Regulated Practices, Market Definition

A relevant market is defined as the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview](#)

[Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview](#)

[HN4](#) [] Antitrust & Trade Law, Sherman Act

As a general rule, a company has the unfettered right to deal with whom it pleases and to refuse to deal with whom it pleases, so long as the determination is made unilaterally. Courts must not yield to the long resisted temptation to create a federal common law of unfair competition. The purpose of the Sherman Act is not to maintain friendly business relations among firms in the same industry nor was it designed to keep these firms happy and gleeful. In some circumstances, however, a monopolist who controls a facility, access to which is essential for a competitor to enter a market, may be under a duty to make the facility accessible. When an essential facility exists, the firm that controls the facility can block access to the market by excluding competitors.

[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 > Clayton Act > Scope](#)

[Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview](#)

[Antitrust & Trade Law > Federal Trade Commission Act > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Governments > Legislation > Interpretation](#)

[HN5](#) [] Public Enforcement, US Federal Trade Commission Actions

The Massachusetts unfair competition act is to be construed consistently with the interpretations given by federal courts and the Federal Trade Commission in construing § 5(a)(1) of the Federal Trade Commission Act (Act). [Mass. Gen. Laws ch. 93A, § 2\(b\)](#). The Act is somewhat broader than the Sherman Act and the Act prohibits incipient

violations of the Sherman Act and the Clayton Act as well as some practices which violate neither the letter nor the spirit of the antitrust laws. However, to violate the Act or the Massachusetts statute, a practice must be unfair, immoral, oppressive, unethical, unscrupulous, or cause substantial injury to consumers or competitors.

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

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

HN6 Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Refusals to sell, without more, do not violate the law. It is the right of one engaged in private business to refuse to deal, or discontinue dealing, with anyone, for any reason, unless the dealer combines with others in a concerted effort to hinder free trade.

Counsel: **[**1]** Earle C. Cooley, Esq., Hale & Dorr, Boston, Massachusetts, for Plaintiff.

R. Robert Popeo, Esq., Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Boston, Massachusetts, for Defendant.

Judges: Skinner, J.

Opinion by: SKINNER

Opinion

[*1236] MEMORANDUM AND ORDER DENYING DEFENDANT'S MOTION FOR PRELIMINARY INJUNCTION

SKINNER, J.

The plaintiff, The Interface Group, Inc. (Interface), is a Massachusetts corporation which is in the business of producing computer and communications conferences, trade shows, and expositions in the United States and abroad. Plaintiff brought this suit for preliminary injunctive relief and a declaratory judgment under [28 U.S.C. §§ 2201](#) and [2202](#). The defendant, Gordon Publications, Inc. (Gordon), is the publisher of some 15 specialty trade magazines, three of which, *Computer Dealer*, *Computer Products*, and *Software Retailing*, are specifically directed to the computer trade. The plaintiff wants to keep the defendant from selling or distributing a "show daily" from the exhibition floor of any of plaintiff's shows unless the defendant and the plaintiff enter into a contract which authorizes the defendant to do so. The defendant filed an answer and a counterclaim, **[**2]** alleging that the defendant has a contract right to distribute defendant's show daily at plaintiff's exhibitions and alleging that plaintiff's efforts to exclude the defendant constitute violations of the United States antitrust laws and the Massachusetts law proscribing unfair methods of competition.

For the past few weeks, the parties have been engaged in a process of expedited discovery so this court would have the opportunity to rule on a motion for a preliminary injunction before the plaintiff's upcoming trade show, Comdex/Spring '83, which will be held at the Georgia World Congress Center in Atlanta, Georgia, April 26-29, 1983. At this point in the proceedings, the court has before it defendant's **[*1237]** motion for a preliminary injunction. Both parties have submitted extensive filings in support of their respective positions and the court heard oral argument on April 20, 1983.

The Comdex shows, or Computer Dealer Exhibition shows, are a series of computer trade shows sponsored by Interface at which most of the exhibitors are manufacturers or other suppliers of computers or computer-related products. These exhibitors will be there to sell to the show attendees. The **[**3]** attendees or buyers are not individual consumers buying personal home computers, but rather are resellers, which include independent sales

organizations such as dealers, distributors, systems houses, computer retailers, turnkey vendors, value adders, mass merchandisers, and others. Interface sponsored the first Comdex show late in 1979 and now sponsors three Comdex shows each year. Two are held in the United States and one is held in Europe. The largest show is Comdex/Fall, which this year was held in Las Vegas, Nevada. The next largest show is Comdex/Spring, which is held annually in a city in the eastern United States. The first Comdex/Europe was held last year in Amsterdam, The Netherlands, and Comdex/Europe '83 is also scheduled to be held in Amsterdam.

In addition to the exhibitors who purchase booth space so they can sell computers and computer products, some of the purchasers of Comdex booths are publishers of computer trade magazines. The defendant, Gordon Publications, Inc., is in the business of publishing business and technical trade journals for several technical fields, such as biology, metallurgy, and, of course, computers. Gordon has participated as an exhibitor [**4] at every single one of Interface's Comdex shows since Interface started producing the Comdex series in 1979. At the shows, Gordon distributes its three computer journals: *Computer Dealer*, *Computer Products*, and *Software Retailing*. In addition, ever since the second Comdex show, Comdex/Spring '80, Gordon has published and distributed a "show daily" as part of its Comdex exhibit.

A "show daily" resembles a program for a trade show. It contains information about the exposition, the exhibitors, and the happenings at the show and in the industry. It is also filled with advertising. Show dailies contain advertising both from the exhibitors concerning their company and their wares and from area hotels and other merchants concerning services in the city where the exposition is held. In the computer trade show industry, show dailies, including Gordon's, are distributed free of charge to the people who attend the shows, and the advertising revenue covers the costs of writing, printing, and distributing the publication. Gordon's show dailies are tabloid newspapers which contain articles about trade developments, product announcements, and information about the show. In addition, [**5] Gordon's show daily is filled with advertising, mostly by exhibitors in the show. The advertisements stay the same throughout the show, but the articles are changed slightly so a different edition of the show daily is distributed each day of the show. The show dailies distributed by Gordon in Las Vegas were 168 pages in length. Almost every page contained advertising and approximately 100 pages contained only advertising. Gordon sold all of that advertising space and distributed thousands of free copies.

Gordon uses its show daily as an inducement to the industry to advertise in its principal computer trade publication, *Computer Dealer*, by offering reduced rates in the show daily to advertisers in *Computer Dealer*. Gordon sets its show daily advertising rates below the prevailing market rate for other computer trade publications, including other show dailies in the computer trade.

From Comdex/Spring '80 through and including Comdex/Spring '82, Interface allowed and even encouraged Gordon to publish and distribute its show daily. Interface, as the management of these trade shows, supplied much of the information about the show and the exhibitors which became the editorial [**6] and news content of Gordon's show dailies.

[*1238] Over the years, the Comdex shows grew. From 157 exhibitors and 2100 attendees at Comdex/Fall '79, the show has grown to 1106 exhibitors and 30,500 attendees at Comdex/Fall '82. Over the same period, advertising in Gordon's show dailies has grown. From Spring, 1980 through Spring, 1982 Gordon was the only firm distributing a show daily at Comdex shows and, as a result, as the show audience grew and Gordon's distribution and circulation grew with it, advertisers became more interested in advertising in Gordon's show daily, a publication that would be distributed to all who attended. For example, Gordon grossed \$ 105,000 in advertising revenue for its show dailies which were distributed at Comdex/Fall '82 in Las Vegas.

During 1982 a dispute developed between the parties, resulting in this litigation. It was the view of Sheldon Adelson, President of Interface, that because Gordon was distributing its show daily on premises leased by Interface to an audience assembled through Interface's efforts, Interface was entitled to a share of the show daily revenue. Interface told Gordon that Interface would not agree to allow Gordon [**7] to distribute its show dailies at future Comdex shows unless Gordon agreed to pay Interface 25 to 30% of the gross show daily advertising revenue. Gordon refused.

On October 15, 1982 Interface returned Gordon's application and deposit for an exhibit booth at the Comdex/Europe '82 show in Amsterdam, which was held November 8-11, 1982. In November, 1982 Interface rejected Gordon's applications for exhibit space at the Comdex/Fall '82 and Comdex/Spring '83 expositions. The Comdex/Europe '82 and Comdex/Fall '82 shows were held and Gordon attempted, with varying degrees of success, to distribute its show daily at these shows, despite Interface's refusal to license such distribution or to sell Gordon exhibit space. There were court cases in Amsterdam and Las Vegas concerning distribution of Gordon's show dailies at these shows. Gordon alleges that in addition to seeking to keep Gordon from distributing its show dailies in the Comdex exhibition halls, Interface interfered with Gordon's distribution of show dailies from hotels in Amsterdam and Las Vegas.

Interface has refused to accept Gordon's application for an exhibit booth at Comdex/Spring '83 in Atlanta, so Gordon will not be allowed [**8] to distribute its show daily or its three computer magazines from the exhibition floor in Atlanta if an injunction does not issue. Whether or not Gordon is allowed to distribute show dailies from the exhibition floor, Gordon has arranged to distribute its show dailies from hotels and other areas in Atlanta where Gordon might reach those attending the exposition without entering premises leased by Interface to do so.

In addition, Interface has decided to enter the market and will be publishing and distributing its own show daily at the Comdex/Spring '83 exposition. All of the advertising for both plaintiff's and defendant's show dailies has already been solicited, and both parties are ready to go to print with their respective publications.

Gordon seeks a preliminary injunction preventing interference from keeping Gordon's show daily off the exhibition floor. [HN1](#)[] In order for Gordon to prevail, the court must find that Gordon has satisfied four criteria:

- (1) that [Gordon] will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on [Interface]; (3) that [Gordon] has exhibited a [**9] likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction.

[Auburn News Co., Inc. v. Providence Journal Co.](#), 659 F.2d 273, 277 (1st Cir. 1981), cert. denied, 455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982) (citation omitted). See also Section 16 of the Clayton Act, [15 U.S.C. § 26](#).

I turn first to assess the likelihood of success of Gordon's contract and antitrust claims. The evidence shows that companies wishing to participate in an Interface exposition must complete an application form for that exposition. The application form [*1239] states that no contract for exhibit space exists until Interface accepts the application in writing. Interface literature explains the AO Procedure, a first-come, first-served, priority system. AO stands for assignment order and the AO procedure provides that exhibit booth space at Comdex shows will be assigned on the basis of how many prior shows the exhibitor has attended.

For example, under the AO procedure, the first exhibitor at the first Comdex show would be given AO priority number 1 (one). As long as he paid his exhibit rental [**10] fee on time, kept his contractual commitments, and did not miss two consecutive shows, he would keep AO priority number 1 (one). Exhibitors are allowed to select which exhibit booths they want to occupy at each show on the basis of their respective AO priority numbers. The holder of AO priority number 1 (one) gets his first choice concerning which exhibit booth he wants. Gordon contends that its prior contracts, course of dealing, and the AO procedure have given Gordon an option or a contract right to participate in all future Comdex shows. Interface contends that the AO procedure simply establishes what an exhibitor's selection priority will be if Interface agrees to enter into a contract renting an exhibition booth to that exhibitor. In my view, Gordon is not likely to succeed on the merits of this contract claim.

Gordon further contends that by refusing to sell Gordon an exhibit booth, Interface is violating [Sections 1 and 2](#) of the Sherman Act, [15 U.S.C. §§ 1 and 2](#).

Gordon's [Section 1](#) claim is that Interface contacted hotels in Las Vegas and Amsterdam to convince them to prohibit Gordon from distributing show dailies from their hotels and these communications coupled [**11] with concerted action establish a concerted refusal to deal. See [Klor's Inc. v. Broadway-Hale Stores, Inc.](#), 359 U.S. 207,

[70 S. Ct. 705, 3 L. Ed. 2d 741 \(1966\)](#); [Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 \(1941\)](#). However, Gordon has not produced any evidence that this conduct, even if it took place as alleged, is likely to continue at future Comdex expositions. Rather, all evidence is to the contrary. Interface has acknowledged that Interface has no right to interfere with Gordon's distribution of its show dailies at hotels and all other areas which have not been leased by Interface. Therefore, since Gordon will be entitled to treble damages, costs and a reasonable attorneys' fee if it proves at trial that Interface engaged in such conduct and that conduct was a violation of Sherman Act [§ 1](#) and caused Gordon damages, because there is no immediate danger of irreparable loss or damage, Gordon's [Section 1](#) allegations do not merit preliminary injunctive relief. See Clayton Act §§ 4 and 16, [15 U.S.C. §§ 15, 26](#).

Gordon also contends that Interface's unilateral refusal to sell exhibition space to Gordon violates [Section 2](#) of [\[**12\]](#) the Sherman Act. Gordon has outlined four separate theories under which it believes that Interface's conduct violates the [Section 2](#) proscriptions against monopolization and attempts to monopolize. Interface's conduct is challenged as: (1) an attempt to monopolize, (2) an unlawful exclusion of Gordon from an essential facility, (3) use or leverage of monopoly power in one market to foreclose competition in another market, and (4) an effort by Interface to extend or abuse its monopoly power.

HN2 [↑] The purpose of the prohibitions of [Section 2](#) of the Sherman Act is to go beyond [Section 1](#)'s proscription of contracts, combinations, or conspiracies in restraint of trade, which applies to conduct by two or more actors, in order to proscribe conduct by a single economic entity which may stifle competition. See [Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 \(2d Cir. 1979\)](#), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980). The first step in this court's analysis of a claim of monopolization or an attempt to monopolize must be an examination of the relevant market to determine if Interface's conduct is likely to affect competition adversely. See, e.g., [\[**13\] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391-393, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#); [\[*1240\] Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d 274, 278-281 \(1st Cir. 1982\)](#).

The Court of Appeals [HN3](#) [↑] defines a relevant market as "the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market." [Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d at 280](#), quoting L. Sullivan, Handbook of the Law of Antitrust 41 (1977). Applying that standard and the Supreme Court's "reasonable interchangeability" formulation to this case, see [United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#), it appears that the relevant product market is not show dailies at Comdex shows as Gordon suggests, but rather is advertising in computer trade publications which have a substantial circulation to independent sales organizations (ISO's), original equipment manufacturers (OEM's) and other firms which are in the market for the products hawked at Comdex shows.

It is important [\[**14\]](#) that show dailies are not sold to the people who attend trade shows. The attendees are not the buyers and the show dailies are not the product. Rather, the product in this case is advertising space in a computer publication which will be distributed to the people who attend Interface's Comdex expositions. The critical question is whether the advertisers who buy space in the show dailies believe that advertising by other means is not a reasonable substitute for advertising in a show daily. Compare the *Home Placement* case, for example, wherein the Court of Appeals explained that weekly newspapers were not an adequate substitute for daily newspapers when the product being advertised was rental property, and therefore daily newspaper rental advertising was the relevant market. Rental properties went on and off the market daily and renters needed an up-to-date listing of what properties were available in this volatile market. Therefore, firms and individuals who advertised rental property did not perceive daily and weekly newspapers as "reasonably interchangeable." [Home Placement Service v. Providence Journal Co., 682 F.2d at 280](#). In this case, however, the evidence suggests [\[**15\]](#) that the relevant product market is broader.

There is significant evidence that show dailies are included in this broader computer dealer trade publication advertising market and do not constitute a relevant submarket. First, Interface's show daily editor set the advertising rates for Interface's show daily by reference to the rates charged by other computer trade publications.

This demonstrates his perception that his rates had to be competitive with the rates for advertising in other trade publications; otherwise, the advertisers would not purchase ads in his publication. Second, the same advertisers who advertised in Gordon's computer trade publications, such as *Computer Dealer*, also advertised in Gordon's show daily. Both show daily ads and ads in other computer trade publications identify the advertiser, its products, and extol its products' virtues. Advertisers often place the same ad in show dailies and other computer trade publications, such as Gordon's *Computer Dealer*. Both media also circulate to the same audience; many trade publications develop their mailing lists by referring to lists of those who exhibit at or attend trade shows. Third, while the minor [**16] daily updating of the "news" content of the show dailies may have been peripherally interesting to the attendees at Comdex shows, there has been insufficient evidence submitted that this daily updating affected the advertisers. There was no daily updating of advertisements. The ads ran in all three editions of the show daily. All of the ads for the upcoming Comdex/Spring '83 show have already been placed. Therefore, unlike the *Home Placement* case in which daily newspapers gave rental advertisers a chance to inform the public about rental availability on a day-to-day basis, show daily advertisements are submitted well in advance, as are ads in other computer trade publications. Fourth, Gordon's advertisements in its own [*1241] show dailies evidence that several of its publications are sent to the same organizations which attend Comdex shows. In addition, while the primary advertisers in show dailies are the exhibitors, only 12% of the Comdex/Fall '82 exhibitors advertised in Gordon's show daily; the other 88% evidently spent their advertising dollars elsewhere. Fifth, Gordon reports that some of the advertisers who had placed ads in Gordon's *Computer Dealer* publication [**17] pulled their ads when they learned Gordon might not be allowed to distribute *Computer Dealer* at Comdex/Spring '83. This is because advertisers do not just reach the people who attend trade shows through show dailies. They also reach the people who attend these shows through the other computer trade publications distributed at the shows. The evidence presented to this point indicates that *Computer Dealer* and show dailies are in the same market, the market for advertising in computer dealer trade publications. Gordon believes the computer dealer trade publication market is very competitive and its expert, Professor Cady of the Harvard Business School, agrees with that assessment. Therefore, in my view, Interface's show daily is entering a very competitive *product* market in which Interface will have a very small market share and will compete with many other computer trade publications for advertising revenue.

Similarly, since there are non-Comdex trade shows which are attended by many of the same people who attend the Comdex shows and many OEM's and ISO's which do not attend the Comdex shows,¹ I find that Gordon has not shown that show dailies distributed at these other [**18] competing trade shows are not in the same relevant geographic market as show dailies distributed at Comdex shows.

Gordon is of course correct that show dailies distributed at Comdex shows are a very valuable marketing device for those trying to reach independent computer sales organizations and other computer dealers because show dailies can be distributed at low cost to a large group of people whom the advertiser wants to reach. Similarly, a program distributed at theatres is a valuable marketing vehicle, what Gordon calls a "rifle shot," for advertisers who wish to reach patrons of the theatre. However, there are other ways to contact patrons of the theatre to inform them about products they may wish to purchase and these other advertising methods are included in the same relevant market if they are reasonably interchangeable substitutes which sufficiently limit the market power of the firm distributing the program. See 2 P. Areeda & D. Turner, [*19] ***Antitrust Law*** P 518 (1978). There are also other ways to reach computer dealers. In my view, at this stage of the proceedings, the best evidence argues for a product market which includes, at a minimum, computer dealer trade publications.

Gordon also claims that Interface is attempting to monopolize in violation of ***Section 2*** of the Sherman Act. To establish a likelihood of prevailing on the merits of this claim, Gordon must demonstrate that Interface acted with specific intent to achieve a monopoly position in a relevant market and that there is a dangerous probability that Interface will succeed. See [American Tobacco Co. v. United States, 328 U.S. 781, 785, 90 L. Ed. 1575, 66 S. Ct. 1125 \(1946\)](#); [United States v. Empire Gas Corp., 537 F.2d 296, 298-299 \(8th Cir. 1976\)](#), cert. denied, 429 U.S.

¹ See discussion of trade show monopoly *infra*.

1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977). Gordon has not produced sufficient evidence that there is a dangerous probability that Interface will monopolize a relevant market.

Gordon argues that the fact that Interface's advertising rates for ads placed in its show daily are five times the rates charged by Gordon shows that by excluding Gordon Interface has achieved a monopoly [**20] position and is charging monopoly prices. However, the evidence is that Interface has set a competitive price to compete with advertising in other trade publications. Gordon's lower prices reflect Gordon's marketing strategy to use its show daily to attract advertising in its other publications, in effect, [*1242] using the show daily something like a "loss leader." See, e.g., *Lormar v. Kroger Co.*, 1979 Trade Cas. P 62498 (S.D. Ohio 1979). Under Gordon's analysis, before Interface entered the show daily business Gordon had a monopoly position and could have charged very high advertising rates. Yet, even at that time Gordon charged less than the prevailing market rates. Therefore, a comparison between the rates charged by Interface and Gordon for show daily advertising does not demonstrate that Interface is earning monopoly profits.

Gordon's second Section 2 theory is based on the "essential facility doctrine" or "bottleneck analysis" outlined by the Supreme Court in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973) and anticipated by our Court of Appeals twenty-one years earlier in *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir. 1952). HN4 [↑] As a general rule, a company has the unfettered right to deal with whom it pleases and to refuse to deal with whom it pleases, so long as the determination is made unilaterally. *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 854 (6th Cir. 1979); *Associated Press v. United States*, 326 U.S. 1, 14-15, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945); *United States v. Colgate & Co.*, 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919). Courts must not yield to the "long resisted temptation to create a federal common law of unfair competition." *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 560 (1st Cir. 1974) (citation omitted), cert. denied, 421 U.S. 1004, 44 L. Ed. 2d 673, 95 S. Ct. 2407 (1975). "The purpose of the Sherman Act . . . is not to maintain friendly business relations among firms in the same industry nor was it designed to keep these firms happy and gleeful." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 291 (2d Cir. 1979), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980) (citation omitted).

In some circumstances, however, under the *Otter Tail* case, [**22] a monopolist who controls a facility, access to which is essential for a competitor to enter a market, may be under a duty to make the facility accessible. When an essential facility exists, the firm that controls the facility can block access to the market by excluding competitors. See generally Note, Refusals to Deal by Vertically Integrated Monopolists, 87 Harv. L. Rev. 1720, 1740-1752 (1974).

Gordon has not demonstrated a likelihood of prevailing on this theory for two reasons. First, Gordon has not made a sufficient showing that Interface has monopoly power in the computer trade show industry. *The Sizzle Sheet*, a computer publication, identifies approximately 200 computer and computer-related trade shows scheduled for 1983 in its "1983 Information Trade Show Calendar." Gordon contends that Comdex shows are "unique" dealer-to-dealer shows, unlike all the other computer trade shows. However, examination of *The Sizzle Sheet's* calendar demonstrates that while the Comdex shows may be the largest, there are approximately one hundred other computer trade shows which are attended by ISO's, OEM's, and other dealers. There is significant evidence that the trade show industry [**23] in general is growing extremely quickly and computer-related shows are the fastest-growing segment. While Gordon's experts may prove to be correct that there are some economies of scale in the computer trade show market, there is also evidence that there are diseconomies of scale and if a show tries to grow too large it may lose some business. See P. Alker, For Convergent, Comdex is Too Big to Be Effective, in Computer System News 91 (March 14, 1983) (Exhibit E to Affidavit of Sheldon G. Adelson). A survey conducted by Gordon's own *Computer Dealer* magazine found that only 44.1% of the dealers responding attended Comdex shows, 61.2% attend the NCC show, 15.5% attend the NOMDA show, and 44.9% attend other shows (Exhibit F to Affidavit of Sheldon G. Adelson). Therefore, a sufficient showing of Interface's monopoly power has not been presented.

In addition, there has not yet been a sufficient showing that the Comdex show is an "essential facility" for a firm in the business of selling advertising space in computer [*1243] trade publications. In my view, this is not the same type of case as those relied upon by Gordon. In *United States v. Terminal R.R. Assoc. of St. Louis*, 224

U.S. 383, 393, 56 L. Ed. 810, 32 S. Ct. 507 (1912), the defendant railroads gained control of all railroad switching facilities in St. Louis "to obtain the control of every feasible means of railroad access to St. Louis." Despite Professor Cady's characterization of Comdex as a "market maker" or a computer "exchange," excluding a publisher of computer trade magazines from a Comdex show is not the same as excluding a securities broker-dealer from access to the New York Stock Exchange as in Silver v. New York Stock Exchange, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963). Similarly, this is not a case like Gamco Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952), in which the defendants excluded the plaintiff, a Providence, Rhode Island buyer and reseller of produce, from access to the Providence produce building. The produce building was adjacent to the Providence Railroad Station's main freight lines and all local produce trade was centered in the building. The Court of Appeals in that case found that to exclude Gamco from the Produce Building would effectively exclude him from the Providence produce market. In this case, given [**25] that there are many other shows and Interface does not control access to the market, Gordon has not made a sufficient showing that the essential facility doctrine is applicable.

Gordon's final two Section 2 theories, that Interface leveraged monopoly power in one market to foreclose competition in another and that exclusion of Gordon was an effort by Interface to abuse or extend its monopoly power, both require a showing that Interface has monopoly power or is likely to obtain monopoly power in the computer trade show market. See, e.g., United States v. Griffith, 334 U.S. 100, 105-108, 92 L. Ed. 1236, 68 S. Ct. 941 (1948); Gamco, 194 F.2d at 486-487; Berkey Photo, 603 F.2d at 275; Home Placement, 682 F.2d at 281. Because it is my view that Gordon is not likely to be able to establish that Interface possessed or will possess such monopoly power, I do not believe Gordon is likely to prevail on the merits under either of these theories.

With respect to Gordon's antitrust claims under state law, I reach the same result: Gordon is not likely to prevail on the merits. As Gordon points out, HN5 [↑] the Massachusetts unfair competition act is to be construed consistently with the [**26] interpretations given by federal courts and the Federal Trade Commission in construing § 5(a)(1) of the Federal Trade Commission Act. See M.G.L. c. 93A, § 2(b). The Federal Trade Commission Act is somewhat broader than the Sherman Act and the Supreme Court has said that the Federal Trade Commission Act prohibits incipient violations of the Sherman Act and the Clayton Act as well as some practices which violate neither the letter nor the spirit of the antitrust laws. See FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239, 31 L. Ed. 2d 170, 92 S. Ct. 898 (1972). However, to violate the Federal Trade Commission Act or the Massachusetts statute, a practice must be unfair, immoral, oppressive, unethical, unscrupulous, or cause substantial injury to consumers or competitors. See PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. 593, 321 N.E.2d 915 (1975); FTC v. Sperry Hutchinson Co., supra.

Gordon has not made a sufficient showing that the state antitrust laws should be interpreted to prohibit unilateral refusals to deal by non-monopolists. The Massachusetts Supreme Judicial Court, in one of the principal cases relied upon by Gordon, stated:

Although [**27] most of the "refusal to deal: cases have arisen under the anti-trust acts, the analysis therein is applicable to the instant case. . . . HN6 [↑] "Refusals to sell, without more, do not violate the law." Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 625, 97 L. Ed. 1277, 73 S. Ct. 872 (1953). In each of these cases, the court emphasized that more than a mere refusal to deal would be required to violate the Federal acts. . . . It is the right of one engaged in private business to refuse to deal, or [**1244] discontinue dealing, with anyone, for any reason, unless the dealer combines with others in a concerted effort to hinder free trade.

PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. at 597 (citations omitted). Compare Auburn News Company, Inc. v. Providence Journal Co., 659 F.2d at 278. Gordon has not shown that Interface's refusal to deal or its decision to replace Gordon's show daily with its own show daily as the exclusive show daily at Comdex shows will affect competition adversely. Similarly, there has been no showing that it was in any sense unfair, immoral, oppressive, unethical or unscrupulous for Interface to refuse to enter into a [**28] contract selling Gordon booth space at upcoming Comdex shows when Interface gave Gordon notice well in advance that its application would

not be accepted. Gordon has not demonstrated that Massachusetts law prohibits such conduct. See also P. Areeda, Antitrust Analysis 832-834 (3d Ed. 1981).

It is therefore my view that Gordon is not likely to prevail on either its state or federal antitrust claims, so preliminary injunctive relief should not be granted. In addition, Gordon has not demonstrated that relief at law would be inadequate. Should Gordon prevail at trial, treble damages, attorneys' fees and costs would be an adequate remedy. Gordon's main argument in support of its contention that damages would be an inadequate remedy is based on Professor Cady's statement that if Gordon loses market share during the pendency of this suit Gordon will lose credibility with its advertisers and will be unable to recover that market share. However, the only reason Gordon gives for this loss of credibility is that the advertisers will see that Gordon is not distributing its show daily at Comdex shows. If this court orders Interface to sell Gordon booth space at future shows, Gordon [**29] will be able to use this court's orders as assurance to advertisers that Gordon will be present at future shows. Therefore, Gordon has not given this court any reason to believe that under the facts of this case it would be difficult for Gordon to regain its market share. Gordon has not shown that it will suffer irreparable injury if the injunction is not granted.

Accordingly, Gordon's motion for preliminary injunction is DENIED.

End of Document



U. S. Audio & Copy Corp. v. Philips Business Systems, Inc.

United States District Court for the Northern District of California

April 25, 1983; as amended April 29, 1983

No. C-81-4236-MHP; No. C-82-3205-MHP

Reporter

1983 U.S. Dist. LEXIS 17440 *; 1983-1 Trade Cas. (CCH) P65,364

U.S. AUDIO & COPY CORPORATION, a California corporation, et al., Plaintiffs, vs. PHILIPS BUSINESS SYSTEMS INCORPORATED, a corporation, et al., Defendants; AND RELATED COUNTERCLAIM. PHILIPS BUSINESS SYSTEMS, INC., a corporation, Plaintiff, vs. U.S. AUDIO & COPY CORPORATION, et al., Defendants.

Core Terms

distributors, dealers, new contract, terms, conspiracy, antitrust, marketing, exclusive territory, summary judgment, sales, products, expired, withdrawal, dictation, lawsuit, prices, concealment, inferred, argues, summary judgment motion, competent evidence, abuse of process, competitor, deposition, customers, notice, probability of success, market power, expectancy, undisputed

LexisNexis® Headnotes

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN1 [down arrow] Business Torts, Fraud & Misrepresentation

The elements of fraud in California are (1) misrepresentation; (2) knowledge of falsity; (3) intent and induce reliance; (4) justifiable reliance; and (5) resulting damages.

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

Evidence > ... > Statements as Evidence > Hearsay > Hearsay Within Hearsay

Evidence > ... > Hearsay > Rule Components > Nonverbal Conduct

HN2 [down arrow] Summary Judgment, Supporting Materials

Unauthenticated documentary evidence must be ignored in consideration of a motion for summary judgment. Similarly, inadmissible hearsay is not competent under [Fed. R. Civ. P. 56\(e\)](#).

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN3 Defenses, Fair Comment & Opinion

Mere expressions of opinion, absent certain exceptional circumstances, are not actionable fraud.

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

Evidence > ... > Statements as Evidence > Hearsay > Hearsay Within Hearsay

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

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

HN4 Summary Judgment, Opposing Materials

A non-moving party cannot create a genuine issue of fact to defeat summary judgment by presenting inadmissible double hearsay contradicting the admission of its own witness. The very object of summary judgment is to separate real and genuine issues from those that are formal or pretended, so that only the former may subject the moving party to trial.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN5 Affirmative Defenses, Fraud & Misrepresentation

Under California law, a defendant cannot be liable for fraud by omission unless it had a duty to disclose. A non-contractual duty to disclose only arises if the defendant (1) has a confidential relationship with the plaintiff; (2) made a representation to the plaintiff likely to mislead absent disclosures; or (3) is a party to the sale and knew that the plaintiff did not know and could not reasonable discover the terms of the contact, and those terms are material to the sale. Under certain circumstances active concealment of the terms of a contract could be a basis for fraud by omission.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN6 Summary Judgment, Evidentiary Considerations

Unsupported, self-serving statements are not competent evidence that can defeat a summary judgment.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

[HN7](#) Fraud & Misrepresentation, Negligent Misrepresentation

Where there is no misrepresentation, there is no scienter.

Torts > ... > Commercial Interference > Contracts > General Overview

[HN8](#) Commercial Interference, Contracts

The elements of a tortious interference claim are (1) a right to or expectancy of a business relationship; (2) knowledge on the part of defendant of that right or expectancy; (3) intentional acts primarily motivated to disrupt the right or expectancy; (4) actual disruption of the right or expectancy; (5) reasonably certain damages proximately caused by the conduct; and (6) absence of the privilege of competition.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Interpretation > General Overview

[HN9](#) Types of Contracts, Covenants

Absent compelling public policy reasons California law will not imply covenants, which contravene the express terms of the contract.

Business & Corporate Compliance > ... > Contract Formation > Offers > Counteroffers

Business & Corporate Compliance > ... > Contract Formation > Acceptance > General Overview

Business & Corporate Compliance > ... > Acceptance > Apparent Acceptance > General Overview

Business & Corporate Compliance > ... > Acceptance > Apparent Acceptance > Silence

[HN10](#) Offers, Counteroffers

Acceptance of an offer must be unqualified to create a contract.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

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

[HN11](#) Conspiracy, Elements

A plaintiff may rely on circumstantial evidence of conspiracy because conspiracies can rarely be proven directly. Moreover, a plaintiff need not prove express agreement; the agreement may be tacit. Once a plaintiff creates a material issue of fact as to the existence of a conspiracy to restrain trade, it need produce only slight evidence to show that the defendant is a member of the conspiracy to defeat summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN12[] Antitrust & Trade Law, Sherman Act

A party is not immune from antitrust liability for a legitimate suit, which is part of a larger antitrust conspiracy. Baseless lawsuits which are a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor are also not immune from antitrust liability. A single lawsuit instituted without regard to merit and for anticompetitive purposes rather than the genuine purpose of achieving the judicial relief prayed for in the complaint comes within this "sham" exception.

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

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

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > Elements

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > General Overview

HN13[] Attempts to Monopolize, Sherman Act

An attempt to monopolize under § 2 of the Sherman Act has three elements: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed toward accomplishing the unlawful purpose; and (3) a dangerous probability of success.

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Antitrust & Trade Law, Sherman Act

Evidence of market power is relevant to intent and to dangerous probability of success.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Privileges > Attorney-Client Privilege > General Overview

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

HN15[] Summary Judgment, Evidentiary Considerations

It is no longer necessary to provide evidence of improper motive for attorney-client consultation independent of evidence about the consultation itself in order to defeat the attorney-client privilege.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Torts > Intentional Torts > Abuse of Process > Elements

Torts > Intentional Torts > Malicious Prosecution > General Overview

Torts > ... > Malicious Prosecution > Elements > General Overview

HN16[Complaints, Requirements for Complaint

To establish abuse of process, in contrast to malicious prosecution, a plaintiff need not show favorable termination or lack of probable cause. However, a plaintiff must show both "an ulterior purpose" and a wilful act in the use of the process not proper in the regular course of the proceedings.

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN17[Intentional Torts, Malicious Prosecution

Merely filing a suit for a collateral purpose is not enough to show an improper act in the use of judicial process where a party is entitled to process.

Opinion by: [*1] PATEL

Opinion

ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT [April 25, 1983]

I. PBSI's Motion for Summary Judgment against Audio

A. Background

U.S. Audio ("Audio") was a distributor of Philips Business Systems Incorporated's ("PBSI") Norelco office dictation products from July 1, 1964 until June 30, 1981 under a series of four different contracts. Three of these contracts, dated July 1, 1964, August 16, 1966 and June 1, 1978, provided that Audio would be PBSI's exclusive authorized distributor in a territory designated by PBSI. The January 1975 contract, however, appointed Audio an authorized but not exclusive distributor. Other terms of the contracts also varied. Audio's territory changed under the different contracts, although the basic area was Northern California. The 1964 and 1966 agreements were terminable upon 30 days notice by either party; the 1975 agreement was to expire without notice on December 31, 1979; and the 1978 agreement expired without further notice on June 30, 1981. Each contract provided that the written agreement constituted the entire agreement.

Edward Wright and Russell Adamson purchased Audio from its previous owner, William Scott, on April [*2] 1, 1981. Wright had been on Audio's Board of Directors since 1975 and had complete access to its books and records from that time. Adamson became Audio's controller in March, 1980 and had complete access to its books and records from that time.

Upon the expiration of the 1978 contract by its own terms on June 30, 1980, PBSI offered to enter into a new contract with Audio providing for a nonexclusive dealership in those areas where Audio had a direct sales office. PBSI also offered direct sale agreements to dealers who had purchased from Audio while the 1978 agreement was in effect. Thus, in contrast to the prior agreement, the new contract would allow dealers in Audio's former territory

to purchase directly from PBSI. Audio refused to sign the 1981 agreement as offered. Nevertheless, PBSI continued to sell to Audio until September 1981, when Audio's debt for product sold and delivered exceeded \$150,000.

Audio brought suit in state court against PBSI on October 13, 1981, and PBSI removed to this court. Audio's primary claim is that PBSI fraudulently misrepresented and concealed its intention not to renew Audio's distribution agreement on the same or similar terms as the [*3] 1978 contract. In addition, Audio claims PBSI breached implied covenants of good faith and fair dealing under the 1978 and 1981 agreements and tortiously interfered with Audio's prospective business relationship with its dealers. PBSI crossclaimed against Audio for abuse of process, breach of contract and related torts. PBSI also filed a separate suit on June 19, 1982, charging Audio with violations of the Sherman Act, the California Cartwright Act and state common law. PBSI has moved for summary judgment against all of Audio's claims. Audio has moved for summary judgment against PBSI'S antitrust and abuse of process claims only. PBSI's motion is granted. Audio's is granted in part and denied in part.

B. Fraud

HN1 [↑] The elements of fraud in California are (1) misrepresentation; (2) knowledge of falsity; (3) intent and induce reliance; (4) justifiable reliance; and (5) resulting damages. [Seeger v. Odell, 18 Cal.2d 409, 414 \(1941\)](#); [Girard v. Ball, 125 Cal. App. 3d 772, 783 \(1981\)](#). Audio has failed to present evidence creating and disputed issue of material fact as to any of these elements.

1. Affirmative Misrepresentation

Audio claims that PBSI both affirmatively misrepresented [*4] and concealed the planned terms of the new agreement despite a duty to disclose. PBSI has produced competent evidence to the contrary, and Audio has failed to come forward with competent evidence to create a disputed issue of material fact.

In all the deposition extracts, exhibits, affidavits and 84 page opposition filed by Audio, Audio points to only three alleged affirmative misrepresentations by PBSI about the terms of the new contract. The first is an alleged statement in 1980 by defendant Paul Dentone, then Vice President of Marketing for PBSI's dictation products, at a meeting of Norelco dealers at which admittedly no one from Audio was present.¹ Audio's evidence of this statement is inadmissible and hence cannot create a question of fact to defeat summary judgment. Audio presents minutes of the meeting allegedly received by Scott and discussed with Wright, which are not only unauthenticated but also double hearsay. In addition, Audio points to the hearsay testimony of a dealer unrelated to Audio who claims to have been present (although the minutes do not list him as present). There is no claim that he

¹ The minutes of the July 24-25, 1980 meeting of the Independent Norelco Distributors Association, Plaintiff's Exhibit No. 1 to Watkins deposition, state in relevant part:

Presented herein are the highlites (sic) of this meeting by subject category.

NEW CONTRACT:

The present distributors contract expires on June 30, 1981. Before the end of the year Paul [Dentone] will deliver a rough draft of the proposed new contract which will bear the "Evergreen" concept. That is, it will be based on performance and will have no pre-determined expiration date. It continues indefinitely as long as the sales performance for the designated territory remains at quota.

The profit margins will be as good or better under the new contract.

A recent survey report verified the fact that the distributor/dealer method for marketing dictating machines is the only way (sic) to go and therefore, the present Norelco distributors are vital to the success of PBSI. Paul reiterated (Sic) several times that he is personally committed to the success of this business and that the continued relationship with all distributors is essential.

The model 585 will be included under the new contract. But no mention of 196 or 640.

The rough draft of the contract will be in our hands by January 1, 1981, so that we may review it on an association level, with legal council (sic) if necessary, and mutually, make recommendations for change.

communicated his impressions of the meeting to anyone at Audio. [HN2\[\]](#) [*5] Unauthenticated documentary evidence must be ignored. See [*Hamilton v. Keystone Tankship Corp.*, 539 F.2d 684, 686 \(9th Cir. 1976\)](#). Similarly, inadmissible hearsay is not competent under [*Rule 56\(e\), Fed.R.Civ.P. McGuire v. Columbia Broadcasting System*, 399 F.2d 902, 905 \(9th Cir. 1968\)](#). In any case, as discussed below, in light of PBSI's subsequent statements about the need for changes in the marketing system, any duty to correct Dentone's earlier statement was discharged and there was no justifiable reliance on that earlier statement.

[*6] Second, Audio points to Wright's account of his telephone call to defendant Ralph Fiorie, National Sales Manager for PBSI's dictation products, on March 31, 1981, literally on the eve of Wright's purchase of Audio. Wright testified that he had already made the decision to purchase Audio by January. He testified that he telephoned Fiorie the day before the purchase, told him he was ready to purchase the company and asked, in substance, "Is there any reason why I shouldn't buy the company?" and that Fiorie replied "Absolutely not." Wright admits he did not ask Fiorie what the terms of the new contract would be, but only when it would be available. Thus, Wright asked for and received only a general statement of opinion. He did not ask for its basis.[HN3\[\]](#)

Mere expressions of opinion, absent certain exceptional circumstances, are not actionable. See, e.g., [*Pacesetter Homes, Inc. v. Brodkin*, 5 Cal.App.3d 206, 211 \(1970\)](#). Audio has not shown any such exceptional circumstances here. Fiorie's alleged statement did not imply a factual basis and was not expressed as a fact, and there is no evidence that he did not believe it. The only exceptional circumstance arguable applicable would be [*7] PBSI's superior knowledge. However, Fiorie was present at the prior January 1981 meeting with Audio (discussed in more detail below) at which PBSI's President, Hanrahan, warned that Audio's new contract might be different if it continued to sell below quota. Moreover, Fiorie did not know the terms of Wright's purchase of Audio, and Wright did. Finally, although Wright knew that Hanrahan and Dentone, not Fiorie, were the policy makers for PBSI, Wright made no effort to contact anyone at PBSI between the January meeting and the eve of his purchase, and then, when he could not reach Hanrahan or Dentone immediately, he simply called Fiorie. Thus, even if Fiorie's statement were misleading, Wright had no right to rely upon it.

Audio attempts to alter Wright's clear testimony that he did not ask Fiorie about the terms of the contract by introducing Adamson's second-hand account of Wright's report to Adamson about the conversation. [HN4\[\]](#) Audio cannot create a genuine issue of fact to defeat summary judgment by presenting inadmissible double hearsay contradicting the admission of its own witness. "The very object of summary judgment is to separate real and genuine issues from those that [*8] are formal or pretended, so that only the former may subject the moving party to trial." [*Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543-44 \(9th Cir. 1975\)](#). See also *Mesirow v. Pepperidge Farm, Inc.*, No. 81-3371, slip op. at 352 (9th Cir. Jan. 25, 1983).

There is one other affirmative statement by PBSI which Audio claims was misleading and lulled Audio into expecting the terms of the new contract to be roughly the same as the old one: a letter dated May 1, 1981 from Hanrahan to all PBSI Distributors. This letter postdated Wright's and Adamson's April 1, 1981 purchase of Audio, so they obviously did not rely on it as to the purchase. The only conceivable relevance would be to Audio's claim that it hired an additional salesperson in anticipation that PBSI would not change its marketing system, although Audio does not argue that he was hired exclusively to sell Philips products or in fact did so. In any case, the letter does not promise the continuation of the status quo; to the contrary, it states that PBSI is considering several innovative marketing alternatives. Although the letter states that PBSI expects the distributors to continue as part of the marketing program, [*9] this statement was not false. PBSI offered distributors the opportunity to continue to purchase from PBSI at a volume discount which would enable them to compete for dealer sales.

2. Concealment

Audio also argues that PBSI deceived it by concealing the terms of the new contract. Yet Wright and Adamson knew that the 1978 contract was going to expire four months after their purchase without any requirement that PBSI provide notice about the terms of any succeeding contract, or indeed any right to renew at all. Moreover, the contract expressly provided that its terms could not be varied by oral statements. Therefore, it is difficult to see how the terms could be modified by silence.

Moreover, even if the court looks beyond the contact itself, no factors are present which would impose a duty upon PBSI to disclose the terms of the new contract. [HN5↑](#) Under California law, PBSI cannot be liable for fraud by omission unless it had a duty to disclose. [Goodman v. Kennedy, 18 C.3d 335, 346 \(1976\)](#). A noncontractual duty to disclose only arises if PBSI (1) had a confidential relationship with Audio; (2) made a representation to Audio likely to mislead absent disclosures; or (3) was a [*10] party to the sale and knew that Audio did not know and could not reasonable discover the terms of the new contact, and those terms were material to the sale. Under certain circumstances active concealment of the terms of the new contract could be a basis for fraud by omission. [18 Cal.3d at 346-47](#). Since none of these factors are present here, PBSI had no duty to Audio to disclose the terms of the new contract.

PBSI did not have a confidential relationship with Wright and Adamson, the purchasers of Audio. To the contrary, when Scott asked PBSI to waive the 1978 contract provision against assignment as to Wright, PBSI did not know Wright and only agreed on condition that Scott -- the known entity -- remain "active" in the business. Also, as discussed above, PBSI did not make any affirmative statements of fact that were misleading absent further disclosures.

Audio argues that PBSI actively concealed the terms of the new contract. The undisputed competent evidence is to the contrary. It shows that PBSI discussed with Audio and other distributors the need for some kind of marketing changes because PBSI's sales and market share had declined dramatically. In January 1981, Hanrahan, [*11] Fiorie and Watkins (PBSI's regional sales manager) met with Scott and Wright as part of a series of meetings set up by PBSI with its distributors to explain the need for improved sales. Several important facts about the meeting with Audio are beyond dispute. First, Hanrahan conveyed that he was very upset about business, and showed Scott and Wright charts and data about PBSI's declining sales and Audio's failure to meet its quota. Second, neither Scott nor Wright asked generally what PBSI intended to do about the poor business situation or specifically whether the new contract would reflect any changes in the marketing system. The only question they asked about the new contract was when they would get a copy, and the answer was "shortly". Third, Hanrahan told them that PBSI had to have the same opportunity to sell to "customers" as its distributors had. Although Audio argues that "customers" does not include "dealers," Audio presented no evidence to counter the plain meaning that it does.

The competent evidence also shows that Hanrahan discussed the need to make marketing changes, although Audio tries to manufacture a conflict of fact out of self-serving statements by Wright [*12] and Scott which are contradicted by both their own testimony and each other's. At his deposition, Scott initially testified that Hanrahan did not discuss the need to make marketing changes to offset declining sales. However, Scott also specifically stated that he believed based on the meeting that PBSI might sell to some dealers directly, although he added that Audio would be excepted from this change if it filled its sales quota. Similarly, Wright admitted that Hanrahan told him PBSI might go out of business unless it changed its marketing system. Audio attempts to counter this admission with Wright's qualification that the change would not apply to Audio "because Audio was doing a good job." Yet Wright admitted that Hanrahan discussed the fact that Audio's sales were below quota at the meeting, and the undisputed competent evidence shows that Audio's sales were poor. Thus, Wright's [HN6↑](#) unsupported, self-serving statement that Audio would be exempted from any marketing change is not competent evidence that can defeat summary judgment. See [Radobenko, 520 F.2d at 543-44](#); Mesirow at 352; cf. [Comfort Trane Air Conditioning Co. v. Trane Co., 592 F.2d 1373, 1383 \(5th Cir. 1979\)](#) (upholding [*13] directed verdict on the ground that "[u]nsupported, self-serving testimony is not substantial evidence sufficient to create a jury question").²

² Wright also stated in his deposition: "I was kind of in shock because of the way the Mr. Hanrahan and Mr. Fiorie were acting, and I think that any game plan that we went in that room with was set aside by their actions" in response to the question: "Were you interested in questions like [what marketing ideas Hanrahan had to remain profitable]?" Wright admitted that he already intended to buy Audio when he first came into the meeting. PBSI argues that this statement constitutes a clear admission that he changed his mind about buying the company. However, the meaning of "game plan" is ambiguous. Wright could have been referring to his plans for the meeting. Thus, even ignoring Wright's subsequent declaration purporting to explain what he meant, which is not competent evidence, Mesirow at 352, Wright's statement is not dispositive.

There is also undisputed evidence that Hanrahan held similar discussions with other distributors in January 1981 about the possibility of direct sales to dealers. Although PBSI told the distributors [*14] to keep the meetings confidential, they admitted in depositions that they had no reason not to tell Wright about these discussions if he had inquired, but that even though he did talk with some of them about the meetings, he did not inquire. There is also undisputed evidence that when other distributors did ask Hanrahan in March 1981 and May 1981 about the terms of the new contract, Hanrahan told them that it would be "evergreen," i.e., not terminable except for cause, and "non-exclusive."

Finally, Audio argues that in response to several requests for copies of the new contract, PBSI stated that it was not yet printed in order to avoid disclosing the terms. However, the undisputed evidence shows that Audio never asked about the terms.

3. Intent to Defraud

Audio has also failed to raise any question of fact that PBSI intended to defraud Audio, another requirement for fraud. [HN7](#) Where there is no misrepresentation, there is no scienter. *Girard v. Ball*, 125 Cal.App.3d 772, 784 (1981). Moreover, Audio's claim is that PBSI defrauded it by inducing Wright and Adamson to purchase Audio, which they would not have done had they known the terms of the new contract. Yet Audio produced [*15] no direct or indirect evidence that PBSI had any such intent to induce reliance. PBSI had no interest in their purchasing Audio at all, much less that they purchase it prior to the presentation of the new contract. Indeed, PBSI required Scott, a known entity, to remain active in the firm after the sale because it knew nothing about Wright. The only possible motive PBSI could have had to conceal the terms of the new contract would be to ensure that Audio hired an additional salesperson before the new contract was available. Yet Audio has not produced any evidence that PBSI even knew of these plans, much less intended to induce them.

4. Reliance

Audio also failed to present any competent evidence of reliance on PBSI's alleged concealment of the terms of the new contract, much less of reasonable reliance. Adamson admitted in his deposition that he relied solely upon Wright in deciding to purchase Audio. As controller of Audio, he had full access to Audio's records. These records include letters from Scott to PBSI voicing concern about the absence of renewal provisions and other protections against marketing changes in prior contracts. Yet Adamson admitted at his deposition [*16] that he never looked at the records. His subsequent declaration claiming reliance on PBSI creates only a sham issue and should be ignored. *Radobenko v. Automated Equipment Corp*, 520 F.2d at 543-4; Mesirow at 352.

Wright also could not have relied on PBSI's alleged silence about the terms of the new contract in deciding to purchase Audio on April 1, 1981, because he knew that the old contract was set to expire without further notice or any renewal provision on July 1, 1981, and knew that he had not seen the new contract. Moreover, at the January 1981 meeting, PBSI told him that there was a possibility of marketing changes if Audio continued its poor performance. Wright also had access to all of Audio's records. At most, he and Scott "speculate[d]" about the new contract. Speculation, of course, is not competent evidence, any more than it is reasonable reliance.

Audio's theories of reliance are confused. Audio argues in its opposition that Scott and Wright believed, based on their knowledge that PBSI had in the past temporarily and without success taken away part of Audio's territory to try to increase sales and add new dealers, that PBSI would not try to do so again. [*17] Obviously, this is not reliance on PBSI but a calculated risk which did not pay off. Second, Audio argues that the reason Wright and Adamson purchased on April 1, 1981, prior to seeing the new contract was the availability of financing at that time. This, too, clearly is not reliance on PBSI. If the terms of the new contract had been an important factor in their purchase, they could have waited three months. Scott testified that he was in no hurry to complete the sale and would have allowed them to delay their purchase.

Finally, several cases cited by Audio lack relevance here because they involved unsophisticated plaintiffs and sophisticated defendants. For example, in *Brady v. Carman*, 179 Cal.App.2d 63 (1960), plaintiffs purchased real estate subject to an easement without knowing what an easement was based on the salesman's inaccurate

explanation in response to their direct question. By contrast, Wright and Adamson were knowledgeable and experienced businessmen. Indeed, they had some particularly relevant experience. Both worked for Playtex while it changed the marketing system of a business sold to it by Wright from one of marketing exclusively through wholesalers to [*18] one of direct sales. Wright admitted that companies constantly change their marketing strategies in this manner.

5. Damages

Audio also did not present any evidence that it was damaged by PBSI's change in marketing system, much less PBSI's alleged concealment of its plans to do so. Audio's tax returns show that its profits increased after July 1, 1981, the date the new contract was offered, whereas its profits had declined during the previous two years under the old contract. Audio did not respond with evidence sufficient to create a material issue of fact as to damages. Adamson's declaration presents incomplete profit and loss data from financial statements which he claims are more accurate than the tax returns. Yet the financial statement data show essentially the same pattern:

Ca	+\$24,900
len	
der	
ye	
ar	
19	
82	
FY	-\$79,500
81	
(en	
din	
g	
6/3	
0/8	
1	
FY	+\$ 6,800
80	

Moreover, Audio presented no evidence of causation. Adamson's self-serving, unsupported and conclusory statement that Audio's dealer sales fell after the new contract was offered is insufficient as a matter of law to prove damages caused by PBSI's alleged concealment of the terms of its new contract.

[*19] C. Tortious Interference Claim

Audio complains that PBSI interfered with its supposed "right to be free from competition from PBSI in dealing with their [i.e., Audio's] dealer customers." [HN8](#) The elements of a tortious interference claim are (1) a right to or expectancy of a business relationship; (2) knowledge on the part of defendant of that right or expectancy; (3) intentional acts primarily motivated to disrupt the right or expectancy; (4) actual disruption of the right or expectancy; (5) reasonably certain damages proximately caused by the conduct; and (6) absence of the privilege of competition. *Buckaloo v. Johnson*, 14 Cal.3d 815, 827 (1975); *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal.App.3d 13, 18 (1978); *DeVoto v. Pacific Fidelity Life Insurance Co.*, 618 F.2d 1340, 1347 (9th Cir. 1980).

PBSI has produced uncontradicted evidence showing that none of these elements were present. Most importantly, Audio had no right or expectancy of any exclusive relationship with its previous dealers once the 1978 contract expired. The evidence is undisputed that PBSI did not interfere with Audio's exclusive relationship with its dealers while the contract was in effect, and that PBSI [*20] obtained Audio's customer list by legitimate means. Audio voluntarily turned over the list to PBSI for use in the General Services Administration catalogue and other legitimate business purposes. Once the contract expired, PBSI could incur no liability to Audio by offering those dealers the opportunity to make direct purchases. The dealers were:

[c]ustomers not things to be owned by anyone. They are the life-stream of trade and commerce; are free to choose for themselves and to be chosen by those whose only motive is to advance their own welfare and to do no harm to others.

A.B.C. Distrib. Co. v. Distillers Distrib. Corp., 154 Cal.App.2d 175, 192 (1957). Moreover, Audio has not presented any evidence to counter PBSI's evidence that its change to direct sales was pro-competitive and hence protected by the privilege of competition.

Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc., 116 Cal.App.3d 111 (1981), does not lead to a different conclusion. In that case, plaintiff and defendant had engaged in a joint venture conducting laboratory work and analysis relating to veterinary pathology under an oral contract without a fixed term. The defendant [*21] laboratory owner secretly obtained plaintiff's customer list, terminated the relationship suddenly without notice or good cause, and conducted an advertising blitz to obtain plaintiff's customers. In the words of the court, "[a]ll this was done at a time when [defendant] knew the sudden termination of [plaintiff], without notice, and simultaneous denial of any further lab facilities or services to [plaintiff] would result in its inability to continue its veterinary pathology business unless it could immediately arrange for equivalent lab services, a task virtually impossible in the position it found itself." 116 Cal.App.3d at 127. As a result, plaintiff was forced out of business. Citing the fiduciary implications of the joint venture relationship between plaintiff and defendant, the court found that defendant's conduct constituted "more than a breach of contract" and was not privileged. 116 Cal.App. 3d at 127.

Although Audio argued that the facts of Institute of Veterinary Pathology bear "an incredibly striking resemblance" to their case, this court fails to see the similarity. Audio had prior notice that the contract would expire on a set date; PBSI did not surreptitiously [*22] obtain Audio's customer list; PBSI did not breach any contract with Audio; and PBSI had no expectation that competition would force Audio out of the dictation business, as indeed it did not. Moreover, PBSI and Audio were not in a fiduciary relationship. Finally, PBSI's abolition of exclusive territories was privileged because it enhanced competition.

D. Implied Covenants of Good Faith and Fair Dealing

1. The 1978 Agreement

Audio claims that PBSI "breached their agreement with plaintiffs by willfully deceiving them to alter their position to their injury." This claim fails for the same reasons Audio's fraud claim failed. In addition, HN9 absent compelling public policy reasons not present here, California law will not imply covenants which contravene the express term of the contract. See, e.g., A.B.C. Distrib. Corp., 154 Cal.App.2d at 183-85. Where, as here, the written contract provides an express expiration date and sets forth no obligation to renew or notify distributors of the terms of the new contract, if any, the court will not imply any such requirement.

2. The 1981 Agreement

Audio also claims that PBSI breached express and implied covenants of good faith and fair [*23] dealing in the 1981 Agreement. This contention is wholly frivolous. Both Wright and Anderson admit that they did not sign the contract offered to them by PBSI but instead altered its terms by interlineations, returned it to PBSI and never received any acceptance by PBSI. Elementary principles of contract law teach that HN10 acceptance of an offer must be unqualified to create a contract. Audio merely made a counteroffer which was never accepted. As PBSI had no duty to respond, its silence in the face of a counteroffer could not constitute acceptance.

Audio also complains that PBSI agreed to continue dealing with Audio after the 1978 agreement expired, but changed its credit terms and then cut off shipments after Audio's admitted failure to pay its account exceeding \$150,000. This contention merits no further discussion.

Finally, Audio complains that PBSI's reduction of its prices after the 1978 contract expired reduced the value of Audio's inventory. The 1978 contract clearly contemplated that PBSI could change its prices at will. After its expiration, PBSI's freedom to reduce prices was hardly any less. A rule of law implying such a restriction would be

highly detrimental [*24] to competition and consumers, and there is no authority to support one. Finally, Audio admitted that its excessive inventory problem was of its own making.

Because of Audio's failure to raise any disputed issues of material fact as to any of its claims against PBSI, summary judgment is granted for defendant on Audio's claims.

II. Audio's Motion for Summary Judgment against PBSI

A. Antitrust Claims

PBSI charges that Audio engaged in a horizontal conspiracy to divide the market for dictation products, to fix prices, boycott and refuse to deal with PBSI in violation of § 1 of the Sherman Act, and attempted to monopolize the dictation market in violation of § 2. In addition, PBSI charges Audio with violating the California Cartwright Act based on the same alleged anticompetitive conduct. In essence, PBSI claims that Audio and unnamed co-conspirators, who are other former PBSI distributors and their trade associations, conspired to restore exclusive territories for wholesale distribution of Norelco, PBSI's dictation productline, after the 1978 contract expired in order to reduce competition and maintain prices artificially high. PBSI claims that Audio agreed to (1) withhold [*25] money owed to PBSI to coerce it to alter the 1981 contract to restore exclusive territories; (2) institute sham lawsuits for the same purpose; (3) interfere with PBSI's attempt to appoint competing dealers in the formerly exclusive territories; (4) pressure trade associations to encourage dealers not to deal with PBSI except on the horizontally-agreed terms of exclusive territories; and (5) encourage dealers of Norelco to switch to competing products marketed through exclusive territories. Audio moved for summary judgment based on insufficient evidence of conspiracy under § 1 and absence of proof of relevant market and dangerous probability of monopolization under § 2. In addition, Audio asserts the defenses of Noerr-Pennington³ and in pari delicto.⁴

1. § 1 Violations

HN11 [+] PBSI may rely on circumstantial evidence of conspiracy because conspiracies can rarely [*26] be proven directly. E.G., *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 671 (9th Cir. 1980). Moreover, PBSI need not prove express agreement; the agreement may be tacit. E.g., *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489 (9th Cir.), cert. denied, 344 U.S. 892 (1952). Once PBSI creates a material issue of fact as to the existence of a conspiracy to restrain trade, it need produce only slight evidence to show that Audio was a member of the conspiracy. E.G., *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087 (5th Cir. 1978). PBSI has met its burden here, as the following brief summary of the facts which can fairly be inferred from the evidence shows.

(a) The Evidence

PBSI has introduced substantial evidence that Wright, Kilpatrick (a PBSI distributor located in Texas) and other Norelco distributors opposed the new 1981 agreement because it took away protected territories and portended increased competition. Audio admits in its papers that the distributors shared the common goal of returning to the status quo ante of exclusive territories. There is also evidence that the distributors, including Audio, met, agreed upon and took concerted action [*27] to achieve this goal.

Wright, Adamson, Kilpatrick and other members of the Independent Norelco Dealers Association ("INDA") participated in three meetings in Las Vegas in late July 1981. The first meeting was composed of distributors of Norcom, a dictation product which competes with Norelco and, according to Wright, sells at list price because it is marketed through exclusive territories. Wright addressed the meeting and suggested that dealers show Norcom products to purchasers interested in Norelco. In light of the other evidence discussed below, PBSI has raised an

³ *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mineworkers v. Pennington*, 381 U.S. 657 (1965).

⁴ Audio also argued that PBSI improperly asserted claims of intra-enterprise conspiracy against it, but PBSI conceded at oral argument that it made no such claim.

issue of fact whether Wright did so as part of an anticompetitive agreement to convert customers to Norelco, rather than as legitimate competitive conduct.

More importantly, PBSI has presented evidence of a second meeting at which INDA members discussed their dissatisfaction with the 1981 agreement and an attorney outlined tactics to combat the agreement. There is evidence that three methods of putting pressure on PBSI to alter the agreement were discussed: (1) withholding money owed to PBSI; (2) refusing to sign the 1981 Agreement; and (3) bringing individual law suits. A vote was taken on who would sue PBSI, [*28] with 15 members including Wright voting to sue. There may also have been a vote on whether to sign the 1981 contract. Wright and others admitted discussing withholding money from PBSI to coerce it to change the contract, although Wright claimed that the discussion was not serious. Wright and at least three others did withhold money, although they apparently also owed money before the meeting. After the meeting, INDA members elected Kilpatrick as their spokesperson.

At the third meeting, distributors met with Gordon Adams, Chair of the Manufacturer-Dealer Relations Committee of the National Office Machine Dealers Association ("NOMDA"), a trade association, and a NOMDA attorney. NOMDA had previously approved PBSI's 1981 agreement at PBSI's request. NOMDA approval influences whether dealers will sign an agreement. At the meeting, distributors complained that they wanted the exclusive territory marketing system restored. There is evidence that Adams agreed to pressure PBSI and give it unfavorable publicity. After the meeting, one member wrote dealers that NOMDA would withdraw its approval. From the evidence concerning these two meetings, it is reasonable to infer that former [*29] PBSI distributors and Adams agreed to pressure PBSI to reinstitute exclusive distributorships.

After the Las Vegas NOMDA meeting, telephone transcripts show that Adams spoke several times with Kilpatrick about Adams' actions with respect to the PBSI contract, culminating in Adams' recommendation to NOMDA's President that NOMDA withdraw its approval of the contract. Yet as late as August 1, 1981, Adams admitted that the new contract conformed to all of NOMDA's requirements for approval and that distributors objected to it because of the lack of exclusive territories. PBSI has also presented evidence that Kilpatrick told Adams that distributors were considering suing Adams and NOMDA for its approval of the contract and that one distributor raised the possibility of such a suit to Adams directly. Adams stated that he did not perceive these communications as threats. But the statements themselves and Adams' letter to NOMDA's President, mentioning the possibility of such suits and recommending withdrawal, create a disputed issue of fact as to whether NOMDA withdrew its approval as a result of pressure by distributors. Furthermore, when Adams read the letter recommending withdrawal [*30] to Kilpatrick, he made a comment about it that could be interpreted as admitting that NOMDA had no valid reason for withdrawing its approval. Kilpatrick told Adams that withdrawal of approval would lead PBSI to change the contract.

On December 23, 1981, NOMDA did withdraw its approval of the PBSI 1981 contract, and publicized the withdrawal. The withdrawal of prior NOMDA approval was unprecedented. Subsequently, in response to a letter from Kilpatrick, Adams acknowledged that Wright's problems in San Francisco included "[p]rice deterioration." In addition, in fall 1981 or early winter 1982, former PBSI distributors met in Atlanta and discussed litigation against PBSI. Some offered to share documents, and at least one distributor felt pressured by the others to sue. Thus, a question of fact exists whether the meeting was merely for informational purposes or was part of an antitrust conspiracy.

In March 1982, PBSI offered the 1981 dealer agreement to Trend, a San Francisco dealer whom it considered to be the strongest prospective seller of Norelco in the area. Audio sent a letter to Trend which claimed that Trend's employees had falsely disparaged Audio by stating that [*31] Audio was not an authorized Norelco dealer and was unable properly to service Norelco products. The letter threatened litigation unless Trend retracted. Although Audio never signed the 1981 contract with PBSI, it is undisputed that Audio continued to hold itself out as an "authorized" Norelco dealer for Northern California based on Kilpatrick's purported appointment of it to that position. Audio argues that a disputed question of fact exists as to whether Kilpatrick had the authority to appoint Audio as an authorized Norelco dealer. In his deposition, however, Adamson appeared to admit that he knew Kilpatrick did not have such authority. Trend subsequently declined to sign the PBSI agreement and PBSI claims that it lost sales of over \$240,000 as a result. Audio claims that it did not know when it sent the letter that Trend had been offered the contract, but Adamson equivocated in his deposition as to when he learned of the offer. A jury

could reasonably infer that the letter constituted a threat of litigation designed to exclude a potential competitor from what was formerly Audio's exclusive territory.

PBSI entered a dealer agreement with Van's Office Machines in Berkeley [*32] in March 1982. Van Gelder testified at his deposition that Adamson called him shortly thereafter and threatened suit based on vague allegations that Van's employee had disparaged Audio's products. Van Gelder perceived the call as a threat designed to stop him from competing with Audio in sales of Norelco. Audio also sent a letter in June 1982 to Dictation Systems, who had signed a contract with PBSI in March 1982, threatening a lawsuit unless it retracted alleged defamatory statements. There is sufficient evidence to create a material issue of fact whether these threats of litigation were part of a plan to reduce competition.

b. PBSI's § 1 Theories and Audio's Defense

PBSI argues that the evidence discussed above is sufficient to survive summary judgment on four § 1 theories: (1) horizontal conspiracy to divide the market into exclusive territories; (2) horizontal conspiracy to boycott PBSI; (3) concerted refusal to deal; and (4) horizontal conspiracy to fix prices. All are per se violations. *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979). The court agrees, although it questions in particular whether PBSI can survive a directed [*33] verdict at trial on the price-fixing theory.

PBSI's evidence of the distributors' efforts to pressure PBSI to return to a marketing system based on exclusive territories and to exclude competitors from the formerly authorized territories creates a question of fact whether Audio conspired to divide the market in violation of the Sherman Act. The evidence concerning NOMDA's withdrawal of approval of the 1981 contract also raises a question of fact whether Audio engaged in an illegal boycott. Under the principals of *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*, 312 U.S. 457 (1941), proof that the distributors exerted group pressure on their trade association to withdraw the service of approval of the PBSI supplier-dealer contract and that such a withdrawal tends to reduce the number of dealers who will sign the contract may establish a boycott in violation of § 1. Similarly, PBSI may establish a concerted refusal to deal based on a collective decision not to sign the 1981 contract in order to force PBSI to return to exclusive territories.

PBSI's theory that Audio conspired with other distributors and trade associations to fix prices is a closer question. [*34] PBSI has shown little more so far than that the distributors' desire to return to exclusive territories may have stemmed in part from a desire to maintain prices above the level they would fall to if competitors sold Norelco in those territories. Because summary judgment is disfavored in antitrust cases, *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), and because of the significant overlap in proof of PBSI's different theories, the court will not now preclude PBSI from proceeding on the price-fixing theory. The court doubts, however, whether PBSI can prevail on this theory unless it presents evidence from which a jury could infer conspiracy to manipulate prices which goes beyond any evidence of a conspiracy to restore exclusive territories. Otherwise, all conspiracies to divide the market into exclusive territories would automatically also be conspiracies to fix prices.

The affirmative defenses asserted by Audio against PBSI's § 1 claims, as well as § 2 claims discussed below, under the Noerr-Pennington⁵ and in pari delicto doctrines do not support summary judgment against PBSI's antitrust claims. Audio argues that under Noerr-Pennington it is immune from antitrust [*35] liability for instituting the present suit against PBSI even if the suit were part of an antitrust conspiracy. However, *HN12*[ Noerr-Pennington does not immunize an otherwise legitimate lawsuit which is part of a larger antitrust conspiracy. *Clipper Express v. Rocky Mountain Motor Tariff*, 674 F.2d 1252, 1273 (9th Cir. 1982). PBSI has raised a question of fact as to whether this was such a lawsuit.

Baseless lawsuits which are a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor" are also not immune from antitrust liability. *Noerr*, 365 U.S. 127, 144 (1961). Clipper Express made clear that a single lawsuit instituted without regard to merit and for

⁵ See footnote 3.

anticompetitive purposes rather than the genuine purpose of achieving the judicial relief prayed for in the complaint comes within this "sham" exception. [674 F.2d at 1262-27](#). PBSI introduced sufficient evidence to raise a question of fact whether Audio had such an improper motive. Moreover, Audio's failure to survive a motion for summary judgment, while not conclusive, is further indication of the requisite sham intent. [Clipper Express \[*361 at 1264; Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 841 n. 13 \(9th Cir. 1980\)](#).

It appears, however, although it is not entirely clear, that plaintiff must show that defendant abused the judicial process not only by instituting the suit for an unlawful anticompetitive purpose, but also by committing specific acts related to the suit but outside the normal judicial process. [Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386, 389 \(9th Cir. 1983\); Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 138 \(5th Cir. 1980\)](#), cert. denied, 450 U.S. 1030 (1981) (cited by Heliodyne with approval). In Heliodyne, the court held that allegations that defendant instituted a baseless lawsuit to generate adverse publicity about a competitor were sufficient for the claim to come within the sham exception. [698 F.2d at 389](#). In Page, the court held that defendant's use of spurious lawsuits based on false affidavits to delay payment of its debt to its competitor in order to deprive its competitor of funds was not immune under [Noerr-Pennington, 624 F.2d at 1347, 1358](#). As discussed below in reference to PBSI's abuse of process claim, PBSI has not produced evidence of improper [*37] acts by Audio outside the normal judicial process in relation to the lawsuit. However, since this court finds that for purposes of summary judgment PBSI has come within the other exception to Noerr-Pennington, it is not necessary to decide whether PBSI could also come within the sham exception.

Audio also argues that even if it conspired to force PBSI to reinstitute exclusive distributorships, PBSI cannot recover because PBSI itself originally established the exclusive distributorship system. Audio exhibits a basic misunderstanding of **antitrust law**. Even assuming that an *in pari delicto* defense to antitrust liability exists, which Audio admits is a hotly disputed issue, such a defense could not apply here. PBSI's vertical imposition of exclusive territories under prior contracts is subject to a rule of reason analysis, whereas a horizontal conspiracy by distributors to pressure PBSI to impose vertical restraints is a *per se* violation. Compare [United States v. Topco Associates, 405 U.S. 596 \(1972\)](#), with [Consumer Product Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102 \(1980\)](#). Audio has not even attempted to show that PBSI's prior contracts were not vertically imposed but instead [*38] resulted from horizontal pressure by Audio and other distributors and therefore constituted a *per se* violation. Accordingly, Audio has not raised any question of fact that PBSI itself violated the antitrust laws and is therefore barred from recovering against Audio.

2. § 2 Attempt to Monopolize Claim

Audio also moved for summary judgment on PBSI's claim that Audio attempted to monopolize the market for United States sales of dictation products. [HN13](#) Attempt to monopolize has three elements: "(1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed toward accomplishing the unlawful purpose; and (3) a dangerous probability of success." *General Business Systems v. North American Philips Corp.*, slip op. at 389 (9th Cir. Jan. 28, 1983). The same evidence which enabled PBSI to survive summary judgment on its § 1 *per se* claims supports its § 2 claims. PBSI has raised material issues of fact as to whether Audio engaged in anticompetitive conduct to restrain trade. Specific intent to destroy competition can be inferred from the same conduct. See, e.g., *Mesirow* at 353. [HN14](#)

Evidence of market power is relevant [*39] to intent and to dangerous probability of success. See, e.g., [Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 669 \(9th Cir. 1980\)](#). PBSI has introduced no evidence of Audio's market share. It acknowledged that PBSI's share of the national dictation products market is well under 50%, with two companies sharing over half the market and approximately ten others including PBSI sharing the rest. Since PBSI products were sold by many distributors and dealers besides Audio, the court may infer that Audio's share of PBSI sales is quite small. Yet PBSI's evidence appears to show at most that Audio attempted to exclude competitors from the market for PBSI dictation products. In appropriate circumstances, [Lessig v. Tidewater Oil Co., 327 F.2d 459 \(9th Cir. 1964\)](#), rehearing denied per curiam, [327 F.2d 478 \(9th Cir. 1964\)](#), cert. denied, 377 U.S. 993 (1964), and its progeny have stated that dangerous probability of success may be inferred from *per se* violations of § 1 which clearly threaten competition without proof of market power. This court is mindful, however, that "[t]he rules of decisions in antitrust cases must not be construed too literally, but should be viewed within the [*40] context of the

particular factual situations presented." [Ernest W. Hahn v. Coddling](#), [615 F.2d at 841](#). This court does not believe that the circumstances in this case support such an inference absent any proof of market power. In view of the policy against granting summary judgment in antitrust cases, the court will permit PBSI to proceed on its § 2 claim. However, the court will explain its view on proof of dangerous probability of success in order to provide guidance for trial.

Lessig itself held only that plaintiff need not prove that defendant held a dominant position in the market where it showed by other evidence that defendant attempted to monopolize "an appreciable segment of interstate sales." [327 F.2d at 475](#) (emphasis added). This suggests that some showing that Audio had the potential to monopolize a significant portion of the market is necessary. PBSI has not suggested any satisfactory method other than showing market power. Moreover, not only has Lessig's position that proof of market power is not necessary to show dangerous probability of success been rejected by the majority of circuits and implicitly by the Supreme Court, see 16B Von Kalinowski, Business Organizations [*41] § 9.01 [3] n.41, and criticized by commentators, see, e.g., P. Areeda and D. Turner, [Antitrust Law](#) 341-43 (1978); but even within the Ninth Circuit itself Lessig has not been uniformly followed. See, e.g., [Cornwell Quality Tools Co. v. C.T.S.C. Co.](#), [446 F.2d 825, 832 \(9th Cir. 1971\)](#), cert denied, [404 U.S. 1049](#) (plaintiff must prove defendant had sufficient market power to come dangerously close to success); [Columbia S.S. Co. v. American Mail Line](#), [510 F.2d 29 \(9th Cir. 1975\)](#), cert. denied, [424 U.S. 969](#) (1976); E. Cooper, Attempts and Monopolization, 72 Mich.L.Rev. 373, 420 (1974) and cases cited therein. Other Ninth Circuit cases have recited the Lessig doctrine but then held on other grounds that plaintiff failed to establish an attempt to monopolize. See, e.g., [Hallmark Industry v. Reynolds Metals Co.](#), [489 F.2d 8 \(1973\)](#); [M.A.P. Oil Co., Inc. v. Texaco, Inc.](#), [691 F.2d 1303 \(9th Cir. 1982\)](#).

The Ninth Circuit has recently recognized the problematic status of the Lessig doctrine: "[w]hether 'dangerous probability of success' must be alleged and proved in an attempt to monopolize claim has been controversial, even within this circuit, since this court's decision in Lessig." [*42] [Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.](#), [627 F.2d 919, 925 \(9th Cir. 1980\)](#) (citations omitted). The Hunt-Wesson court cautioned that because the purpose of the dangerous probability of success requirement is to assure that the unilateral acts under attack would, if unchecked, result in monopoly power, courts must adopt a "flexible approach toward the "mix" of conduct, actor, and market conditions that make up the offense." [Hunt-Wesson at 925](#). In Hunt-Wesson itself, the court relied on the allegation that defendant possessed a 65% market share as providing the requisite basis for inferring monopoly power in a § 2 claim. [Id. at 926](#). In this case, there has been no comparable showing. Therefore, the court will not mechanically apply Lessig and its progeny to draw an inference of dangerous probability of success which appears unwarranted by the particular facts of this case. Accordingly, at trial PBSI will have to prove that Audio has at least some market power in an appreciable segment of the relevant market. Defendant may, of course, also introduce evidence that market conditions rendered any attempt to monopolize unlikely to succeed. [William Inglis & Sons Baking Co. v. ITT Continental Baking Co.](#), [668 F.2d 1014, 1030 \(9th Cir. 1981\)](#).

3. PBSI's Motion for Reconsideration of the Magistrate's Denial of Its Motion to Compel

PBSI moved to compel Audio and its principals to testify about discussions with attorney Hammond in July 1981 at the Las Vegas meeting and with distributors and their attorneys in Atlanta, Georgia in late fall or winter 1981-82, as well as all other discussions with distributors in the presence of attorneys on the subject of distributor action against PBSI as a result of the 1981 agreement. PBSI argued that these conversations with attorneys were not privileged because they were part of a crime, i.e., an antitrust conspiracy. The Magistrate denied the motion to compel on the ground of insufficient evidence of an antitrust conspiracy.

The Magistrate correctly recognized that if PBSI made a prima facie showing of a per se Sherman Act violation, the attorney-client privilege would not apply under [United States v. Hodge and Zweig](#), [548 F.2d 1347, 1354 \(9th Cir. 1977\)](#) [United States v. King](#), [536 F.Supp. 253, 258-62 \(C.D.Cal. 1982\)](#) and other cases from this circuit. Since the Magistrate's decision, additional evidence has been submitted. [*44] This court has found that there is sufficient evidence of an antitrust conspiracy to withstand summary judgment. Moreover, [HN15](#) it is no longer necessary to provide evidence of improper motive for attorney-client consultation independent of evidence about the consultation itself in order to defeat the privilege. King at 192. Therefore, the evidence by other distributors present at the Las Vegas meeting that the consultations may have been in furtherance of an antitrust conspiracy is sufficient

to compel discovery about that meeting as well as other consultations. Moreover, even if independent evidence were required, PBSI has produced sufficient independent evidence that Audio conspired in violation of the antitrust laws to compel the discovery PBSI seeks. Accordingly, PBSI's motion for reconsideration is granted.

B. Abuse of Process Claim

PBSI cross-claimed against Audio for abuse of process in the suit filed by Audio. PBSI alleged that Audio filed that suit for the collateral purpose of avoiding its debt to PBSI. Although PBSI did not also allege that Audio filed the suit for the collateral purpose of furthering an antitrust conspiracy, the court will construe the pleading [*45] as encompassing that claim to achieve substantial justice. [Fed.R.Civ.P. 8\(f\)](#). Audio is not prejudiced thereby because the same issues arose in the antitrust suit.[HN16](#)[

To establish abuse of process, in contrast to malicious prosecution, plaintiff need not show favorable termination or lack of probable cause. However, plaintiff must show both "an ulterior purpose" and "a wilful act in the use of the process not proper in the regular course of the proceedings". [Barquis v. Merchants Collection Association, 7 Cal.3d 94, 103-04 \(1972\)](#), (citations omitted); Witkin, Summary of California Law, § 263 at 2538-39 (8th Ed. 1974 and 1982 Supplement). PBSI has met the first requirement for purposes of Audio's motion for summary judgment with its evidence from which it could be inferred that Audio filed suit to further an antitrust conspiracy. PBSI presented no evidence, however, from which it could be inferred that Audio filed suit to avoid its debt to PBSI. The sole evidence on that point is the testimony by PBSI's employee that Adamson told him that Audio would not pay its debt to PBSI because Audio had filed a lawsuit. That statement by itself cannot reasonably be construed to mean that [*46] Audio filed the lawsuit for the purpose of improperly avoiding its debt.

PBSI had failed to meet the second requirement. It has provided no evidence that Audio committed any improper act in its use of the judicial process. [HN17](#)[] Merely filing a suit for a collateral purpose is not enough where a party is entitled to process. E.g., [Tellefsen v. Key System Transit Lines, 198 Cal.App.2d 611, 613-14 \(1961\)](#); [Golden v. Dungan, 20 Cal.App.2d 884 \(1951\)](#), the court held that a creditor did not abuse process by properly executing an attachment to collect a debt even though he did so solely for the purpose of destroying the debtor financially. By contrast, in Barquis, the court held that creditors abused process because they committed improper acts by filing suits based on statutorily inadequate pleadings in courts where venue was not proper for the collateral purpose of obtaining default judgments and coercing inequitable settlements. [7 Cal.3d 94](#). PBSI has made no such showing of improper acts by Audio in connection with its lawsuit against PBSI. Therefore, Audio's motion for summary judgment on PBSI's abuse of process claim must be granted.

In accordance with this opinion, IT IS HEREBY ORDERED [*47] THAT PBSI's motion for summary judgment against Audio's claims is GRANTED and Audio's suit is DISMISSED WITH PREJUDICE; Audio's motion for summary judgment against PBSI's antitrust claims is DENIED; Audio's motion for summary judgment against PBSI's abuse of process claim is GRANTED; and PBSI's motion for reconsideration of the magistrate's discovery order is GRANTED.

Order re Clarification of Prior Order

[April 29, 1983]

PATEL, D.J.: The court's April 25, 1983 Order granting defendant Philips Business Systems Incorporated ("PBSI")'s motion for summary judgment against U.S. Audio's claims did not expressly state that the Order also granted the parallel motions of co-defendants North American Philips Corporation, parent corporation of PBSI, and individuals Arthur Hanrahan, Ralph J. Fiorie, Paul Dentone and Joseph DeVito, employees of PBSI. This order clarifies that the ruling granting summary judgment with respect to PBSI included those co-defendants.



Walker v. Bruno's, Inc.

Supreme Court of Tennessee, At Knoxville

April 25, 1983

No Number in Original

Reporter

650 S.W.2d 357 *; 1983 Tenn. LEXIS 775 **; 1983-1 Trade Cas. (CCH) P65,341

WILLIAM H. WALKER, III, COMMISSIONER, DEPARTMENT OF AGRICULTURE, STATE OF TENNESSEE, Plaintiff-Appellant, v. BRUNO'S, INC., ET AL., Defendants-Appellees

Prior History: [\[**1\]](#) Hamilton Equity

Hon. Howell N. Peoples, Chancellor

Disposition: REVERSED AND REMANDED.

Core Terms

milk, retailers, prices, wholesale, Sales, Unfair, Sherman Act, Agriculture, retail price, processors, invoiced, selling, antitrust, minimum price, regulations, supervision, meeting competition, involvement, parties, resale price, anti-competitive, distributors, rebates, regulatory statute, state statute, actual cost, fair trade, proceedings, injunction, decisions

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > General Overview

[**HN1**](#) Antitrust & Trade Law, Regulated Industries

The Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, is not a resale price maintenance or "fair trade" statute but is designed to prevent "loss-leader" sales and other unfair sales practices. Among other things it prohibits retailers of milk from selling below a "lawful minimum price," subject to certain exceptions.

Antitrust & Trade Law > Regulated Industries > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

[**HN2**](#) Antitrust & Trade Law, Regulated Industries

The Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, was intended to prevent a conspiracy to sell milk below cost on a sustained basis. If it violates federal antitrust measures, this most certainly was not the intent of its sponsors, according to its legislative history.

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

HN3  Antitrust & Trade Law, Regulated Industries

Milk wholesalers and distributors subject to the Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, are required regularly to file price lists both at wholesale and retail of all items of milk and dairy products sold by them and of all changes in and amendments thereto, these filings to be mailed to the Tennessee Department of Agriculture at least ten days prior to the effective date thereof.

Antitrust & Trade Law > Regulated Industries > General Overview

HN4  Antitrust & Trade Law, Regulated Industries

See Tenn. Code Ann. § 52-331(2)(c).

Antitrust & Trade Law > Regulated Industries > General Overview

HN5  Antitrust & Trade Law, Regulated Industries

Retailers are prohibited from selling milk below their cost. This cost is defined as the sum of the invoiced cost to the retailer, as shown on the schedules provided by wholesalers and producers, plus 8 percent, representing their presumed cost of doing business in the absence of proof to the contrary.

Antitrust & Trade Law > Regulated Industries > General Overview

HN6  Antitrust & Trade Law, Regulated Industries

The Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, does not, either in theory or in practice, permit processors or wholesalers to "fix" or to establish the minimum retail prices charged by any retail grocer. A presumed cost of doing business of 8 percent is added to the wholesale cost filed by the processors with the Tennessee Department of Agriculture, but no retailer is required to sell at that figure if he can establish that his actual costs are less than 8 percent. The retailer, not the wholesaler, has control of that aspect of the pricing.

Antitrust & Trade Law > Regulated Industries > General Overview

HN7  Antitrust & Trade Law, Regulated Industries

Under Tenn. Code Ann. § 52-334(7), any milk product may be sold by a retailer below the price fixed by the Tennessee Department of Agriculture if such sale is made in good faith to meet competition, provided that such prices shall not be cut more than once, nor in any event cut below the price of competition.

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

[**HN8**](#) [] **Antitrust & Trade Law, Regulated Industries**

The Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, prohibits a number of advertising and sales practices by processors, distributors, and retailers of milk, an essential agricultural commodity.

Antitrust & Trade Law > Regulated Industries > General Overview

[**HN9**](#) [] **Antitrust & Trade Law, Regulated Industries**

Tenn. Code Ann. § 52-333 contains statutory authorization for the imposition of sanctions, both civil and criminal, against persons who may violate the Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334.

Antitrust & Trade Law > Regulated Industries > General Overview

[**HN10**](#) [] **Antitrust & Trade Law, Regulated Industries**

Tenn. Code Ann. §§ 52-332 and 52-333 have been implemented by rather detailed regulations issued by the Tennessee Department of Agriculture. A number of exemptions from the regulatory statutes are provided.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

[**HN11**](#) [] **Exemptions & Immunities, Parker State Action Doctrine**

State regulatory statutes may limit competition without conflicting with federal antitrust statutes.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Governments > Police Powers

[**HN12**](#) [] **Exemptions & Immunities, Parker State Action Doctrine**

Federal legislation should never be interpreted as superseding a state's exercise of its sovereign police powers unless the purpose of Congress to do so is clearly manifested.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN13 [] **Exemptions & Immunities, Parker State Action Doctrine**

There are two standards for antitrust immunity for state regulatory schemes. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN14 [] **Exemptions & Immunities, Parker State Action Doctrine**

Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

HN15 [] **Exemptions & Immunities, Parker State Action Doctrine**

The legislature gave the Commissioner of the Tennessee Department of Agriculture broad and general power in order that he could bear the burden of enforcing the Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, at the instance of injured parties or on his own volition, in accordance with the duties and responsibilities imposed upon him by the Act.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Civil Procedure > Attorneys > General Overview

Criminal Law & Procedure > ... > Search Warrants > Affirmations & Oaths > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

HN16 [] **Exemptions & Immunities, Parker State Action Doctrine**

Tenn. Code Ann. § 52-333 is replete with statutory authorization for the imposition of sanctions, both criminal and civil, against any person who may violate the Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, whether this be a processor, distributor or a retailer. The statute spells out in great detail actions which may be taken by the Commissioner of the Tennessee Department of Agriculture, including the swearing out of criminal warrants, civil injunctions, complaints to the District Attorney, or the holding of administrative hearings. Among other sanctions which may be imposed by the Commissioner are revocation of plant licenses and registration privileges of violators.

Antitrust & Trade Law > Regulated Industries > General Overview

Contracts Law > Personal Property > Personality Leases > General Overview

Tax Law > State & Local Taxes > Sales Taxes > Imposition of Tax

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

Tax Law > State & Local Taxes > Sales Taxes > General Overview

HN17 [] Antitrust & Trade Law, Regulated Industries

The Commissioner of the Tennessee Department of Agriculture initially approves or establishes minimum lawful prices. He has issued detailed regulations which confirm a policy of active enforcement and supervision. All distributors and retailers of milk and milk products covered by the Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, are required to retain invoices for a period of ninety days, subject to inspection by the Commissioner or his duly authorized representative. They are required to keep bills of sale, purchase contracts and lease arrangements of equipment used for storing, transporting or selling milk products. Cost records of their operations during the preceding three months are to be maintained. These include invoices, cost of materials, salaries, rebates or discounts, lease agreements, purchase contracts, depreciation and tax computations.

Admiralty & Maritime Law > ... > Business & Corporate Compliance > Admiralty & Maritime > Marina Regulation

Antitrust & Trade Law > Regulated Industries > General Overview

HN18 [] Marinas, Regulation

Tennessee Rules and Regulations, §§ 0080-3-5-.01 to -.03, require separate filings for sales in private label cartons, and lists of customers involved in sales on a store door or a store platform service or plant dock. Any amendment in price schedules must be filed with the Commissioner of the Tennessee Department of Agriculture, including those made for the purpose of meeting competitive prices or lawful competitive conditions. Records concerning changes to meet competition are required to be preserved for a period of one year, together with information and statements detailing the surrounding circumstances.

Antitrust & Trade Law > Regulated Industries > General Overview

HN19 [] Antitrust & Trade Law, Regulated Industries

Tenn. Code Ann. § 52-332 prohibits a number of practices both by processors and distributors and by retailers. It is by no means addressed solely to retail pricing.

Antitrust & Trade Law > Regulated Industries > General Overview

HN20 [] Antitrust & Trade Law, Regulated Industries

The Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, does not permit processors or wholesalers to fix or establish a minimum retail price. No retailer is required to sell at the figure fixed by the Tennessee Department of Agriculture if he can establish that his actual costs are less. Further, Tenn. Code Ann. § 52-334(7) permits any milk product to be sold below the legal cost price fixed by the department if it is made in good faith to meet competition.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Antitrust & Trade Law > Regulated Industries > General Overview

HN21 [blue icon] Consumer Protection, Deceptive & Unfair Trade Practices

The Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, is not a price-fixing statute in any sense. It is simply designed to prevent unfair and deceptive trade practices with respect to the advertising and sale of essential farm commodities, milk and milk products.

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN22 [blue icon] Antitrust & Trade Law, Regulated Industries

The Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, does not involve the Commissioner of the Tennessee Department of Agriculture in determining what is or is not a desirable minimum milk price from the standpoint of the consuming public. That is not its purpose. Neither does he fix a maximum retail price.

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Governments > Police Powers

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN23 [blue icon] Antitrust & Trade Law, Regulated Industries

The Unfair Milk Sales Act, Tenn. Code Ann., §§ 52-331 to 52-334, is designed to prevent deceptive advertising and loss-leader sales by the continued advertising and sale of milk below the retailer's cost, that cost being his invoice price plus 8 percent unless he shows otherwise by specific evidence. The Commissioner of the Tennessee Department of Agriculture does in fact actively and continuously supervise this statutory program which was held by the supreme court of Tennessee to be a purpose affected with the public interest and quite properly within the state's police power.

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

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

HN24 [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

The Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, does not demonstrate a passive submission by the state in letting wholesalers or milk processors set retail prices in a monopolistic or anticompetitive fashion.

[Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview](#)

[Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions](#)

[Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview](#)

[Antitrust & Trade Law > Regulated Industries > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview](#)

[**HN25** \[+\] Consumer Protection, False Advertising](#)

The varying rebates which are given to large volume retailers cause presumed lawful statutory minimum prices of different retailers to vary. Since any other retailer can set his retail price to meet any lawful price, the effect of the Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, is not to set a uniform price in the market in any sense, but simply to prevent deceptive advertising and sales practices. The Department of Agriculture monitors those practices which are actually followed by the retailers and monitors the price lists submitted by the wholesalers and processors. The role of the state in the administration of this statute is not passive in any sense, in our opinion, nor is the state fostering monopolistic practices, engaging in them itself, or permitting, expressly or impliedly, combinations in restraint of trade.

[Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview](#)

[Constitutional Law > Supremacy Clause > Federal Preemption](#)

[Constitutional Law > Supremacy Clause > General Overview](#)

[**HN26** \[+\] Exemptions & Immunities, Parker State Action Doctrine](#)

In determining whether the Sherman Act preempts a state statute, the court applies principles similar to those which it employs in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause. As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.

[Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview](#)

[Constitutional Law > Supremacy Clause > General Overview](#)

[**HN27** \[+\] Exemptions & Immunities, Parker State Action Doctrine](#)

A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Constitutional Law > Supremacy Clause > General Overview

Governments > Police Powers

Antitrust & Trade Law > Regulated Industries > General Overview

HN28 [+] Exemptions & Immunities, Parker State Action Doctrine

The Unfair Milk Sales Act, Tenn. Code Ann. §§ 52-331 to 52-334, does not, in theory or in practice, violate any federal antitrust legislation. It falls well within the state police power as recognized by both state and federal decisions, deals with a vital farm commodity and is important in the regulation of the milk industry in this state.

Counsel: For Plaintiff-Appellant: William J. Haynes, Deputy Attorney General, Barry Turner, Assistant Attorney General.

Of Counsel: William M. Leech, Jr., Attorney General.

For Defendants-Appellees: Thomas A. Harris, David F. Hensley, Chattanooga, Tennessee, (for Bruno's Inc. and Consumer Warehouse Foods, Inc.).

W. Ferber Tracy, Chattanooga, Tennessee, (for Kroger Company, Inc.).

William T. Alt, Chattanooga, Tennessee, (for Golden Gallon, Inc.).

Carlos C. Smith, Chattanooga, Tennessee, (for Red Food Stores, Inc.).

Judges: Harbison, J. wrote the opinion. Fones, C.J.; Cooper and Drowota, JJ., concur. Brock, J., files dissenting opinion.

Opinion by: HARBISON

Opinion

[*358] These consolidated cases involve enforcement proceedings under the state "Unfair Milk Sales Act," T.C.A. §§ 52-331 to -334. An evidentiary hearing was held upon application of the Tennessee Department of Agriculture for a preliminary injunction. The injunction was denied. The parties thereafter submitted the record of that hearing along with supplemental materials for disposition of a motion for summary judgment filed by appellees [**2] who attacked the constitutionality of the regulatory statutes. The Chancellor held that the Unfair Milk Sales Act conflicted with the Sherman Antitrust Act, [15 U.S.C. § 1 et seq.](#), and accordingly violated the supremacy clause in Article VI of the United States Constitution. We respectfully disagree and remand for further proceedings.

A. The Present Proceedings

HN1 [+] The Unfair Milk Sales Act, as hereinafter discussed, is not a resale price maintenance or "fair trade" statute but is designed to prevent "loss-leader" sales and other unfair sales practices. Among other things it prohibits retailers of milk from selling below a "lawful minimum price", subject to certain exceptions as hereinafter discussed.

The record reveals that an unstable milk pricing situation had prevailed in the Chattanooga marketing area since 1976. In 1978 an enforcement proceeding was begun by the Commissioner of Agriculture against several of the

retailers involved in this case. They voluntarily agreed to comply with the statute and to cease selling milk below cost. Thereafter in 1978 the Commissioner suspected further violations and caused a conference to be held with several of the principal retailers, **[**3]** including the four parties defendant to one of the present consolidated actions. Subpoenas were issued for several of the retailers. Again voluntary compliance was agreed upon. However, when further violations appeared to have occurred in 1979, the present proceedings were instituted.

B. The Regulatory Statutes

The present milk-pricing statutes were adopted in 1961, replacing earlier statutes enacted in 1955 and in 1957. According to the legislative debates, the earlier statutes were designed primarily to prevent "surplus milk states" from "dumping" their excess milk in Tennessee "in huge quantities," thereby creating a "big monopoly," contrary to the interests of small milk plants and farmers within the state. A Senate sponsor of the 1955 statute stated that such "dumping" was engaged in to obtain a quick profit and to eliminate small companies.

The "Unfair Milk Sales Act" now under consideration replaced the earlier statutes. A House sponsor described it as a bill "to police against monopoly" among large processors and to prevent "subtle forms of price-fixing" among them to the ultimate detriment of the consumer. **HN2**¹ The Act was intended to prevent a conspiracy to sell **[**4]** **[*359]** milk below cost on a sustained basis. If it violates federal antitrust measures, this most certainly was not the intent of its sponsors, according to its legislative history. As stated, the statute is not a "fair trade" or resale price maintenance statute in any sense. Tennessee had such a statute, but it has long since been repealed.¹

HN3¹ Milk wholesalers and distributors subject to the Act are required regularly to file price lists both at wholesale and retail of all items of milk and dairy products sold by them and of all changes in and amendments thereto, these filings to be mailed to the Department at least ten days prior to the effective date thereof. The statute provides:

"Said price list shall be certified as correct by a duly authorized officer if that of a corporation or association or by the owner, a partner or duly authorized manager if that of an enterprise other than a corporation or association." **HN4**¹ T.C.A. § 52-331(2)(c). **HN5**¹

[5]** Retailers are prohibited from selling milk below their cost. This cost is defined as the sum of the invoiced cost to the retailer, as shown on the schedules provided by wholesalers and producers, plus eight percent (8%), representing their presumed cost of doing business in the absence of proof to the contrary.

Presumably the Commissioner and his staff are entitled to rely upon the sworn or certified price lists furnished by the processors and distributors, unless they have other information indicating that these are not correct. It is clear from the testimony of Mr. Kelsey Jones, staff attorney for the Department, that the Department does not accept the filed price lists as conclusive or binding.

Further, the record is clear that **HN6**¹ the statute does not, either in theory or in practice, permit processors or wholesalers to "fix" or to establish the minimum retail prices charged by any retail grocer. A presumed cost of doing business of eight percent is added to the wholesale cost filed by the processors with the Department, but no retailer is required to sell at that figure if he can establish that his actual costs are less than eight percent. The retailer, not the wholesaler, **[**6]** has control of that aspect of the pricing.

Further, **HN7**¹ under T.C.A. § 52-334(7), any milk product may be sold by a retailer below the price fixed by the Department if such sale

". . . is made in good faith to meet competition, provided that such prices shall not be cut more than once, nor in any event cut below the price of competition."

The statutes **HN8**¹ prohibit a number of advertising and sales practices by processors, distributors, and retailers of milk, an essential agricultural commodity. T.C.A. § 52-332. The following section, **HN9**¹ T.C.A. § 52-333,

¹ See T.C.A. §§ 69-201 to -205 (repealed).

contains statutory authorization for the imposition of sanctions, both civil and criminal, against persons who may violate the Act. [HN10](#)[¹] These statutes have been implemented by rather detailed regulations issued by the Department of Agriculture. See [Tennessee Rules and Regulations, Section 0080-3-5-.01](#) to -.03. A number of exemptions from the regulatory statutes are provided. See T.C.A. § 52-334.

C. Decisions Under the Sherman Act

In [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#), the Supreme Court of the United States held [HN11](#)[¹] that state regulatory statutes may limit competition without conflicting [^{**7}] with federal antitrust statutes. That case involved a challenge to a California intra-state raisin market program, and the Court enunciated a "state action" doctrine of antitrust immunity. In holding that the California statute did not violate the Sherman Act, the Court noted that [HN12](#)[¹] federal legislation should never be interpreted as superseding a state's exercise of its sovereign police powers unless the purpose of Congress to do so is clearly manifested. The Sherman Act was found not to manifest any such purpose. The California raisin program was upheld as a proper exercise of the state's police powers for the benefit and protection of the public welfare.

[*360] Parker and subsequent decisions established [HN13](#)[¹] two standards for antitrust immunity for state regulatory schemes. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the state itself. [City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 55 L. Ed. 2d 364, 98 S. Ct. 1123 \(1978\)](#). See also [California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d](#) [^{**8}] 233, 100 S. Ct. 937 (1980). As hereinafter discussed, we find that the Tennessee statutes and regulations here under consideration meet both of these criteria.

The cases principally cited and relied upon by appellees and by the Chancellor below involved a California resale price maintenance or "fair trade" statute, which was wholly different in theory and in practice from the statutes here under consideration. That statute indeed permitted the processor of wine to set the retail price, and variations from that price could only be granted "for good cause" by the administrative agency charged with enforcement. In holding the statute violative of the Sherman Act, the California Supreme Court said:

"We have not been referred to any instance in which the department allowed a retailer to sell below the listed price 'for good cause.'" [Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal. 3d 431, 579 P.2d 476, 483, 146 Cal. Rptr. 585 \(Cal. 1978\)](#).

The entire statutory scheme in California was quite different from the Tennessee statutes involved here. That scheme was also held to violate the Sherman Act by the Supreme Court of the United States in [California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)](#).

In that case, the Supreme Court suggested that the level of state involvement which would have justified immunity from the Sherman Act would have included establishment of prices, review of the reasonableness of prices, or regulation and pointed re-examination of the program.² Each of these levels of involvement is present in the operation of the Unfair Milk Sales Act, as hereinafter discussed, thus meeting the second standard required to protect "anti-competitive activity" from antitrust challenge.

In another case relied upon by appellees, [Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 \(1976\)](#), the Supreme Court found violative of the Sherman Act the passive approval of a utility tariff by a Michigan administrative agency. In the course of its opinion, however, the Supreme Court said:

² Note, California Retail Liquor Dealers Ass'n. v. Midcal Aluminum Co., Inc. *Limitation on State Action Antitrust Exemption*, 6 J. Corporation L. 681, 690 (1981). See also, *The State Action Exemption in Antitrust From Parker v. Brown to Cantor v. Detroit Edison*, 1977 Duke L.J. 871 (1977).

"Unquestionably [HN14](#)[¹⁵] there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition. Agricultural marketing programs, such as that involved in *Parker*, were of that character." [428 U.S. at 595](#).

D. Analysis of the Tennessee Statute and the Present Record

In our opinion the Tennessee regulatory statute involved here meets both of the standards or criteria set by the United States Supreme Court to prevent its conflicting with the Sherman Act.

The Chancellor recognized that the statute clearly articulated and affirmatively expressed a valid state policy, but was of the opinion that that policy was not sufficiently supervised by the state itself. In their briefs in this Court counsel for appellees appear to have conceded that the Tennessee statute is constitutional upon its face, but they attack the validity of its enforcement by the Department of Agriculture, at least during [**11] the period of time covered by this record.

[*361] The Chancellor found that the statute permits milk wholesalers to set retail prices and that the State "cannot vary the privately established minimum prices even if it determines that the prices are contrary to the purpose of the Act."

In our opinion this statement is not borne out by the record or by the provisions of the statute. In sustaining the statute against a due process challenge this Court said:

"The [HN15](#)[¹⁵] Legislature gave the Commissioner broad and general power in order that he could bear the burden of enforcing the Act at the instance of injured parties or on his own volition, in accordance with the duties and responsibilities imposed upon him by the Act." *Hogue v. Kroger Co.*, 213 Tenn. 365, 377, 373 S.W.2d 714, 719 (1963).

The provisions of the statute and of the regulations promulgated thereunder make this abundantly clear.

We have previously alluded to the requirement that milk processors and distributors file certified lists of their wholesale prices and, if they sell at retail, of their retail prices. [HN16](#)[¹⁵] T.C.A. § 52-333 is replete with statutory authorization for the imposition of sanctions, both criminal [**12] and civil, against any person who may violate the Act, whether this be a processor, distributor or a retailer. The statute spells out in great detail actions which may be taken by the Commissioner, including the swearing out of criminal warrants, civil injunctions, complaints to the District Attorney, or the holding of administrative hearings. Among other sanctions which may be imposed by the Commissioner are revocation of plant licenses and registration privileges of violators.

[HN17](#)[¹⁵] The Commissioner initially approves or establishes minimum lawful prices. He has issued detailed regulations which confirm a policy of active enforcement and supervision. All distributors and retailers of milk and milk products covered by the Act are required to retain invoices for a period of ninety days, subject to inspection by the Commissioner or his duly authorized representative. They are required to keep bills of sale, purchase contracts and lease arrangements of equipment used for storing, transporting or selling milk products. Cost records of their operations during the preceding three months are to be maintained. These include invoices, cost of materials, salaries, rebates or discounts, lease [**13] agreements, purchase contracts, depreciation and tax computations.

[HN18](#)[¹⁵] The regulations require separate filings for sales in private label cartons, and lists of customers involved in sales on a store door or a store platform service or plant dock. Any amendment in price schedules must be filed with the Commissioner, including those made for the purpose of meeting competitive prices or lawful competitive conditions. Records concerning changes to meet competition are required to be preserved for a period of one year, together with information and statements detailing the surrounding circumstances. See [Tennessee Rules and Regulations, §§ 0080-3-5-.01](#) to -.03.

It is difficult to conceive that this panoply of civil and criminal sanctions and regulations is not sufficient to "vary" prices which the Commissioner determines to be fixed contrary to the purposes of the regulatory statutes.

There is testimony from an inspector of the Department, Mr. Ansel Harper, to the effect that he simply administers prices fixed by two particular distributors. The Chancellor seized upon this testimony, but we believe that it must be taken in context. It had reference to the Chattanooga situation being **[**14]** considered in this litigation and is testimony from a mere retail inspector, not an official of the Department. Mr. Harper was a retail price inspector whose duties involved checking retail markups and wholesale invoices against filings which he had received from the Commissioner's office. He specifically testified that it was not his responsibility or a part of his employment to determine whether a violation of the statute had or had not occurred. Decisions as to whether a violation was occurring, decisions setting the lawful minimum prices and decisions as to whether to **[*362]** take corrective actions were not made by Harper, but were made by other state officials.

Mr. Harper testified that he did not undertake independent investigations as to whether retail prices were reasonable or justified. He simply stated that if they did not represent eight percent above invoiced cost, he would correspond with Mr. Jones, staff attorney of the Department, and Mr. Jones would make a determination as to what should be done.

At another point in his lengthy testimony Mr. Harper was asked:

"Q. Mr. Harper, is it part of your purpose to see that everybody sells the same kind of **[**15]** milk at the same price?

"A. No. No.

"Q. Well isn't that the practical effect of what you do?

"A. No.

"Q. Don't you try to make that the effect of what you do, Mr. Harper?

"A. No."

It is perfectly clear from the testimony of this witness, taken in context, that he was nothing more than an inspector, and that if he found in the course of checking retail prices against invoices a situation which he felt to be suspicious or contrary to the statutes, he would report this to his superiors for appropriate investigation and action.

The Chancellor stated in his opinion:

"No evidence was offered to establish that the Department of Agriculture has ever made any investigation of any of the prices filed by wholesalers during the 25 years the Act has been in effect."

In our opinion this finding is clearly erroneous. Both Mr. Harper and Mr. Jones testified that as to two of the parties defendant, Kroger and Golden Gallon, sufficient cost figures had not been supplied to the Department of Agriculture. Adequate cost figures had been supplied by the other wholesale suppliers, Flav-O-Rich and Mayfield. The Commissioner found nothing suspicious or unreliable **[**16]** about the latter cost figures, but, being dissatisfied with those supplied by the other two processors, he was causing an investigation to be made into their cost figures and had been contemplating the issuance of administrative subpoenas for that purpose. Both Golden Gallon and Kroger were milk processors and retailers. They therefore had no regular wholesale cost figures to supply to the Department, and the Department had to rely upon their cost for raw milk, transportation costs, cost of containers and the like in order to compile a wholesale cost figure to then be marked up by the statutory eight percent in order to fix a minimum retail price for milk sold by these two processor-retailers. The record shows that the Department was actively supervising the cost figures of these two companies, making inquiries about them and was actively engaged in seeing that the policies embraced in the statute were being carried out -- that is, that there be no deceptive trade practices or sustained sales below cost in order to divert trade or to engage in any of the other practices prohibited by **HN19**  T.C.A. § 52-332. The latter statute prohibits a number of practices both by processors and distributors **[**17]** and by retailers. It is by no means addressed solely to retail pricing.

We have already alluded to the fact that **HN20**  the statute does not permit processors or wholesalers to fix or establish a minimum retail price. No retailer is required to sell at the figure fixed by the Department if he can establish that his actual costs are less. Further, as previously pointed out, T.C.A. § 52-334(7) permits any milk product to be sold below the legal cost price fixed by the Department if it is made in good faith to meet competition.

The voluminous transcript in this case was compiled at a hearing dealing not with the constitutionality of the statutes in question, but with whether a preliminary or temporary injunction should be issued against the four defending retail grocery companies. The Chancellor found that all of them were selling below their cost and were violating the Act in that sense, but he found that they did not make such sales with intent to violate it and found that most of the sales were made for the purpose [*363] of meeting competition under the exception quoted above. The Chancellor held in other proceedings that "milk is milk", regardless of brand name, and that any [**18] retailer could cut his price on any brand to meet a lawful retail price established by any competitor.³ Under that holding of the Chancellor, no wholesaler or processor could possibly fix the price at which its product would be sold at retail, because the retailer might well sell below his projected "cost" (based upon the wholesale figure plus the statutory markup) if his actual costs were less than that computed under the statutory formula or if a retail sale was made in order to meet a lawful competitive price. As stated, therefore, [HN21](#)[] the statute is not a price-fixing one in any sense. It is simply designed to prevent unfair and deceptive trade practices with respect to the advertising and sale of essential farm commodities, milk and milk products.

The Chancellor correctly stated that the statute [HN22](#)[] does not involve the Commissioner in determining [**19] what is or is not a desirable minimum milk price from the standpoint of the consuming public. That is not its purpose. Neither does he fix a maximum retail price. [HN23](#)[] The statute is designed to prevent deceptive advertising and loss-leader sales by the continued advertising and sale of milk below the retailer's cost, that cost being his invoice price plus eight percent unless he shows otherwise by specific evidence. The Commissioner does in fact actively and continuously supervise this statutory program which was held by this Court in *Hogue v. Kroger Co., supra*, to be "a purpose affected with the public interest and quite properly within the State's police power." 213 Tenn. at 372, 373 S.W.2d at 717.

Continuing, the Court said:

"The method adopted by the Legislature to attain this end was to prohibit retailers from selling milk below their cost. This "cost" was defined as the sum of their invoiced price, plus eight per cent of their invoiced price for cost of doing business (the eight per cent being the presumed cost of doing business in absence of proof to the contrary).

"The Act is not for the purpose of guaranteeing to anyone a profit. It is not a price-fixing statute. [**20] Under it, the retailer may set any price he chooses so long as it is above his 'cost'. Its purpose, as set out above, would be defeated if retailers could avoid its limitations directly or indirectly so as to sell at prices effectively below 'cost'." 213 Tenn. at 372, 373 S.W.2d at 717.

It is clear from the testimony of both Mr. Harper and Mr. Jones that the Department does not exercise any control over the pricing of raw milk to the farmer. This is controlled by federal marketing orders, which are expressly recognized by the Tennessee statutes. T.C.A. § 52-331(1)(m). Mr. Jones testified, however, that his Department had definitely undertaken to ascertain actual costs both from Golden Gallon and from Kroger, since they did not file the wholesale price list required by the statute, for the reasons stated above. Mr. Jones testified that he had real reservations about using the eight percent markup figure as retailers' cost in connection with the products of both of these companies. He said that he had no way to ascertain the Kroger cost other than to use the procedures outlined by law, such as by investigation and subpoenas. Kroger apparently purchases its milk in the midwest [**21] and has it shipped into the Chattanooga area.

Describing the actual involvement of the Department of Agriculture in the administration of the present statute, Mr. Jones testified as follows:

"Q. What is your understanding of your involvement insofar as the government is concerned of setting the price of milk?

"A. I administer a law which regulates unfair trade practices in the sale of dairy products to the extent that particular methods of pricing are included as unfair trade practices.

³ Milk is classified and priced according to butterfat content. The Chancellor deemed 3.5 percent butterfat milk of one brand to be equivalent to that of another.

[*364] "Then, I feel that we have an impact on pricing.

"I don't feel that we set it at any point.

"Let me elaborate on that a little more.

"The particular sale -- the most common unfair trade practice which comes to our attention is the sale below cost. And obviously there is a direct impact on price there, because if someone is selling a product at a price which is below their cost, well, then, we feel that it is a violation of the law and take action, some action to correct the problem."

Mr. Jones said that he ordinarily took action against a retailer which he felt was initiating price cuts below cost, and not against others who made cuts for the purpose of meeting competition. [**22] As stated, the transcript of testimony indicates that the four defending retailers in the present case for many months were selling below their cost as computed by the Commissioner from such data as he had. It may be that he was unwise in instituting an enforcement proceeding when he did not have at hand the actual cost of either Kroger or Golden Gallon, since the other defending parties insisted that they cut their prices to meet competition by sales of those competing products. Nevertheless the record indicates that the Department is kept currently aware of price trends in the milk industry, of rising or falling costs of raw milk, containers and other equipment, and that it at all times has current information as to what actual costs should ordinarily be.

HN24 [+] Neither the statute by its terms nor the record in this case, in our opinion, demonstrates a passive submission by the State in letting wholesalers or milk processors set retail prices in a monopolistic or anti-competitive fashion as found by the Chancellor.

The record in this case dealt with one narrow marketing area of the state. It dealt with a market that had been unstable for a period of years because of a variety of factors [**23] shown in the record, including the proximity of competing markets in the neighboring state of Georgia. To conclude from this record that the entire statutory scheme puts the State in the position of fixing prices in a monopolistic fashion, in our opinion, is unjustified. As stated previously, the testimony which was adduced in this regard was taken before a constitutional issue had been formally raised, and was taken on a hearing for a temporary injunction prior to the filing of responsive pleadings by the defending parties. It is therefore not surprising that there is absent from the record a detailed history of the enforcement of the statute in other parts of the state or during other periods than the short time covered by this record.

The finding of the Chancellor that there had not been active supervision by the Department failed to take note of the fact that the Department was in fact investigating the prices filed by both Kroger and Golden Gallon when the present enforcement proceedings were begun. It further ignores the following testimony of Mr. Jones:

"Q. All right, sir. Now, as I understand from Mr. Harper's testimony, your Department does not undertake to [**24] go behind the price filings made by the wholesalers; is that correct? You accept their wholesale price filings at whatever figure they give you.

"A. Well, we generally do, Mr. Smith.

"That is not to say that we will always do that.

"If a price were filed that was inordinately low, it looked suspiciously low, arouse our suspicion, then that would probably be cause for us to try to proceed administratively to look behind that figure.

"But as a general rule, the prices that are filed are routinely in order -- rarely -- well, they have never to me given an indication -- there is always an increase, I guess.

"Q. All right, sir. So, what you do, or what your department does when you get the price filing, you take the rebate, is that correct, which gives you a net price to the retailer?

"A. Yes. The rebate is part of the price filing.

[*365] "Q. All right, sir. And then you take this mathematical figure out of the statute, eight percent in the case of the retailers involved here, and then you take that percentage and add it to the net price to get their minimum retail price; is that correct?

"A. The law allows us to presume eight percent for their [**25] cost of doing business.

"We don't always allow them, but most of the time we do.

"Q. So, for all practical purposes, when you receive from Mayfield and Flav-o-Rich a price filing as to what their wholesale prices are, you effectively, except for doing two mathematical calculations, permit Mayfield and Flav-o-Rich to set the minimum price for their product; is that not correct?

"A. I will have to qualify the answer to that.

"Q. All right, sir.

"A. In the usual sense, that's probably true.

"That would be a Fair Trade Law, obviously, a resale price maintenance arrangement.

"The law is not that, and I believe the Court can come to that conclusion.

"But if there is a lower lawful price on the market, then they can go down to that price regardless of what their costs are.

"So, in that sense, the wholesaler would have no control over the eventual retail price of this commodity.

"Q. All right, sir. But when they do go below that cost, they are taking advantage of the provision in the code that they are selling below cost to meet competition?

A. True.

Q. All right, sir. But what I'm saying is that Mayfield and Flav-o-Rich, effectively, by filing [**26] with you a price, set the minimum price, the minimum cost of milk in this market; is that not right?

"A. I couldn't agree with that, either. I mean, effectively, no. Because we've got -- Golden Gallon here, I'm not at this time prepared to challenge the \$1.69, \$1.49, \$1.29. That may be, and in fact that could be, depending upon the whim of Golden Gallon, if they choose to establish their price there, then other merchants in the market could also go down to that apparently lawful price to meet it."

In further testimony, Mr. Jones stated that the Department did not require retailers to use the eight percent markup over wholesale invoice. He said:

"We don't require them to mark that up. We tell them what, based upon the presumption in the law, the lawful minimum price would be.

"I have always made it clear to them that if they can establish actual cost less than that presumption, that they are welcome to use some figure less than eight percent of the invoice.

"And I have also made it known to them that if there is a competitor in the market who is pricing less than what they are and less than what their wholesale cost is, and lawfully doing so, that they are entitled [**27] to meet him.

"Q. Let me get back to my question first.

"The effect of your application of the laws require retailers, if they follow your orders, to mark up wholesale milk by eight percent; is it not, sir? I'm talking about the practical effect now. Isn't that what they do?

"A. As a practical matter, the eight percent figure probably has some significance, true. But, again, eight percent, if it's standard service -- I don't know -- there may be some merchants in the market who are receiving drop shipment. I'm not sure.

"But in the sense that they are receiving standard service and where they do not care to offer evidence to the contrary, they do use the eight percent, and that's the minimum price over their wholesale invoice."

Mr. Jones testified positively that the practical effect of the administration of the statute by his Department was not to set a [*366] uniform price throughout the market. He said:

"As I have stated to you earlier, there are other factors in the market. They have the right to meet competition which, as you know, in this market is something that is done very frequently.

"And they have the right to acquire milk from a different [**28] source.

"We are not requiring that they acquire their milk from these particular wholesalers; although, you say as a practical matter they do.

"But I couldn't agree that they set the price in the market, no."

Mr. Jones did testify that after his administrative hearing in 1978, retail grocers raised their price above cost and all of them ultimately arrived at the same price. This was action taken by the retailers, however, not by wholesalers or

processors, and came after the Department had called a conference of retailers pursuant to pricing complaints which it had received.

It is clear from the testimony that [HN25](#)[] the varying rebates which are given to large volume retailers cause presumed lawful statutory minimum prices of different retailers to vary. Since any other retailer can set his retail price to meet any lawful price, the effect of the statute is not to set a uniform price in the market in any sense, but simply to prevent deceptive advertising and sales practices. The Department monitors those practices which are actually followed by the retailers and monitors the price lists submitted by the wholesalers and processors. The role of the State in the administration of [\[**29\]](#) this statute is not passive in any sense, in our opinion, nor is the State fostering monopolistic practices, engaging in them itself, or permitting, expressly or impliedly, combinations in restraint of trade.

E. Federal and State Interpretation of Similar Statutes

The involvement of the Commissioner of Agriculture, the state dairy administrator, and their staffs is markedly similar to the powers of the Connecticut Liquor Commission in [*Serlin Wine & Spirit Merchants, Inc., v. Healy, 512 F. Supp. 936 \(D. Conn. 1981\)*](#), and the Alcohol and Tobacco Tax Division of the Maryland State Comptroller's Office in [*George W. Cochran Co. v. Comptroller of the Treasury, Alcohol and Tobacco Tax Division, 292 Md. 3, 437 A.2d 194 \(Md. 1981\)*](#). These cases, which dealt with statutory prohibitions against below-cost selling, upheld unfair sales acts which are similar in design and purpose to the Unfair Milk Sales Act against antitrust challenges. In each case the level of state supervision and enforcement was held to satisfy the second state action requirement for exemption from Sherman Act violation.

Indeed appellees have cited little authority for holding an unfair sales statute, such as [\[**30\]](#) that involved here, violative of federal anti-trust statutes. However, the Commissioner has cited and relies upon [*Baseline Liquors v. Circle K Corp., 129 Ariz. 215, 630 P.2d 38 \(1981\)*](#), in which an Arizona appellate court expressly distinguished between resale price maintenance laws and those designed to prevent "loss-leader" sales or other unfair sales practices. Citing and distinguishing the *Rice* case, *supra*, from California, the Arizona court said:

"The Rice opinion dealt with a fair trade law in California. It found that the law violated the Sherman act and was not protected by the state action exemption to the law. That is not the situation here, since this statute is not a fair trade act, but one which prohibits below-cost sales for the purpose of injuring competition. That there is a difference is manifested by the fact that until 1976, Arizona had *both* a fair trade act *and* an act prohibiting below-cost sales. The former was repealed." [630 P.2d at 45](#).

The Arizona court also noted that the California court had not stricken down "loss-leader" statutes of that state and had indicated that those statutes would be sufficient to achieve fundamental [\[**31\]](#) goals of price maintenance laws without contravening the Sherman Act. Review of the Arizona decision was denied by the Supreme Court of the United States. See [*Skaggs Drug Centers, \[*367\] Inc. v. Baseline Liquors, 454 U.S. 969, 102 S. Ct. 515, 70 L. Ed. 2d 387 \(1981\)*](#).

In the recent case of [*Rice v. Norman Williams Co., 458 U.S. 654, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 \(1982\)*](#), the Supreme Court of the United States sustained certain California liquor statutes against a Sherman Act attack. These statutes required that wholesalers be designated as authorized importers by distillers in order to purchase or accept delivery of the distillers' brands of beverages. While those statutes were quite different from the agricultural commodity regulations involved in the present case, the following statement from the opinion of the Court is instructive:

"In [HN26](#)[] determining whether the Sherman Act preempts a state statute, we apply principles similar to those which we employ in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause. As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between [\[**32\]](#) the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the

statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anti-competitive effect. [Citations omitted.]

"A [HN27](#)¹ party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy." [102 S. Ct. at 3299](#).

F. Our Conclusions

In our opinion [HN28](#)¹ the regulatory statutes involved in this case do not, in theory or in practice, violate any federal antitrust legislation. They fall well within the state police power as recognized by both state and federal decisions, deal with a vital farm commodity and are important in the regulation of the milk industry in this state.

After a lengthy hearing in this case, the Chancellor denied a temporary injunction because he did not find that the violations [\[**33\]](#) of the statute committed by the four defending parties were intentional, and he found that some of their below-cost prices were lawfully fixed in order to meet competition as permitted by the statute. No additional evidence was offered after answers were filed and motion for summary judgment heard. It may be that upon remand he will see fit to deny injunctive relief, but that is a far different thing from striking this statute from the books as conflicting with federal anti-trust legislation. It seems to us to do just the opposite -- that is, to involve the State in preventing deceptive pricing, advertising, and sales practices and to prevent the use of milk and dairy products as loss-leaders in the wholesale and retail business. In this sense it resembles several other state statutes designed to prevent unfair trade practices.⁴

[\[**34\]](#) The judgment of the Chancellor is reversed and this cause is remanded for further proceedings which he may deem appropriate. Costs incident to the appeal are taxed to appellees. All other costs will be assessed by the Chancellor.

Fones, C.J.; Cooper and Drowota, JJ., concur;

Brock, J., files dissenting opinion.

Dissent by: BROCK

Dissent

BROCK, J.

I respectfully dissent from the majority opinion.

On or about May 1, 1979, Ansel Harper, who was employed by the Tennessee Department of Agriculture to monitor retail dairy prices in the Chattanooga/Hamilton [\[*368\]](#) County area, observed that Bruno's was selling milk at prices that violated Tennessee's "Unfair Milk Sales Act," T.C.A., §§ 52-331 -- 52-334. Harper reported Bruno's prices to his superiors in the Department. Bruno's pricing of milk at prices below cost, as computed pursuant to T.C.A. § 52-331(1)(n), resulted in this enforcement action by the Commissioner.

The Chancellor held that the Act conflicted with the Sherman Antitrust Act, [15 U.S.C. § 1](#), and was, therefore, proscribed according to the dictates of the supremacy clause in Article VI of the federal constitution. The case reaches us by direct appeal.

⁴ E.g., T.C.A. §§ 52-335 to -341 (Unfair Frozen Dessert Law); T.C.A. §§ 69-301 to -306 (Unfair Sales Law); T.C.A. §§ 69-401 to -413 (Unfair Cigarette Sales Law); T.C.A. §§ 69-101 to -115 (Unlawful Restraint of Trade and Discrimination); T.C.A. §§ 69-601 to -607 (Unfair Trade Practice and Advertising Act).

The Unfair Milk [**35] Sales Act is an anticompetitive measure first adopted by the legislature in 1955. Ostensibly, the Act was designed to prevent destruction of the small retailer by financially strong competitors who are able to sell below their costs for extended periods of time. *Hogue v. Kroger Co.*, 213 Tenn. 365, 373 S.W.2d 714 (1963). To achieve that end the Act establishes a "lawful minimum price" and makes it unlawful for a retailer to sell milk below this statutory minimum. The method adopted by the legislature to attain this end was to prohibit retailers from selling milk below their cost. This "cost" is defined as the sum of (1) the retailer's invoiced price plus (2) their "cost of doing business" which is presumed to be 8% of the invoiced price, in the absence of proof to the contrary. Wholesalers and producers file price schedules with the Department of Agriculture and the 8% markup is applied to those schedules.

The Sherman Act was enacted in 1890 and declared: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations is declared to be illegal." The Miller-Tydings Act and the [**36] McGuire Act were enacted by Congress in 1937 and 1952, respectively, for the purpose of permitting "fair trade" contracts and laws which prescribe minimum resale prices for certain goods, and allowing "non-signer" provisions which make minimum resale prices enforceable against a retailer who has not entered into a "fair trade" contract. The Tennessee legislature enacted the Unfair Milk Sales Act in 1955.

In 1975, the U.S. Congress enacted the "Consumer Goods Pricing Act" which effectively repealed Miller-Tydings and McGuire. The result has been a restoration of the Sherman Act's ban on resale price maintenance unless the industry or program enjoys a special antitrust immunity.

In [*Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#), the Supreme Court acknowledged that a state may engage in anti-competitive conduct and not run afoul of the Sherman Act. The court's *ratio decidendi* is revealed in its conclusion that, "there is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history." [317 U.S. at 351](#). This so-called "state action exemption" is limited, however, to those situations in which a state exercises its legislative [**37] authority in promulgating regulations and in prescribing the conditions of their application. In effect, *Parker* holds that the Sherman Act does not forbid the State itself to fix non-competitive prices, but that a state statute which purports to permit private parties to engage in non-competitive price fixing is in violation of the Sherman Act. The anticompetitive conduct, therefore, requires more than mere state approval before it is granted immunity. [*Cantor v. Detroit Edison Co.*, 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 \(1976\)](#); [*Goldfarb v. Virginia State Bar*, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 \(1975\)](#).

Recently in [*California Retail Liquor Dealers Asso. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)](#), the Supreme Court once again addressed the issue of antitrust immunity, and articulated the following standards based on *Parker v. Brown* and its progeny:

"These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' [**369] [**38] by the State itself. [*City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 55 L. Ed. 2d 364, 98 S. Ct. 1123 \(1978\)](#)." [445 U.S. at 105](#).

The Unfair Milk Sales Act, as interpreted in *Hogue v. Kroger Company*, *supra*, comports with the first standard set forth in *Midcal* requiring that state policy of noncompetition be clearly articulated. The second requirement, active supervision and promotion of that policy by designated state authorities, however, is not present in the Act; and, the evidence reveals that in practice the supervisory activity of the Department of Agriculture is so minimal as to disqualify the Act from the qualified antitrust immunity allowed to the states in *Parker v. Brown*.

The regulatory scheme challenged in *Parker* permitted the organization of local cooperatives to develop marketing policies for the California raisin crop. The program was administered under the auspices of the State Agricultural Prorate Advisory Commission. The Advisory Commission, which was appointed by the Governor, was empowered to disallow the implementation of any cooperative policies if those policies were deemed to be in derogation of the objectives of [**39] the program. Owing to the high degree of direct involvement and supervision by state authorities, the Supreme Court held in *Parker* that the Sherman Act did not apply. In *Midcal* the court was

attempting to further define the parameters of the state action exemption, and referring to the *Parker* decision stated, "Without such (state) oversight, the result could have been different."

The testimony of an employee of the Tennessee Department of Agriculture, whose duties include checking the prices of milk at retail stores, reveals the extent to which the state is involved in administering the Unfair Milk Sales Act. The employee testified as follows:

"Q. I'm talking about the price filings that are made by your department from Mayfield and Flav-o-rich, as to what they are selling at wholesale; you accept those at face value, do you not?

"A. That's right.

"Q. You don't go behind those numbers. So really, all you are doing is you are administering a statute, the minimum prices of which are fixed by Mayfield Dairies and Flav-o-rich, are you not?

"A. That's right."

The activity described above does not rise to the level of state involvement required [**40] to immunize anticompetitive conduct from the strictures of the Sherman Act. Indeed, it more closely resembles the wine pricing scheme that was condemned by the Supreme Court in *Midcal*, the court saying:

"The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." [445 U.S. at 105-106](#).

The learned Chancellor analyzed the Tennessee Unfair Milk Sales Act in the context of the affirmative responsibilities that state authorities must undertake to avoid application of the Sherman Act. In a thorough and well reasoned opinion he found as follows:

"Under the terms of the Tennessee Unfair Milk Sales Act, the state has no power to undertake investigations to determine what minimum price will best serve the public interest [**41] and best achieve the purposes of the Act. The state cannot vary the privately established minimum prices even if it determines that the prices are contrary to the purposes of the Act. In fact, the small retailer which the Act purports to protect is placed at a competitive disadvantage by volume discounts [*370] afforded by wholesalers and producers to the large retailers."

This anomaly is the result of rebates included in the price schedules filed by wholesalers. The quoted testimony that follows is that of Mr. Kelsey Jones, staff attorney with the Tennessee Department of Agriculture and administrator of the "milk law," and it demonstrates the effect of these rebates. Mr. Jones testified as follows:

"Q. When you get these wholesale reports that are filed, they are required to be filed is that true, sir?

"A. That's correct.

"Q. And where they file these discounts, rebates, I think they call them -- those rebates are based on volume; is that correct?

"A. Correct.

"Q. So, therefore, the larger the purchaser, the bigger the purchase, the larger the volume of purchase, the cheaper they got the milk; is that true.

"A. Yes.

"Q. And [**42] then, I think, as you answered to Mr. Harris, when it comes to the small Mom and Pop operation, they don't get the discount and therefore their cost is higher, is that correct?

"A. That's correct.

"Q. And I think you indicated their only alternative, other than to sell at what it costs them is to cut their price down to supermarket level; is that right?

"A. Cut their price down, correct.

"Q. And then, over an extended period of time, they are constantly losing money on the sale of their milk; is that correct?

"A. That's correct."

This testimony substantiates the Chancellor's conclusion that, "In fact, the small retailer which the Act purports to protect is placed at a competitive disadvantage by volume discounts afforded by wholesalers and producers to the large retailers."

The California appellate court based its ruling in *Midcal* on a prior decision by the California Supreme Court in which similar pricing restrictions were invalidated because of passive state involvement. That case was [*Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal.3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 \(1978\)*](#), wherein the court described a situation very similar [**43] to that in the case at bar.

"In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers." [*579 P.2d at 486.*](#)

The point was made in *Rice* that the vertical control exerted over wine prices by producers resulted in effectively destroying horizontal competition. I conclude, after reviewing the record evidence, that the Tennessee Unfair Milk Sales Act has the same effect in this regard. Mr. Kelsey Jones, an attorney with the Tennessee Department of Agriculture, whose testimony was quoted *supra*, further testified as follows:

"Q. All right, sir. When you contacted the defendants who have been named in this suit after the administrative hearing and told them what you thought the legal price of milk was, did they all establish the same price after your contact, sir?

"A. They all established a price above those lawful, what I considered to be the lawful minimum prices.

"Q. [**44] That is the same price for like items?

"A. I believe that they did arrive at the same prices."

It is obvious on the face of the record that horizontal competition is substantially impeded by enforcement of the Unfair Milk Sales Act and, since the Sherman Act forbids the kind of price fixing shown here, the Tennessee enactment should yield under the [*supremacy clause of the Constitution of the United States.*](#)

[*371] I would affirm the decree of the Chancellor.

End of Document



Gold Cross Ambulance & Transfer v. Kansas City

United States Court of Appeals for the Eighth Circuit

February 16, 1983, Submitted ; April 26, 1983, Filed

No. 82-1913

Reporter

705 F.2d 1005 *; 1983 U.S. App. LEXIS 28532 **; 1983-1 Trade Cas. (CCH) P65,339

Gold Cross Ambulance And Transfer and Standby Service, Inc., Appellants, v. City Of Kansas City, Metropolitan Ambulance Services Trust, Hadley Reimal d/b/a Ambulance Services, Lawrence Hughes d/b/a Ambulance Services, June DeSaulniers d/b/a Ambulance Services, Eugene DeSaulniers d/b/a Ambulance Services, Ambulance Services, Inc., Fourth Party, Inc. and Jack Stout, Appellees

Prior History: [**1] Appeal from the United States District Court for the Western District of Missouri.

Disposition: Affirmed.

Core Terms

ambulance service, ambulance, municipal, ordinance, license, state action doctrine, state policy, supervision, nonemergency, rights, anti trust law, district court, public utility, regulation, anticompetitive, articulated, emergency, displace, city council, authorization, antitrust, state action, cable television, summary judgment, private company, due process, plaintiffs', possessed, monopoly

LexisNexis® Headnotes

Governments > Local Governments > Duties & Powers

HN1 **Local Governments, Duties & Powers**

Municipalities are instrumentalities of the state, and their actions may reflect state policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Governments > Public Improvements > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN2 **Exemptions & Immunities, Parker State Action Doctrine**

The Parker state action doctrine exempts anticompetitive conduct engaged in by municipalities, pursuant to state policy to displace competition with regulation or monopoly public service.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

[**HN3**](#) Exemptions & Immunities, Parker State Action Doctrine

In order to successfully assert the Parker state action doctrine as a defense, the government entity must establish the requirement that its challenged restraint constituted either the action of the state itself in its sovereign capacity, or municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

[**HN4**](#) Exemptions & Immunities, Parker State Action Doctrine

An expression of state policy that is sufficient to establish Parker state action immunity is comprised of two elements: The legislature must have authorized the challenged activity, and it must have done so with an intent to displace competition.

Constitutional Law > State Constitutional Operation

Governments > Local Governments > Police Power

[**HN5**](#) Constitutional Law, State Constitutional Operation

There is no absolute right to contract free of state regulation under the police power.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

[**HN6**](#) Standing, Third Party Standing

A litigant may not claim standing to vindicate the constitutional rights of some third party.

Counsel: Paden, Welch, Martin, Albano & Graeff, P.C., Michael W. Manners, C. Robert Buckley, Independence, Missouri, for Appellants.

George E. Leonard, Russell S. Jones, Jr., Shughart, Thomson & Kilroy, A Professional Corporation, Kansas City, Missouri, for Metropolitan Ambulance Services Trust, Ambulance Service, Inc., Jack Stout and Fourth Party, Inc., Sam B. Mumma, William D. Geary, Assistant City Attorneys, Kansas City, Missouri, for City of Kansas City, Missouri.

Judges: Heaney, McMillian and Arnold, Circuit Judges.

Opinion by: HEANEY

Opinion

[*1007] HEANEY, Circuit Judge.

The issue we face here is whether the City of Kansas City, the Metropolitan Ambulance Services Trust (MAST), and various other defendants¹ violated the federal and state antitrust laws and the United States Constitution by implementing a single-operator ambulance system to provide all of the city's emergency and nonemergency service. We hold that Kansas City, MAST, and the consultants they retained are shielded from federal and state antitrust liability because they established the municipal ambulance system [*2] pursuant to state authorization and a clearly articulated and affirmatively expressed state policy to displace free competition in the ambulance business. We further hold that none of the defendants deprived the plaintiffs of their constitutional rights to due process. The district court's judgment, therefore, is affirmed.

I.

BACKGROUND

Kansas City, Missouri, has established a municipal ambulance system under which a municipal trust, MAST, contracts with a single private operator to provide all of the ambulance service -- both emergency and nonemergency -- within the city. In November, 1979, MAST awarded the initial [*1008] exclusive [*3] contract to Ambulance Service, Inc. (ASI), a corporation which had been formed earlier that year by the merger of the five existing private ambulance companies located in Kansas City. MAST has since renewed this contract and ASI continues to be Kansas City's exclusive provider of ambulance service.

Because ASI holds the city's sole ambulance license, other ambulance companies in the metropolitan area are denied access to most of the Kansas City market. They can transport into Kansas City patients whom they have picked up outside the city limits, and they can travel through the city on their way to other municipalities. They cannot, however, pick up any patients within the Kansas City borders.

Dissatisfied with these restrictions, plaintiffs Gold Cross Ambulance, Inc. (Gold Cross), and Transfer and Standby Services, Inc. (Transfer) -- two private companies located in suburban Independence, Missouri -- brought this five-count action, alleging that the defendants had violated federal and state antitrust laws and deprived the plaintiffs and Kansas City residents of various constitutional rights.²

[*4] On May 7, 1982, the district court granted summary judgment in favor of defendants Kansas City, MAST, Jack Stout and Fourth Party, Inc., on the plaintiffs' antitrust claims, but denied it to the individual shareholders of ASI on these counts. [538 F. Supp. 956, 967-970 \(W.D. Mo. 1982\)](#). The court also granted summary judgment in favor of all defendants on the plaintiffs' constitutional claims. [Id. at 970-973](#). The plaintiffs now appeal.³

¹ In addition to Kansas City and MAST, the plaintiffs named as defendants Ambulance Service, Inc. (ASI), the current holder of the city's exclusive ambulance license; four individual shareholders of ASI who had consolidated their previously private companies; Jack Stout, a consultant who helped develop the city's ambulance system; and Stout's company, Fourth Party, Inc.

² The plaintiffs originally filed their action in state court, alleging only Missouri antitrust law violations and constitutional claims under the fourteenth amendment and 42 U.S.C. § 1983. Defendant MAST removed the case to federal court, and filed a counterclaim alleging that the plaintiffs violated the federal antitrust laws. The plaintiffs then amended their complaint to include their Sherman Act claims.

³ The appeal is properly before this Court because the district court directed entry of final judgment pursuant to Fed. R. Civ. P. 54(b) on plaintiffs' claims against which it granted summary judgment.

II.

FACTS

Kansas City for many years provided emergency ambulance services to its citizens by operating a public ambulance system through the Kansas City General Hospital and, later, through the city Fire Department. In the early 1970s, however, Kansas City began to contract with five competing, private companies for emergency ambulance service. A central dispatch center [**5] allocated calls among the various companies on a "round-robin" basis. In 1973, the dispatch center adopted a policy of dispatching the closest available ambulance to the scene of the accident, regardless of which company owned the vehicle.

In 1978, a controversy developed concerning the slow response time by the private ambulance companies to emergency calls. As a result, the city formed a Public Safety Improvement Committee to investigate alternatives for improving emergency medical service. The Committee reported its findings to the city council on March 21, 1979, and recommended that the city adopt a publicly controlled ambulance system which utilized a single provider for both emergency and nonemergency services. Within two weeks, the city council approved a resolution committing Kansas City to such a system. In April, 1979, the city retained a consulting firm to study the implementation of a single-provider system.

Jack Stout, the consultant, was the recognized developer of the so-called "public utility model" of ambulance service in which a single operator replaces competing private companies. This model is designed to eliminate the incentive created by free-market delivery [**6] of ambulance service by private companies to neglect emergency ambulance service in favor of the more profitable nonemergency business.

This incentive to neglect emergency service arises from the cost structure of the [*1009] ambulance business. The fixed cost of providing emergency service is very high because expensive advanced life support equipment is required and because sufficient capacity to meet peak demand within an adequate response time must be maintained, even though that full emergency capacity is seldom utilized. In contrast, the cost of handling nonemergency ambulance service with the idle excess capacity is low. Moreover, the fee-collection rate for nonemergency service is substantially higher than for emergency service. Thus, nonemergency calls are significantly more profitable than emergency calls, and private ambulance companies operating in an unregulated market have a strong incentive to concentrate on providing nonemergency service rather than quick, high quality emergency care.

To resolve these problems, the public utility model advocates the following approach: first, a city contracts with a single operator to provide all municipal ambulance service [**7] within medical care and response time standards set by public officials. The city then collects from each patient the fee for services rendered by the company. If the ambulance company fulfills its contractual requirements, it receives payment regardless of whether the city has been able to collect all fees due. If the city collects insufficient fees to cover the amount owed to the ambulance company, the city makes up the deficit as a government subsidy. Finally, the city owns all the ambulance service equipment to prevent service from being interrupted if the operator encounters financial difficulty.

Thus, the public utility model, in theory at least, eliminates the incentive to favor nonemergency calls because the operator is paid only the contractual sum and this payment is not conditioned on the collection of user fees. For this model to be economically feasible, however, the municipally-licensed operator should be the only ambulance service allowed to do business in the city. If other private companies are permitted to operate in the city, they will retain the strong incentive to take the high profit nonemergency calls and leave the less-profitable emergency business to [**8] the city system.

In September, 1979, the Kansas City council passed an ordinance formally adopting the public utility model for city ambulance service and creating a nonprofit public trust, MAST, to implement and manage the new system. Several problems prevented Kansas City from implementing its plan, however. Missouri law requires all ambulance service

operators to have a state-issued license,⁴ which MAST did not possess. Moreover, MAST did not own the equipment necessary to provide full ambulance service to the city. Thus, MAST could not provide a bidder with either the license or the equipment necessary to implement the public utility model.

Consequently, in October, 1979, the city council repealed its September ordinance, while retreating from full implementation of the public utility model, reiterated Kansas City's commitment to the concept. Thereafter, MAST contracted with ASI, which possessed the requisite state license and equipment, **[**9]** to provide the city's ambulance service. MAST apparently issued the exclusive municipal license to ASI without complying with the competitive bidding procedures required by city ordinance because, according to defendant Kansas City, ASI was the only state-licensed company in the area that possessed sufficient equipment to provide ambulance service on a single-provider basis.

Eventually, in December, 1980, the city council directed MAST to fully implement the public utility model.⁵ In September, 1981, MAST purchased all of ASI's outstanding stock, thereby obtaining the company's equipment and state license. Thereafter, on December 17, 1981, the city council passed Ordinance 53539, which directed **[*1010]** MAST to fully implement the public utility model.⁶

[10]** Thus, pursuant to Ordinance 53539, Kansas City has adopted a publicly controlled, single-operator ambulance system. The plaintiffs challenge that system, contending that the defendants have violated the federal and state antitrust laws and the United States Constitution by implementing it.

III.

ANTITRUST CLAIMS

The district court found that the state action doctrine shields defendants Kansas City, MAST, Jack Stout and Fourth Party, Inc., from liability under the federal antitrust laws.⁷

[11] A. The State Action Doctrine.**

In *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), the Supreme Court first addressed the question of whether the federal antitrust laws prohibit a state from exercising its sovereign powers to impose certain anticompetitive restraints. It held that a marketing program enacted by the California legislature to create price supports for raisins was exempt from challenge under the Sherman Act because the program "derived its authority * * * from the legislative command of the state." *Id. at 350*. The Court stated:

⁴ [Mo. Rev. Stat. §§ 190.105, 190.125](#).

⁵ Shortly thereafter, Gold Cross and Transfer filed their action in state court. After the plaintiffs commenced their lawsuit, no further action apparently was taken on the license applications they had pending with MAST.

⁶ Ordinance 53539, of course, requires MAST to contract with a single operator to provide all of Kansas City's ambulance service. In addition, it establishes an Emergency Physicians Advisory Board which appoints an ambulance service Medical Director and makes recommendations for the improvement of ambulance service. The ordinance also gives the city's Director of Health authority to promulgate rules, regulations and standards necessary to implement the public utility system. The Director of Health is empowered to establish standards for clinical performance, patient care, response time and medical protocols, and to develop procedures for medical control over the delivery of advanced life support by ambulance personnel. Finally, the ordinance requires all ambulance drivers, attendants, and dispatchers to obtain permits from the Director of Health.

⁷ The district court held that because the state action doctrine exempted these four defendants from liability under the federal antitrust laws, it also exempted them under Missouri's antitrust statutes. [538 F. Supp. 956, 970 \(W.D. Mo. 1982\)](#). It held that Stout and Fourth Party, Inc., shared the state action exemption of Kansas City and MAST because they did nothing beyond what they were authorized to do by the city and MAST. *Id. at 969-970*. The plaintiffs do not challenge either of these conclusions by the court below; rather, they contend that it erred in holding that the state action doctrine is applicable here.

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. 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.

Id. at 350-351.

Subsequent decisions have refined the *Parker* state action doctrine. E.g., *Goldfarb v. Virginia* [**121] *State Bar*, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977). In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978), the Supreme Court faced the question of whether the state action doctrine protected a municipality from federal antitrust liability. A plurality of four justices rejected the claim that the state action doctrine extended to "all governmental entities, whether state agencies or subdivisions of a State * * * simply by reason of their status as such." *Id. at 408*. The justices nonetheless recognized that *HN1*[↑] municipalities are instrumentalities of the state, and their actions may reflect state policy. ... *Id. at 413*. The plurality thus held that *HN2*[↑] "the Parker doctrine exempts only anticompetitive conduct engaged in * * * by [municipalities], pursuant to state policy to displace competition with regulation or monopoly public service." *Id.*

[*1011] The plurality observed that a state policy to displace competition could [**13] not be found "in the absence of evidence that the state authorized or directed a given municipality to act as it did." *Id. at 414*. It concluded, however, that "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is 'found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" *Id.* at 915 (citation omitted) (emphasis added).

Recently, in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982), the Supreme Court had another opportunity to address the application of the state action doctrine to municipal conduct. It held that the doctrine did not shield the city from antitrust liability when the regulation in question was based only on the state's broad grant of home rule power to the municipality. *Id.*

In rejecting Boulder's state action defense, the Court held that the *HN3*[↑] city failed to establish the requirement that its challenged restraint constituted either "the action of the State of Colorado itself in its sovereign capacity, * * * [or] municipal action" [**14] in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Id. at 52* (citations omitted). The Court emphasized that this standard for determining the applicability of the state action doctrine was fully consistent with the one adopted by the plurality in *City of Lafayette v. Louisiana Power & Light Co.*, *supra*.⁸

[**15] B. The Present Case.

⁸The Court stated:

[The view of the *Lafayette* plurality that municipal conduct is not exempt unless it is "pursuant to a state policy to displace competition"] was simply a recognition that a State may frequently choose to effect its policies through the instrumentality of its cities and towns. It was stressed, however, that the "state policy" relied upon would have to be "clearly articulated and affirmatively expressed." [435 U.S.] at 410. * * * This standard has since been adopted by a majority of the Court. *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 158 L. Ed. 2d 361, 99 S. Ct. 403 (1978); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 163 L. Ed. 2d 233, 100 S. Ct. 937 (1980). [Footnote omitted.]

There is no claim here that Ordinance 53539 enacted by Kansas City constitutes the action of the State of Missouri itself in its sovereign capacity. Thus, the issue is whether it constitutes action in furtherance or implementation of a clearly articulated and affirmatively expressed state policy. [Community Communications Co. v. City of Boulder, supra, 455 U.S. at 52.](#)

HN4 [+] An expression of state policy that is sufficient to establish *Parker* immunity is comprised of two elements: The legislature must have authorized the challenged activity, and it must have done so with an intent to displace competition. See Areeda, [Antitrust Law](#) para. 212.3a, at 53 (1982 Supp.). See also [Community Communications Co. v. City of Boulder, supra, 455 U.S. at 51-52;](#) [City of Lafayette v. Louisiana Power & Light Co., supra, 435 U.S. at 415.](#)

The first element of this test is plainly satisfied here. The State of Missouri has enacted a comprehensive regulatory scheme which expressly authorizes the various elements of the single-operator ambulance system adopted by Kansas City. See [supra, at 1009-1010](#) & n.6 (describing the city ambulance system). The state permits **[**16]** cities to provide ambulance service to its citizens, to acquire the necessary equipment, to "contract with one or more" operators to provide the ambulance service, and to promulgate rules to regulate the provision of that service. [Mo. Rev. Stat. § 67.300.](#)⁹

[17] [**1012]** The state has enacted additional laws concerning ambulance service in Chapter 190 of Missouri Revised Statutes.¹⁰ This chapter permits municipalities to impose their own restrictions on ambulance service in addition to those imposed by the state. Section 190.105.4 provides that the issuance of a state license does not authorize operation of an ambulance "without a franchise in any county, municipality or political subdivision which has enacted an ordinance making it unlawful to do so." Section 190.105.5 provides that municipalities may adopt ambulance service ordinances that do not conflict with state law.

[18]** The foregoing statutes plainly establish that the first element of the *Parker* doctrine is present here: Missouri has authorized Kansas City's single-operator ambulance system. The second and more difficult question is whether Missouri has intended to displace competition with regulation or monopoly service. See [supra, at 1011.](#) The district court found that such an intent existed, stating that "the state's policy [was] to place anticompetitive restraints on ambulance service," and that its regulatory scheme "clearly indicates an intent to regulate the provision of ambulance service on the basis of public need rather than to allow unbridled competition." [538 F. Supp. at 965.](#)

⁹ [Section 67.300 of Missouri Revised Statutes](#) provides:

1. Any county, city, town or village may provide a general ambulance service for the purpose of transporting sick or injured persons to a hospital, clinic, sanatorium or other place for treatment of the illness or injury, and for that purpose may
 - (1) Acquire by gift or purchase one or more motor vehicles suitable for such purpose and may supply and equip the same with such materials and facilities as are necessary for emergency treatment, and may operate, maintain, repair and replace such vehicles, supplies and equipment;
 - (2) Contract with one or more individuals, municipalities, counties, associations or other organizations for the operation, maintenance and repair of such vehicles and for the furnishing of emergency treatment;
 - (3) Employ any combination of the methods authorized in subdivisions (1) and (2) of this section.
2. The municipality or county shall formulate rules and regulations for the use of the equipment and may fix a schedule of fees or charges to be paid by persons requesting the use of the facilities and provide for the collection thereof.

* * *

¹⁰ Section 190.105.1 requires all ambulance operators to be licensed by the State of Missouri, and [Section 190.125](#) requires an annual showing of need for each state ambulance license issued. Sections 190.115 and 190.120 set out the equipment and the kind of insurance coverage which each licensed ambulance must have. Section 190.145 lists the qualifications which ambulance service personnel must meet, and Section 190.175 details the records which each ambulance license holder must maintain.

The Supreme Court has made clear that "a specific, detailed legislative authorization" of monopoly service need not exist to infer the necessary state intent. *City of Lafayette v. Louisiana Power & Light Co., supra, 435 U.S. at 415*. It is sufficient that "the legislature contemplated the kind of action complained of." *Id.* (citation omitted).¹¹ In other words, a [*1013] sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence [**19] of engaging in the authorized activity. Areeda, *Antitrust Law*, *supra*, Para. 212.3, at 54; Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 446 (1981).

[**20] *Section 67.300 of Missouri Revised Statutes*, which permits a city to "contract with one or more" operators to provide ambulance service, plainly contemplates the conduct about which the plaintiffs complain here. Because monopoly service is the necessary consequence of having only one municipal ambulance operator as authorized by Missouri law, this statute alone supports the district court's finding that the state intended to displace unregulated competition in the ambulance industry.

Moreover, the state has also enacted its own anticompetitive scheme for regulating ambulance service in Missouri, which applies in addition to any municipal regulation. *Mo. Rev. Stat. §§ 190.100 et seq.* This chapter requires all ambulance operators and vehicles to be licensed by the state; mandates the necessary equipment and insurance coverage for all ambulances; details the types of records that all ambulances must keep; and provides that *no* ambulance may be licensed without an annual determination by the state license officer that "public convenience and necessity require the proposed ambulance service." See note 10, *supra*. Indeed, the Missouri Supreme Court, in *City of Raytown* [*211] *v. Danforth*, 560 S.W.2d 846 (Mo. 1977) (en banc), expressly held that *Mo. Rev. Stat. § 67.300*, which authorizes cities to set up their own ambulance systems, does *not* allow a city to circumvent the state's licensing and regulatory requirements contained in *Mo. Rev. Stat. §§ 190.100 et seq.* The "thrust of the Licensing Law," the court concluded, was "toward control of destructive competition and improvement of service." *Id. at 849*.

Accordingly, we believe the Missouri legislature has evinced its intent to displace competition in the ambulance industry, and that the state action doctrine thus applies in this case. The plaintiffs, however, vigorously argue that the Supreme Court's decision in *Community Communications Co. v. City of Boulder*, *supra*, renders the doctrine inapplicable here. In that case, the city council passed an ordinance prohibiting a cable television operator in Boulder from expanding its business for three months while the council drafted an ordinance to regulate the cable television market in the city. *455 U.S. at 45-46*. The Supreme Court held that Boulder could not invoke the state action doctrine because the home rule amendment to the Colorado [*22] constitution upon which the city based its moratorium was not a sufficient "clear articulation and affirmative expression" of a state policy to restrain trade in the cable television business. *Id. at 52-56*. The Court reasoned:

¹¹ The plaintiffs contend that state authorization or contemplation of municipal action is insufficient to satisfy the state action doctrine; rather, they apparently suggest that the state must compel or command the city's action. We disagree. *Accord Town of Hallie v. City of Eau Claire*, 1983-1 Trade Cases para. 65,227, at 69,337 (7th Cir. Feb. 17, 1983).

In *Community Communications, Inc. v. City of Boulder*, 455 U.S. 40, 54-57, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982), the Supreme Court did not require state compulsion of the city's conduct as a prerequisite to state action immunity. In fact, the *Community Communications* Court, *id. at 55-56*, repeated with approval the language regarding state authorization or contemplation of the challenged restraint used by the plurality in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978). See Areeda, *Antitrust Law* Para. 212.5, at 59-61 (1982 Supp.) (concluding that state need not compel the challenged restraint as a prerequisite to application of the *Parker* doctrine to municipal conduct).

In fact, the Supreme Court has used language demanding state compulsion only in cases involving private defendants. *E.g., Cantor v. Detroit Edison Co.*, 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975). In any event, in its most recent case involving private conduct, the Supreme Court required, as prerequisites for *Parker* immunity, a state policy to displace competition and active state supervision rather than state compulsion of the challenged practice. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980).

Plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anti-competitive actions for which municipal liability is sought.

Id. at 55 (emphasis included).

The plaintiffs contend that Missouri's position in [*Mo. Rev. Stat. § 67.300*](#) is similarly one of "mere neutrality" regarding municipally operated ambulance service because it permits cities "to contract with one or more" providers. We disagree. In *Community Communications*, the Supreme Court emphasized that the home rule provision on which the city relied did not even address the subject of cable television and no other state cable television regulation existed.¹² See Note, *Municipalities and the [*1014] [**23] Antitrust Laws: Home Rule Authority is Insufficient to Ensure State Action Immunity*, 35 Vand. L. Rev. 1041 (1982).

In this case, there has been an "affirmative addressing of the subject by the State," the [**24] decisive factor missing in *Community Communications*. Indeed, [*sections 67.300*](#) and 190.100 et seq. of Missouri Revised Statutes show that the state has not only affirmatively addressed the subject of ambulance service on the local level, but has "clearly articulated and affirmatively expressed" a state policy which authorizes Kansas City to provide ambulance service to its residents by means of a single provider. The state action test articulated by the Supreme Court in *Lafayette* and *Community Communications*, therefore, is satisfied.

The district court, relying on [*California Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 104-106, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)*](#), concluded that the state action doctrine also required that the challenged restraint must be actively supervised by the state. We do not agree with that conclusion.¹³

[**25] The Supreme Court has required active state supervision of the challenged restraint only in cases in which the defendants were private entities or individuals. See, e.g., [*California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra, 445 U.S. at 99; Cantor v. Detroit Edison Co., supra, 428 U.S. at 582; Goldfarb v. Virginia State Bar, supra, 421 U.S. at 775*](#). In this context, the state supervision requirement is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake. Because municipal officials generally are politically accountable to the citizens they represent for their decisions regarding the challenged restraint, state supervision is not as necessary to prevent abuse as in the private context. See *Town of Hallie v. City of Eau Claire*, *supra*, 1983-1 Trade Cases at 69,338-69,339.

Moreover, because the *Parker* doctrine requires that the state delegate to the local government the authority to engage in the challenged conduct, state supervision of Kansas City's [**26] conduct is unnecessary to find state action. *Id.* at 69,639. As a leading commentator recently noted:

¹² The Supreme Court stated:

Nor can those actions [by the city] be truly described as "comprehended within the powers granted," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged: "We are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City."

[*Community Communications Co. v. City of Boulder, supra, 455 U.S. at 56*](#) (citation omitted) (emphasis included).

¹³ The provision of ambulance service by Kansas City is a traditional governmental function designed to protect public health and safety. See Note, *The Supreme Court, 1981 Term, 96 Harv. L. Rev. 268-278 (1982)*. We need not address the question of whether municipal conduct which is outside the scope of such a traditional governmental function and which may pose a more significant threat to competition may require active state supervision to qualify for protection under the *Parker* doctrine. *Id.*

requiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity.

Areeda, **Antitrust Law**, *supra*, para. 212.2a, at 47 (footnote omitted).

We also believe that requiring active state supervision over a municipal function such as the one present here is unwise. The State of Missouri has authorized its municipalities to provide ambulance service because it believes that such service is a proper local activity. To require the state to supervise Kansas City's ambulance system once the city has elected to exercise its authority to establish the system makes little sense. As the dissent in *Community Communications Co. v. City of Boulder*, *supra*, 455 U.S. at 470-471 & n.6 (Rehnquist, J., dissenting), [*1015] observed in concluding that the state supervision requirement does not apply to municipal conduct, "it would seem rather odd to require municipal ordinances to be enforced by the State rather than the city [**27] itself." ¹⁴ Finally, requiring state supervision could force the state and its municipalities to engage in duplicative, wasteful regulation and could erode the local autonomy that the state has sought to encourage. See *Town of Hallie v. City of Eau Claire*, *supra*, 1983-1 Trade Cases at 69,339.

Accordingly, we believe that the state action doctrine is applicable in this case regardless of whether Missouri actively supervised Kansas City's implementation of Ordinance 53539. ¹⁵ Therefore, the district court's finding that the state action doctrine exempts defendants Kansas City, MAST, Stout, and Fourth Party, Inc., from Sherman Act liability is affirmed. ¹⁶ [**28]

IV.

CONSTITUTIONAL CLAIMS

Counts IV and V of the plaintiffs' complaint allege various violations of their rights to substantive due process, procedural due process, and equal protection. The district court granted summary judgment in favor of all defendants on these claims. ¹⁷

The plaintiffs [**29] allege that they have been denied substantive due process because Kansas City's ambulance system deprives them of the freedom to contract with potential customers and freedom to engage in a lawful business. The district court rejected these contentions, holding that a rational basis existed for Ordinance 53539. We affirm this holding.

We agree with the court below that the challenged ordinance is designed to promote the public health, safety and welfare; and that it does not infringe on any fundamental constitutional right. **HN5** There is no absolute right to contract free of state regulation under the police power. See, e.g., *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 106-107, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978).

Because the challenged ordinance does not involve a fundamental right or suspect class, the defendants need only demonstrate that the ordinance is designed to accomplish an objective within the government's police power, and that a rational relationship existed between the ordinance's provisions and its purpose. See *Hughes v. Alexandria*

¹⁴ Because the majority in *Community Communications, Inc. v. City of Boulder*, *supra*, found that the challenged restraint was not in furtherance of a clearly articulated and affirmatively expressed state policy, it explicitly declined to determine whether the "active state supervision" requirement applied to municipal conduct. 455 U.S. at 51 n.14.

¹⁵ In any event, the district court's finding that adequate state supervision of Kansas City's ambulance system existed here was not clearly erroneous.

¹⁶ Because we hold that the state action doctrine shields these defendants from antitrust liability, we need not address the issue of whether the plaintiffs' Sherman Act claims against them are barred by the tenth amendment to the United States Constitution.

¹⁷ The plaintiffs do not appeal from the district court's finding that they were not denied equal protection under the fourteenth amendment.

Scrap Corp., 426 U.S. 794, 813-814, 49 L. Ed. 2d 220, 96 S. Ct. 2488 (1976). The ordinance "need not be drawn [**30] so as to fit with precision the legitimate purposes" underlying it. *Id.*

The court below found that Ordinance 53539 satisfied the rational basis test. It stated:

The Kansas City ordinance challenged by plaintiffs meets the "rational relationship" standard. Kansas City's stated purpose in passing this ordinance was to protect public health and safety by improving Kansas City's ambulance service. Kansas City officials were concerned that competition in the ambulance service industry was harming the public. Setting up the monopoly public utility model, in which the receipt of payment for ambulance service is not based on a company's [*1016] ability to compete for business, is a reasonable means of improving service. Kansas City's ordinance is not arbitrary or capricious; it is reasonably related to the purpose it seeks to achieve.

538 F. Supp. at 970-971.

After carefully reviewing the record and briefs, and hearing oral argument, we find no error in this conclusion. It therefore is affirmed.

The plaintiffs also contend that the citizens of the Kansas City metropolitan area have been deprived of their right to select the ambulance company to provide service [**31] to them. The district court found that the plaintiffs lacked standing to assert this claim. We agree.

HN6 [↑] A litigant "may not claim standing * * * to vindicate the constitutional rights of some third party." Barrows v. Jackson, 346 U.S. 249, 255, 97 L. Ed. 1586, 73 S. Ct. 1031 (1953). The plaintiffs acknowledge this general rule, but they claim that they have standing under the exception recognized in Singleton v. Wulff, 428 U.S. 106, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976).

In *Singleton*, the Supreme Court held that a physician had standing to assert the rights of women patients to be free from governmental interference with their decision concerning abortion. Id. at 118. In so holding, the Court emphasized two factors: (1) the relationship of the litigant to the persons whose rights the litigant seeks to further; and (2) the ability of the third parties to assert their own rights. Id. at 114-116.

In this case, the plaintiffs would not be effective proponents of the rights of the citizens of Kansas City. There is no close, confidential relationship between the plaintiffs and Kansas City residents. Moreover, the interests of the two are in substantial conflict. [**32] Gold Cross and Transfer are principally interested in operating their businesses profitably, while Kansas City-area residents are principally concerned with receiving high quality ambulance service at the lowest possible cost. Cf. Singleton v. Wulff, supra, 428 U.S. at 113-117.

In addition, the factors in *Singleton* that made it difficult for the third parties to assert their rights are not present here. Unlike the abortion decision in *Singleton*, the right in question here does not involve an intimate, private decision, nor is it affected by concerns of imminent mootness. Cf. id., at 113-117. Accordingly, we agree with the district court that the plaintiffs lacked standing to assert any rights possessed by the citizens of the Kansas City area.

Finally, the plaintiffs allege that their procedural due process rights were violated because Kansas City issued its exclusive ambulance license to ASI and renewed that license without following the requirements of its ordinances and without giving the plaintiffs notice and an opportunity to be heard. The court below held that the plaintiffs were not entitled to any procedural due process because they possessed no protected [**33] property or liberty interest.

To sustain their procedural due process claim, the plaintiffs must first establish that they possessed "a legitimate claim of entitlement" to the ambulance license issued by Kansas City. Board of Regents v. Roth, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). The plaintiffs could demonstrate such a claim of entitlement by showing that they had a reasonable expectancy of receiving the municipal license based upon state or local statutes or regulations, or upon an express contract or mutual understanding with the defendants. See id. at 577-

[578; Perry v. Sindermann, 408 U.S. 593, 600-603, 33 L. Ed. 2d 570, 92 S. Ct. 2694 \(1972\); Brockell v. Norton, 688 F.2d 588, 590-591 \(8th Cir. 1982\)](#). Gold Cross and Transfer, however, have pointed to nothing which gives them a legitimate claim of entitlement to the Kansas City ambulance license.¹⁸ Their unilateral expectation [*1017] of being awarded a license is insufficient to sustain their procedural due process claim. [Board of Regents v. Roth, supra, 408 U.S. at 577](#). Thus, the district court's grant of summary judgment against that claim is affirmed.

[**34] V.

CONCLUSION

We hold that the district court did not err in granting summary judgment in favor of defendants Kansas City, MAST, Jack Stout, and Fourth Party, Inc., on the plaintiffs' antitrust claims and in favor of all defendants on the plaintiffs' constitutional claims. Accordingly, that judgment is affirmed.

End of Document

¹⁸ To the extent that the district court's opinion suggests that a legitimate claim of entitlement can never arise from the procedures established in the statutes or regulations adopted by a state or its subdivisions, we disagree. See, e.g., [Wilson v. Robinson, 668 F.2d 380, 382-383 \(8th Cir. 1981\)](#) (county ordinance requiring two weeks notice prior to the termination of nonprobationary sheriff's deputies creates a property interest protectable under the [fourteenth amendment](#)). We hold only that in this case, Gold Cross and Transfer have failed to demonstrate that there are any Missouri or Kansas City statutes or regulations, or alternatively any agreement between the various parties, which gave the plaintiffs a legitimate claim of entitlement to a municipal ambulance license.



MLC, Inc. v. North American Philips Corp.

United States District Court for the Southern District of New York.

May 3, 1983

No. 78 Civ. 6080 (GLG).

Reporter

1983 U.S. Dist. LEXIS 17230 *; 1983-1 Trade Cas. (CCH) P65,351

MLC, Inc. v. North American Philips Corp., Philips Business Systems, Inc., and N. V. Philips Gloeilampenfabrieken.

Core Terms

cards, MLC, manufacturers, magnetic, ledger, distributor, relevant market, defendants', competitor, customers, machine, restraint of trade, summary judgment, distributorship, termination, monopoly, supplier, vertical, prices, anti trust law, small business, Sherman Act, monopolization, antitrust violation, negotiations, conspiracy, argues, dealer, per se violation, computer system

LexisNexis® Headnotes

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

HN1 [down arrow] Regulated Practices, Monopolies & Monopolization

In considering any monopoly claim, the starting point is the question of the relevant market involved. However, there may, in addition to the relevant market, also be a submarket delineated by 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 > Price Fixing & Restraints of Trade > General Overview

HN2 [down arrow] Regulated Practices, Price Fixing & Restraints of Trade

The termination of a dealer by a supplier for violation of a distribution restraint is, if it is a restraint at all, at most, a vertical one. It should not matter that the dealer was terminated by a supplier in part as a result of comments by that dealer's competitor. The restraint is still vertical. The fact that there are anticompetitive effects on intraband competition as a result of the termination is beside the point. That is true with respect to all vertical restraints. The simple fact is that many dealer termination cases, because they involve unilateral refusals to deal, would not even survive the initial pleadings (or, at best, summary judgment) stage -- much less a full rule of reason analysis.

Antitrust & Trade Law > Sherman Act > General Overview

HN3 Antitrust & Trade Law, Sherman Act

If the sale of assets has an affect on competition, it occurs whether or not appellant was harmed. There is thus lacking the essential connection between injury and the aims of the antitrust laws necessary to give appellant standing.

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 > Restraints of Trade

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 > Resale Price Maintenance

HN4 Per Se Rule & Rule of Reason, Per Se Violations

A per se violation of the antitrust laws, predicated upon an alleged vertical combination, cannot stand absent a showing of some form of price fixing or resale price maintenance.

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

HN5 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Restraints solicited by a distributor but implemented by a manufacturer are not automatically per se violations.

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

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

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

HN6 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In applying a rule of reason to the termination of an exclusive distributorship, anticompetitive impact on the relevant market may not be the only consideration and that a conspiracy to eliminate a distributor may be sufficient.

Counsel: [*1] Murphy & O'Connell, New York, N.Y. (by Kathleen M. O'Connell and Patrick J. Murphy, of counsel), for plaintiff

Gifford, Woody, Palmer & Serles, New York, N.Y. (by James P. O'Neill, of counsel), for defendant

Opinion by: GOETTEL

Opinion

GOETTEL, D.J.: In this antitrust action, the parties cross-move for summary judgment.¹

The complaint presently contains seven causes of action. In the first count, plaintiff alleges that defendants violated section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), by engaging in a combination and conspiracy in unlawful restraint of trade. The second count charges a refusal to deal and to fix prices. The third count charges a conspiracy to monopolize trade. The fourth count makes the same charge with respect to the defendants and certain German manufacturers, who are not parties to this action. The fifth count is a trying claim under 15 U.S.C. § 14 (1976), but this count is being withdrawn by plaintiff. The sixth count, brought under section 7 of the Clayton Act, 15 U.S.C. § 18 (1976 & Supp. V 1981), charges an attempt to create a monopoly by taking over plaintiff's business. [*2] The seventh count charges a violation of the Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1976), by entering into a combination and conspiracy to restrain trade with respect to imported goods. These various legal claims fall basically under one of two headings: restraint of trade (counts one, two, and seven) and monopoly (counts three, four, and six). The plaintiff seeks treble damages in the amount of \$9 million under 15 U.S.C. § 15 (1976 & Supp. V 1981). Plaintiff also seeks injunctive relief under 15 U.S.C. § 26 (1976).

This seemingly awesome legal battle actually grows out of a rather minor business relationship.²

The Facts

N.V. Phillips Gloeilampenfabrieken ("N.V. Philips") is a Netherlands corporation which is the parent of the other two corporate defendants.³ (The defendants and their parent are sometimes referred to, collectively, as "Philips.") From 1969 to 1978, N.V. Philips manufactured a small business computer in West Germany which was distributed in the United States by defendant Philips Business Systems, [*3] Inc. ("PBSI"). This machine was the successor to the electronic accounting machine of earlier decades. The Philips computer, like some of its competitors, stored information on magnetic ledger cards. (Other computers of the same era used hard or flexible discs, magnetic tape, or other means.) The Philips machine was never particularly successful in the United States. Throughout, it never achieved as much as a five percent share of the market for such machines, as measured by units sold annually.

The magnetic ledger cards (called "mlc's" for short) were an essential component of the Philips system. These cards are made of paper with a stripe of magnetic ink impregnated on one of the lateral margins of the card. The mlc's, like certain other components used in the machine, were not made by Philips but rather were purchased from independent vendors. In this instance, the manufacturers were two West German companies, Jollenbeck & Kasten ("JK") and Magnetdruck ("MD"). Philips provided these manufacturers with the specifications [*4] and technical assistance necessary to manufacture the original cards, which required exact tolerances. Philips contends that the information it furnished consisted of trade secrets and confidential specifications.

The Philips accounting computer was first sold in the United States in 1969. At that time, accounting computers were almost the only type of small business computer. (Since then, mini-computer-based systems and small electronic data processing systems have virtually eliminated the accounting computer in the small business computer field.) Philips marketed three different series of the computers, not all of which used the magnetic ledger cards. A number of other companies also had systems using mlc's of a sort different than that used by Philips. Today, the magnetic ledger card is little used, having been replaced completely by other types of more sophisticated and versatile information storage devices. Indeed, Philips's sales started dropping off in 1976 and 1977. Philips stopped importing and selling these accounting computers in November of 1978.

¹ Plaintiff's cross-motion is limited to two of its causes of action.

² In addition to this action, there is a parallel state court action alleging common law claims brought by the plaintiff against the same defendants.

³ N.V. Philips was named as a defendant in this action but was dismissed from the action in February 1982 due to plaintiff's failure to prosecute.

During the ten-year period that Philips was marketing its computers in the United States, the magnetic ledger cards [*5] were a critical part of the system. Apparently, it had simply intended to purchase cards from the inventories of existing manufacturers. It found, however, that the performance standards of existing magnetic ledger cards were not adequate for the operation of its computers. (In the field of magnetic ledger cards, the Philips system could store more information than others, providing that an adequate storage medium was available.) Consequently, Philips contends, it created its own specifications for magnetic ledger cards for its own computers and set up quality control standards. As mentioned earlier, Philips turned to two German printing companies for the production of these cards. Philips contends that the German manufacturers' ability to produce reliable cards resulted from their having both the requisite specifications and the assistance provided by Philips. Indeed, the cards that they manufactured bore the trade name "Philips." It was apparent that Philips's sales efforts depended in great part upon a dependable supply of magnetic ledger cards, since its system was valueless without them, and there were no general sources of supply for usable cards.

For the first few years, [*6] PBSI itself distributed the magnetic ledger cards that were produced for it in Germany. In April 1972, PBSI's marketing manager, John J. Fitzsimmons, decided to change this.⁴ Ultimately, he arranged for a boyhood friend of his, Thomas Donaghy, to form a New York corporation by the name of MLC, Inc. ("MLC").⁵ (The corporation was not legally extant until December 1972.) The agreement between Fitzsimmons and Donaghy was that Donaghy's company would import and distribute the magnetic ledger cards from Germany and PBSI would make all of its purchases from his company. In addition, PBSI agreed to support Donaghy's efforts by making his company the only authorized distributor of the magnetic ledger cards used in the Philips machines.⁶

[*7] Donaghy set up his business in his home and eventually obtained a warehouse in Queens. He was President of the company and the only full-time employee, although his wife acted as the corporate secretary. (Other employees were hired occasionally on a per diem basis, but at no time were there more than six part-time employees.) MLC had no sales organization, owned no commercial space, and had no printing facilities.⁷ Fitzsimmons introduced Donaghy to the German manufacturers and also to the customers of PBSI. MLC entered into distribution contracts first with JK at Mr. Fitzsimmons's suggestion, and later, on its own initiative, with MD. Pursuant to these agreements, MLC imported the blank forms, at wholesale prices, into the United States and sold them to PBSI and its customers. However, there was never a formal written agreement between MLC and any of the Philips companies. Although MLC had taken over the distribution, PBSI still retained responsibility for working out production problems with the German manufacturers. Indeed, at one point, Donaghy was using PBSI's telex facilities to transmit his communications to the suppliers as well as to obtain responses. Subsequently, [*8] Donaghy was to contend that MLC was no more than a "de facto employee" of Philips. Donaghy Letter of April 23, 1974.

The relationship between Philips and MLC proceeded in this fashion for several years. During this period, however, Donaghy's friend, Fitzsimmons, was replaced by Frank Buckley, who became head of the PBSI Data Systems Division. Buckley wanted PBSI to regain control of the distribution of the mlcs because they were a necessary component in the operation of the Philips system and because he thought the business might be profitable. He discussed this possibility with Donaghy, who, needless to say, was not pleased with the suggestion. Donaghy

⁴ At one point, a New Jersey corporation called MLC, Inc. was formed by Fitzsimmons's brother, Cornelius, apparently to distribute the cards. Its business and purpose is not known to this Court. However, both the Fitzsimmons brothers are in litigation against the defendants in this Court and in the Eastern District of New York.

⁵ Mr. Fitzsimmons explains his giving of this exclusive distributorship to his friend in the following words: "At that time our data system division was a young struggling accounting machine business and mlcs were a collateral business which I found was better handled by MLC Inc. and Thomas J. Donaghy." Affidavit of John J. Fitzsimmons at 3.

⁶ One way of achieving this was by initiating a new service policy in April 1972, informing users of Philips machines (as well as its salesmen) that the manufacturer's warranty and customer service contracts would not be honored should the customer employ cards bought from anyone other than an "authorized distributor."

⁷ The mlcs were not usually sold directly to the customer, but rather to independent printers, who would print graphics, columnar headings, and other markings on the cards, pursuant to the orders of the users.

argued that Philips still controlled the sales and distribution of the cards and that he was really functioning cheaply and efficiently as an integral part of the Philips distribution system. Buckley was not impressed with these arguments and directed members of his staff to formulate a plan to regain control [*9] of the distribution of the cards.

The problems involved in this change were discussed at some length with the German manufacturers, who agreed to cooperate with PBSI, as well as with Philips's counsel. (The consultation with counsel was prompted by Donaghy's threat of litigation in the event that PBSI resumed distribution of the cards.) The cooperation of the German suppliers was apparently easily obtained since, among other things, they had been concerned about slow payments by MLC and had asked PBSI to guarantee payments which, in fact, it had done. PBSI consequently negotiated prices it would pay to the German manufacturers. By July 1974, new price quotations had been obtained from the German manufacturers by PBSI. Thomas Dickson, the PBSI representative responsible for this, has maintained that his negotiations were carried on in good faith, and without any intent to injure MLC, but rather to preserve PBSI's ability to provide its branch offices and customers with an adequate supply of cards.

Although Philips could see many advantages to again becoming the sole supplier of its cards,⁸ it was nevertheless extremely concerned over Donaghy's threat of suit. At one point, [*10] there was an exchange of correspondence in which PBSI had simply taken the position that it would terminate its relationship with MLC and that MLC could continue as a distributor in the field to such parties as wished to purchase from it, and that PBSI would do nothing to prevent MLC from purchasing the cards from the German manufacturers. PBSI pointed out that if Donaghy were correct in his claim that he could operate the business much less expensively than PBSI, he would be able to undersell PBSI. MLC's counsel disputed this, and claimed his client's rights were being violated.⁹

[*11] Consequently, negotiations were entered into with Donaghy and his attorney for PBSI to buy out MLC and its inventory. These negotiations lasted over a period of some months. Finally, an agreement was signed on December 3, 1974, in which Philips agreed to purchase all the assets and inventory of MLC as of April 30, 1975, and to reassume the right to be the sole source for supplying branch offices with mlc's for resale to customers.(MLC retained the right to sell cards to agencies, or their printing agents, until May 1, 1975.) MLC and Donaghy were paid slightly in excess of \$300,000 for all of MLC's assets, including its goodwill, inventory, and accounts receivable.¹⁰

During the next few years that Philips was marketing the computers, it continued to be the sole source of supply for the magnetic ledger cards. In November 1978, it announced that it was discontinuing all operations in the small office computer field, and sold its activities in these areas (including the mlc business) to Pertec Computer Corporation.

MLC's claim is that it had no alternative except [*12] to agree to this buy-out, since PBSI had sufficient leverage in the market to take over the distribution in one manner or another, and that it (MLC) was helpless to avoid this. MLC contends, moreover, that Philips's motives in this buy-out and the manner in which it was accomplished were in effect, violations of the antitrust laws.¹¹ In its attack upon the motives and methods of the defendants, plaintiff has had available to it a memorandum prepared by defendants' counsel concerning the possible legal ramifications of

⁸These advantages, as outlined in a memorandum of December 23, 1974, were as follows: (1) Although Philips had a responsibility to its customers, it had no legal protection from MLC in its relationship with it, so that while MLC could make all of the profit, it had no obligations; (2) as the responsible party, Philips was entitled to the profits; and (3) there would be indirect benefits in customer contact which could result in future hardware sales.

⁹One of the alleged tactics objected to by plaintiff was defendants' purported request that JK demand that MLC place a very large order (ten times its usual size), which created the need for the financial guarantees sought from PBSI.

¹⁰This included an agreement for consulting services by Donaghy, which appear to be primarily a tax gimmick.

¹¹Nevertheless, the terms on which the acquisition was ultimately consummated were reasonably close to those which had been proposed by plaintiff's counsel at the beginning of its five-month negotiation with the defendants.

various actions taken by defendants in the course of negotiating with plaintiff.¹² These legal discussions encompass virtually every legal argument that plaintiff could have made (and in fact has made) in this case.

As mentioned [*13] earlier, Philips sold its computer business in November 1978, a few years after it acquired plaintiff's business. Despite this, plaintiff seeks \$9 million in treble damages plus attorneys' fees. Plaintiff bases this large claim on the profits it alleges defendants must have obtained from the sale of mlc's during those years.¹³ At the same time, plaintiff argues, inconsistently, that the cost of the cards was an insignificant part of the system and that MLC could sell the cards for less than could the defendants.

It is clear, however, that by the time of defendants' acquisition of plaintiff, Philips was facing competition from more sophisticated computers that used disc memories and cathode ray tube displays, which threatened the Philips system with obsolescence. Indeed, in 1976, Philips was negotiating to expand in the disc field, both through its own model and that of another manufacturer. Philips, however, never successfully entered the disc or cathode ray tube field in the United States. In *General Business [*14] Systems v. North American Philips Corp.*, 699 F. 2d 965, 973 (9th Cir. 1983), discussed at length below, the Ninth Circuit found that "the mlcs' cost was a substantial part of total cost for many users." The court noted that competitors used the high cost of the mlc's as a sales factor in convincing customers to buy other kinds of computers. The market for magnetic ledger cards was a doomed one, even by the middle of 1975. As the Ninth Circuit observed, Philips's subsequent attempts at continuing in the business of mlc-dependent machines, rather than switching to more sophisticated equipment, was a business error. However, it was not an error that hurt the plaintiff in any fashion.

Monopoly Claims

Plaintiff acknowledges, as it must, that Philips's insignificant position in the small business computer market is such that it could not possibly have monopolized that market. Consequently, plaintiff takes the position that the magnetic ledger cards produced for use with the Philips machine are the relevant product market.

It is obvious that HN1[] in considering any monopoly claim, the starting point is the question of the relevant market involved. However, as the Supreme Court indicated [*15] in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1961), there may, in addition to the relevant market, also be a submarket delineated by "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id. at 325* (footnote omitted). If the magnetic ledger cards used in the Philips machines are viewed as a separate submarket, then plaintiff had 100% (or close to it) of the market in the United States before the buy-out, and defendants took over that 100% control thereafter.

Plaintiff argues that the outer boundaries of a product market are determined by the interchangeability of use or the cross-elasticity of demand between the product and its substitutes, citing *Brown Shoe Co. v. United States*, id. However, plaintiff's definition of this submarket as consisting of mlc's makes no economic sense. If magnetic ledger cards were interchangeable among the various machines and systems of competitors, Philips would have had less than 5% of that market. It is by viewing the product only from the perspective [*16] of its relation to the particular Philips system that a monopoly can be inferred.

Plaintiff argues that the cards are a distinct supply item and that a consumable product is distinct from the main product with which it is used, like any other ancillary product. It points out, for example, that gasoline is essential to the running of internal combustion engines and that time clocks cannot function without punch cards. Plaintiff's Reply Memorandum of Points and Authorities in Support of Its Cross Motion for Summary Judgment at 42. But

¹² These memoranda became available through inadvertence in a companion action, *General Business Systems v. North American Philips Corp.*, 699 F. 2d 965 (9th Cir. 1983), which will be discussed hereafter.

¹³ Plaintiff contends that defendants' gross sales are the measure of damages, since, purportedly, it would have had no costs whatsoever in selling the cards.

plaintiff's argument overlooks the fact that there is a mutual dependency in this case. The system could not function without the cards and the cards did not work in any other system. Even though the users of the Philips systems may have been locked into these data cards, that does not make the cards themselves a relevant market. See, e.g., *Kaplan v. Burroughs Corp.*, 611 F. 2d 286, 295 (9th Cir., cert. denied, 447 U.S. 924 (1980)) (the relevant market for computer processing services geared to a particular system consisted not only of current users of the system but also of all potential users of comparable systems). The "lock-in" theory of relevant [*17] market was also rejected in In *Re Data General Corp. Antitrust Litigation*, 529 F. Supp. 801 (N.D. Cal. 1981), where the court noted:

Under the "lock-in" theory, the market is defined not in terms of the competitive alternatives available to the potential customer when he makes his initial decision to purchase, but rather after the customer has already decided to purchase RDOS, and has thereafter become committed to that product. Such an approach to market definition is untenable, and submarkets based on customer commitment to a given product have been rejected by other courts as too narrow as a matter of law.

Id. at 820 (footnote omitted) (emphasis added).

Nor does the fact that plaintiff operated in a single market itself make that a relevant market for antitrust purposes. As the Fifth Circuit held in *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F. 2d 256, 282 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979), "[t]he fact that a company limits its competitive activity to a single firm's products (and at only one competitive level) cannot control the definition of the relevant market."

If the situation were not obvious enough, the recent Ninth Circuit decision [*18] in *General Business Systems, Inc. v. North American Philips Corp., supra*, 699 F. 2d 965, certainly disposes of the issue, since the product was the same and the defendants were the same. Indeed, plaintiff in that case was in a stronger position than this plaintiff since it was a competitor of the defendant for the sale of Philips' mlc's until, allegedly, the action of the defendants forced it out of the market.

In General Business Systems, the plaintiff had begun importing the cards from one of the two German manufacturers in early 1976.¹⁴ It then sold them in competition with the Philips for a period of time. The defendants then persuaded the German company to cease its shipments to General Business Systems ("GBS"), which in turn commenced the California litigation. The central focus of that case was whether the defendants had committed antitrust violations with respect to an alleged market for magnetic ledger cards compatible with the Philips system. The district court granted Philips's motion for summary judgment, finding that a relevant market for antitrust purposes did not exist in such a narrow field.¹⁵ The dismissal was appealed to the Ninth Circuit which, on January [*19] 28, 1983, unanimously affirmed the district court's decision, agreeing as a matter of law that there was no relevant market in Philips-compatible magnetic ledger cards. In reaching its conclusion, the Ninth Circuit made the following observations:

(1) During the 1970's Philips's share of the small business computer market never exceeded 5% and its magnetic ledger cards worked only in the Philips system. *Id. at 969.*

¹⁴ General Business Systems ("GBS") had been a Philips distributor for Northern California since 1972. It had agreed not to market competitive hardware. (Its area of operations was extended to St. Louis, Missouri, in 1974.) In 1978, Philips exercised a buy-out option, terminating the agency relationship.

In 1974, GBS contacted the German manufacturers and attempted to purchase the cards directly. One of the companies refused to deal with GBS, believing that it (the card manufacturer) had an exclusive dealing relationship with Philips. The other company, however, in 1976, began sales to GBS.

The litigation also concerned a counterclaim by Philips against GBS for dealing with a competing computer manufacturer.

¹⁵ The original complaint in this action was modeled on the General Business Systems complaint.

[*20] (2) With respect to the monopolization claim, the cards were produced in Germany, pursuant to stringent Philips specifications and were not sold for use in other manufacturers' computers and, indeed, the majority of dealers handling the cards dealt only in Philips products. [Id. at 972](#). (The court made extensive findings concerning the interrelationship between the manufacturer of the cards and Philips, which will be discussed below. [Id. at 969-70](#).)

(3) As noted previously, the nature of these cards' production resulted in a price several times as high as other systems' cards, thereby reducing the competitiveness of the Philips system, so that Philips was a victim and not a beneficiary of the high prices of its cards. [Id. at 973](#).

(4) The mlc's were sold separately from the computers because of the dynamics of use (after market), and not because of market differentiation. *Id.*

(5) The cards are an essential component of the system and that the computer was useless without the cards, whose quality determined the overall performance of the system. [Id. at 972-73](#).

(6) Philips was driven from the market by intense systems competition. Taken to its logical conclusion, plaintiff's [*21] argument concerning the single aspect of the product would mean that a manufacturer, facing competition against which it cannot prevail in the sale of its own product, could be found to monopolize the market for each unique component that went into the product. The court noted that "this is surely to lose sight of the forest because of fascination with the trees." [Id. at 975](#).

The crucial finding of the Ninth Circuit in General Business Systems was that "the undisputed facts permit only one conclusion, viz., that the market for mlcs cannot be separated from the general market for smalll business computer systems." [Id. at 972](#). The Ninth Circuit noted, as we already have, that because the cards were an essential component, the system was useless without them. The system was thus differentiable from other appliance-type items that could constitute a separate market, such as automobile air conditioners. The court also rejected a claim of attempted monopolization, finding that the plaintiff had made no showing of predatory conduct whatsoever. Indeed, as the court noted, the defendant competed "ineffectually in the market for small business computers and their accessory products." [*22] [Id. at 976](#).

Consequently, we conclude that MLC's monopolization claims against defendants must be dismissed. In doing so, we also note that its claim stems from a desire to retain a monopoly over an asserted market for itself. The loss of its own monopoly would not be an "injury of the type the antitrust laws were intended to prevent. . ." [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 \(1977\)](#).

Restraint of Trade

Both sides have cross-moved for summary judgment on the causes of action for restraint of trade. Essentially, it is plaintiff's contention that defendants entered into a conspiracy with the German manufacturers of the cards to boycott the plaintiff and exclude it from the market as a distributor of these cards. Plaintiff contends that defendants' motivation was to eliminate competition and to fix prices. Plaintiff alleges further that there had been two competitors for the distributorship business, PBSI and itself, and that by eliminating their competition, defendants obtained complete control of distribution. Defendants respond to these charges as follows:

- (1) There was no competitor to eliminate, since there was only a vertical arrangement [*23] with a single distributor.
- (2) Even if defendant did exclude plaintiff from this market, it was entitled to do so because of its contractual arrangements with the German manufacturers.

(3) If plaintiff has any cause of action at all, it sounds not in antitrust but rather in contract or business tort.¹⁶ See, e.g., *Reisner v. General Motors Corp.*, 511 F. Supp. 1167, 1178 n. 25 (S.D.N.Y. 1981), aff'd, 671 F. 2d 91 (2d Cir.), cert. denied, 51 U.S.L.W. 3256 (Oct. 4, 1982).

Vertical restraints, such as exclusive distributorships, have had an uneven history before the Supreme Court in recent years. In 1967, in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Supreme Court held that vertical territorial and customer restraint were per se unlawful. However, ten years later, in *Continental T.V., Inc. v. GTE Sylvania Inc.* [*24] *Inc.*, 433 U.S. 36, 58 (1977), it backed away from that position and held that these same restraints are to be judged under the rule of reason.

We note initially that there is a factual disagreement as to whether the German manufacturers, upon the defendants' urging, had subsequently refused to deal with MLC. During the period in question, defendants issued some self-serving letters which indicate, they argue, that they were not attempting to prevent MLC from continuing in the market. However, we conclude that plaintiff has the better of this argument and will probably prevail in proving that, had a buy-out agreement not been consummated, defendants would have prevailed upon the German manufacturers to refuse to deal with plaintiff. Another alternative discussed by defendants' counsel was allowing plaintiff to purchase the cards and to be a distributor, but to compel it to purchase them through defendants at a markup, which would give defendants a price advantage. This suggestion was never adopted.

If, at the time in question, plaintiff and defendants had been competitors, and if defendants had no contractual control over the manufacturers' supplies, it is reasonably clear [*25] that a joint refusal to deal would have been a per se violation of the Sherman Act. See, e.g., *United States v. Hilton Hotels Corp.*, 467 F. 2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973). However, on the facts presented, the instant case is somewhat closer to a unilateral foreclosing of a dealer on exclusive distributorship grounds, a situation which might well not constitute an antitrust violation. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, *supra*, 433 U.S. at 58. The only aspects of the instant case not in harmony with such a description are that the defendants were the manufacturers not of the cards themselves, but of the total system, and that there was an aftermarket in the sale of the cards. But these facts by themselves are not sufficient to constitute the antitrust violation that plaintiff is claiming.

The strongest argument that can be made in plaintiff's favor is that, although there may have been legal ways in which the defendants could, as a practical matter, have forced it out of the field, the method threatened was one that prevented plaintiff from becoming a potential competitor. Although a unilateral decision to terminate an exclusive dealership [*26] for any reason would not necessarily constitute a violation of the antitrust laws, it might under certain circumstances. Where the termination comes from the manufacturer of the component upon the insistence of the distributor of the system, such a situation might arguably be controlled by the reasoning in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).¹⁷ In Albrecht, the per se rule of illegality was applied to a maximum resale price ceiling imposed by a supplier to protect the public from an overcharging retailer who was insulated from price competition by virtue of an exclusive territory. Whether Albrecht applies here would depend on the weight accorded the fact that the termination in the instant case was instigated by the manufacturer-distributor of the overall product, rather than by the manufacturer of a specific component. This difference between the two situations could well be so critical as to prevent the Albrecht rule from applying here.

Even were Albrecht held to apply to this situation, defendants' conduct might nevertheless fail [*27] to constitute an antitrust violation under it. This is because Albrecht has tended to blur the distinctions between vertical and horizontal distributorships. As one noted commentator has observed:

¹⁶ See *supra* note 2.

As we noted earlier, plaintiff, as a sole vendor and distributor, would have been considered a monopolist were the magnetic ledger cards for Philips computers a relevant market. Consequently, in talking about unfair competition, plaintiff is not seeking to protect competition per se, but rather to protect its own position.

¹⁷ This is a much criticized opinion. See, e.g., Handler, Reforming the Antitrust Laws, *82 Colum. L. Rev.* 1287, 1299-1307 (1982).

HN2[] The termination of a dealer by a supplier for violation of a distribution restraint is, if it is a restraint at all, at most, a vertical one. It should not matter that the dealer was terminated by a supplier in part as a result of comments by that dealer's competitor. The restraint is still vertical. The fact that there are anticompetitive effects on intraband competition as a result of the termination is beside the point. That is true with respect to all vertical restraints. . . . The simple fact is that many dealer termination cases, because they involve unilateral refusals to deal, would not even survive the initial pleadings (or, at best, summary judgment) stage -- much less a full rule of reason analysis -- if not for the creative conspiracy concepts of Albrecht.

Handler, Reforming the Antitrust Laws, [82 Colum. L. Rev. 1287, 1305 \(1982\)](#).

The simple facts of the instant case demonstrate the point made above. Defendants gave the card business to plaintiff. Plaintiff then [*28] sold it back to the defendants, and defendants continued to sell the same proportion of the product in the market that plaintiff had. This, of necessity, eliminated plaintiff from the market. However, it is not of itself sufficient for a Sherman Act violation.

Plaintiff argues that defendants took this step to raise the price of the cards, which is to say to fix prices, and to make a large profit for themselves.¹⁸ For a period of time, plaintiff held off pressing this claim because of the companion litigation described above involving GBS. The claim of restraint of trade was rejected in that case for a number of reasons, including the fact that the defendants were not engaged in anti-competitive activity with others at the same level of the marketing scale. The court, applying a rule of reason, stated that restraints solicited by a distributor, but implemented by a manufacturer, are not automatically per se violations of the Sherman Act unless they "clearly had or [were] likely to have a pernicious effect on competition and lacked any redeeming virtue." [General Business Systems v. North American Philips Corp., supra, 699 F.2d at 978](#) (citations omitted). As the First Circuit [*29] held in [A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 \(1st Cir. 1980\)](#), **HN3**[] "if the sale of assets had an affect on competition, it would have occurred whether or not appellant was harmed. There is thus lacking the essential connection between injury and the aims of the antitrust laws necessary to give appellant standing."

Plaintiff relies heavily on [Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 \(3d Cir. 1979\)](#). In that case, the Third Circuit found that a per se violation of the Sherman Act might exist where a distributor convinces its supplier to cease dealing with a competing distributor. However, many cases have since concluded that **HN4**[] a per se violation of the antitrust laws, predicated upon an alleged vertical combination, cannot stand absent a showing of some form of price fixing or resale price maintenance. See, e.g., [Borger v. Yamaha International Corp., 625 F.2d 390, 396-98 \(2d Cir. 1980\)](#). Under such decisions, defendants could not have been guilty of an antitrust violation unless their action was intended to affect the [*30] entire market for all magnetic ledger cards, rather than merely that for their own. Threatening a supplier with a discontinuation of business if it deals with a competitor of the distributor is not, perforce, an antitrust violation. [Determined Productions, Inc. v. R. Dakin & Co., 514 F. Supp. 645 \(N.D. Cal. 1979\)](#), aff'd mem., 649 F.2d 866 (9th Cir. 1981).

As indicated earlier, the Ninth Circuit in General Business Systems rejected an unfair competition claim similar to that made by plaintiff here. Among its critical findings was that the district court was correct in concluding that the market for Philips-type cards was not insulated from the competitive struggle between computer systems, so that

Philips had little or no power to raise the price of its mlcs without reducing its profits because any such increase would diminish sales of its computer system and very likely adversely affect aggregate profits. Were mlc prices significantly increased, computer system buyers quickly could shift to other sellers who, in turn, could profitably expand their output to meet the new demand. We agree with the district court that the undisputed facts permit only one conclusion, viz., that [*31] the market for mlcs cannot be separated from the general market for small business computer systems.

[General Business Systems, supra, 699 F.2d at 972.](#)

¹⁸ This contention flies in the face of the fact that defendants were actually hurt by the cost of their cards rather than helped.

The General Business Systems court also rejected the claim that Philips's exclusive dealing arrangement with the German companies violated [section 1](#) of the Sherman Act under either a per se or rule of reason analysis, on the ground that the defendants were not engaged in concerted anticompetitive activity with others at the same level of market organization. The court noted that

[e]xclusive dealerships usually escape the proscriptions of [section 1](#) because, as already indicated, they establish a vertical relationship among firms that do not compete with each other. See [A.H. Cox & Co. v. Star Machinery Co., 653 F. 2d 1302, 1306 \(9th Cir. 1981\)](#); [Gough v. Rossmoor Corp., 585 F. 2d 381, 387 \(9th Cir. 1978\)](#), cert. denied, 440 U.S. 936 (1979).

HN5 Restraints solicited by a distributor but implemented by a manufacturer are not automatically per se violations.

Id. at 978.

Another basis for the court's finding was the conclusion that Philips had a contractual right to designate the distributors for the cards manufactured in Germany. [*32] In this action, however, plaintiff has offered some evidence indicating that such an exclusive distributorship right did not exist. Affidavit of John J. Fitzsimmons at PP15, 16, 17 & 19. Plaintiff also argues that the cooperation of the manufacturers does not constitute an exclusive distributorship, but rather a form of boycott. Furthermore, plaintiff claims that, in contrast to the usual manufacturer-distributor relationship, the distributor in this instance was a powerful company capable of controlling the manufacturers.

Exclusive dealing arrangements have been a source of mischief in the antitrust laws for a considerable period of time. Indeed, the recent issuance of the second edition of the Restatement of Contracts, dealing with covenants in restraint of trade, has promoted further discussion over the subject because of its deletion of exclusive dealing arrangements. See, e.g., Handler & Lazaroff, Restraint of Trade and the *Restatement (Second) of Contracts*, 57 N.Y.U.L. Rev. 669, 707-09.¹⁹ Of course, the obtaining of the exclusive dealership does not create a monopoly, since the relevant market, business computers, is one in which the competition actually occurs. See, [*33] e.g., [Packard Motor Car Co. v. Webster Motor Car Co., 243 F. 2d 418, 420](#) (D.C. Cir.), cert. denied, 355 U.S. 822 (1957).

Despite the above, the Second Circuit's opinion in [Oreck v. Whirlpool Corp., 563 F. 2d 54 \(2d Cir. 1977\)](#), cert. denied, 439 U.S. 946 (1978), reh. denied, 439 U.S. 1104 (1979), suggests that **HN6** in applying a rule of reason to the termination of an exclusive distributorship, anticompetitive impact on the relevant market may not be the only consideration and that a conspiracy to eliminate a distributor may be sufficient.²⁰ This approach is more acceptable in the instant case if MLC is viewed not merely as defendants' exclusive distributor but also as a potential competitor in sales of replacement cards to existing owners. Defendants respond even if such a theoretical cause of [*34] action could be constructed, one is not factually applicable here since, as the Ninth Circuit found, there was a preexisting contractual agreement between Philips and the German manufacturers under

¹⁹ Professor Handler argues that "[i]n sum, the anticompetitive consequences that flow from exclusive representation agreements are not so pernicious as to require or justify the application of a per se rule of illegality either at common law or under federal [antitrust law](#)." Handler & Lazaroff, Restraint of Trade and the *Restatement (Second) of Contracts*, 57 N.Y.U. L. Rev. 669, 712.

²⁰ The court's actual statement was

"Oreck was required to show not only conspiratorial conduct by Sears and Whirlpool in order to recover under [§ 1](#) of the Sherman Act but also credible proof that the net result and effect of the allegedly conspiratorial conduct of the defendants was anticompetitive in the vacuum cleaner industry as a whole or that the conspiracy was designed to drive Oreck out of the vacuum cleaner business."

[Oreck Corp. v. Whirlpool Corp., supra, 563 F. 2d at 58](#) (emphasis added).

which they would distribute only to those companies authorized by Philips. [General Business Systems, supra, 699 F.2d at 969-70.](#)

The Ninth Circuit, in General Business Systems, determined that there had been no restraint of trade on the basis of the above-mentioned distribution agreement between Philips and the German manufacturers. The court also found that, regardless of whether this arrangement amounted to an exclusive dealing relationship, the German manufacturers sold exclusively [*35] to Philips affiliates or designees. [Id. at 970.](#) In addition, the court found that there were alternative sources of mlc's from other suppliers. [Id. at 979.](#) Finally, in light of its view of the relevant market, the Ninth Circuit found that there was not sufficient evidence to indicate that Philips used a worldwide market position to coerce the German manufacturers into refusing to deal with GBS.²¹ [Id. at 978-79.](#)

Despite this rather persuasive authority, we decline to grant defendants' motion for summary judgment on the restraint of trade counts. The documents which allegedly establish an exclusive dealing arrangement between the German manufacturers and Philips or its designees were not produced in the discovery of this case, but came out, rather, in the General Business Systems action. Plaintiff has produced certain evidence in opposition to defendants' motion, indicating that some of those involved in the dealings between Philips and the German manufacturers did not believe there to [*36] be any exclusive distributorship arrangement between them, or that there was any basis in trade secrets or other assistance which justified such an agreement. Affidavit of John J. Fitzsimmons at PP15, 16, 17 & 19. An issue also is raised as to whether, assuming such agreements existed after 1975, they were in existence during the period MLC dealt with the defendants.²² (The California courts were aware of the fact that MLC was the distributor until 1975, speaking of it as a Philips designee.) Plaintiff also argues that certain aspects of the California case are based on factual findings which are not controlling in this action. Plaintiff's Reply Memorandum of Points and Authorities in Support of its Cross Motion for Summary Judgment at 15-25.

[*37] In the final analysis, we may find, as did the Ninth Circuit in General Business Systems that (1) the plaintiff has not proven a violation of [section 1](#) of the Sherman Act because it failed to show that defendants were engaged in concerted anticompetitive activities on the same level as itself, and (2) exclusive dealerships escape the proscriptions of [section 1](#), unless they have a pernicious effect on competition and lack any redeeming value.²³ We are also reasonably confident that the retaking of the distributorship was not for the purpose of fixing prices on the cards, since that was a self-defeating technique with respect to sales of the overall system. In sum, we may find that this case is controlled by the decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 537 F.2d 980 (9th Cir. 1976), aff'd [433 U.S. 36 \(1977\)](#), where the Ninth Circuit held that "[t]here is a veritable avalanche of precedent to the effect that, absent sufficient evidence of monopolization, a manufacturer may legally grant such an exclusive franchise even if this effects the elimination of another distributor." [Id. at 997](#) (Citations omitted).

[*38] For the time being, and in light of the very high threshold for the granting of summary judgment in this Circuit, see. e.g., [Wilson Rich v. Don Aux Associates, Inc., 524 F. Supp. 1226, 1229 \(S.D.N.Y. 1981\)](#), we deny the restraint of trade portion of the motion and grant only that part which seeks summary judgment on the monopoly counts (including the sixth count under brought section 7 of the Clayton Act).²⁴ Defendants' motion is, therefore, granted in part and denied in part, and plaintiff's cross-motion is denied.

²¹ The court did, however, indirectly recognize the possibility of pressure to prevent dealing within the United States market. [General Business Systems, supra, 699 F.2d at 979.](#)

²² On the other hand, defendants have introduced evidence that their specifications for the manufacture of the cards had a legend in German which stated as follows: "All rights expressly reserved. Reproduction or disclosure to third parties in whatever form is forbidden without the written consent of the owner." Affidavit of Thomas W. Dickson at 2. Defendants have also offered evidence suggesting that the exclusive distributorship arrangement existed as early as 1969.

²³ Under such a conclusion, plaintiff may still have some remedy against defendants, but it does not sound in antitrust.

²⁴ The section 7 claim must fail because the relevant product market does not consist of mlc's, so that there could be no substantial lessening of competition in the relevant market by the acquisition of the card distributorship. Cf. [United States v. General Dynamics Corp., 415 U.S. 486 \(1974\)](#) (coal producer found not to have violated section 7 of the Clayton Act because

So Ordered.

End of Document



Vial v. First Commerce Corp.

United States District Court for the Eastern District of Louisiana

May 4, 1983

CIVIL ACTION No. 83-1908 SECTION "A"; No. 83-2021 SECTION "A"; No. 83-2261 SECTION "A"

Reporter

1983 U.S. Dist. LEXIS 17195 *; 1983-2 Trade Cas. (CCH) P65,692

STEPHEN R. VIAL VERSUS FIRST COMMERCE CORPORATION, ET AL; STEPHEN R. VIAL VERSUS C. T. CONOVER; STEPHEN R. VIAL VERSUS HUNTER O. WAGNER, JR.

Core Terms

banks, merger, bank merger, consolidated, proposed merger, preliminary injunction, anti trust law, allegations, state court, removal, suits, motion of plaintiff, instituted, intervene, discovery, motions, federal question, national bank, customers, deposits, lawsuit, parties, combined, enjoin, merge, cause of action, federal law, competitors, convenience, Antitrust

LexisNexis® Headnotes

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Time Limitations

HN1[] Intervention, Intervention of Right

Fed. R. Civ. P. 24(a) sets up a four-prong test for intervention of right: (1) The application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is subject of the action; (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately presented by the existing parties to the suit. In order to intervene as a matter of right, all four of the aforementioned requirements must be met.

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Parties > Intervention > General Overview

HN2[] Intervention, Intervention of Right

The "interest" requirement contained in *Fed. R. Civ. P. 24(a)* cannot be viewed separately from the third requirement of intervention of right, that of impairment of the interest.

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Parties > Intervention > General Overview

HN3 Intervention, Intervention of Right

The final requirement for intervention as a matter of right is that the applicant's interest be inadequately represented by the existing parties to the suit. According to the U.S. Supreme Court, this requirement of the rule is satisfied if the applicant shows that representation of his interest may be inadequate. The burden of making that showing should be treated as minimal.

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Parties > Intervention > General Overview

HN4 Intervention, Intervention of Right

Where there is a likelihood that applicants for intervention, if permitted to intervene, would more vigorously represent themselves and present more compelling arguments on their own behalf, this factor is sufficient to fulfill the requirement of inadequate representation under [Fed. R. Civ. P. 24\(a\)](#).

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Parties > Intervention > General Overview

HN5 Intervention, Intervention of Right

Numerous cases recognize the inadequacy of governmental representation of the interests of private parties for purposes of [Fed. R. Civ. P. 24\(a\)](#).

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

HN6 Specific Cases Removed, Federal Questions

A party seeking removal bears the burden of satisfying each of the following conditions: (1) a federal question must be an essential element of plaintiff's cause of action; (2) the federal question that is the predicate for removal must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal; and (3) the federal question raised must be a substantial one.

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

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Federal Acts > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

[HN7](#) [down] Financial Institutions, Bank Mergers

The Bank Merger Act of 1966, 80 Stat. 7, [12 U.S.C.S. § 1828\(c\)](#), provides: 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 Title 15 ([§ 2](#) of the Sherman Antitrust Act), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5). [12 U.S.C.S. § 1828\(c\)\(F\)](#).

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Mergers > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

[HN8](#) [down] Financial Institutions, Bank Mergers

The standards set forth in the Bank Merger Act of 1966, 80 Stat. 7, [12 U.S.C.S. § 1828\(c\)](#), are 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. [12 U.S.C.S. § 1828\(c\)\(5\)](#).

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

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

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

Mergers & Acquisitions Law > Antitrust > General Overview

HN9 [blue icon] **Financial Institutions, Bank Mergers**

Subparagraph (A) of [12 U.S.C.S. § 1828\(c\)\(5\)](#) of the Bank Merger Act of 1966 tracks the language of the Sherman Antitrust Act, §, [15 U.S.C.S. § 2](#), and subparagraph (B) of this section tracks the language of [§1](#) of the Sherman Act and § 7 of the Clayton Act, [15 U.S.C.S. §§ 1, 18](#). In addition, the last sentence of this section provides that even a merger where the effect may be substantially to lessen competition shall be approved if 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.

Administrative Law > Judicial Review > General Overview

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 > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Governments > Federal Government > Claims By & Against

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN10 [blue icon] **Administrative Law, Judicial Review**

The language of the Bank Merger Act of 1966 (the 1966 Act), its legislative history and the relevant case law all confirm that it was intended to impose a uniform federal standard to be applied in any judicial review of a bank merger of insured banks, be they state or federally chartered. Indeed, state courts which are asked to review a proposed merger under state antitrust laws are required to apply the federal standards set forth in the 1966 Act. There is no statement in the legislative history of the 1966 Act or any case law which would suggest or imply that a state court could continue to apply state antitrust standards following the enactment of the 1966 Act with respect to

actions challenging bank mergers. A House report summarizes the legal effect of the bill as follows: The bill would establish a single set of standards for the consideration of future mergers by the banking supervisory agencies, the Department of Justice, and the courts under the antitrust laws. Thus, there is no question but that is was Congress's intent to create a pervasive regulatory scheme designed to assure "uniformity" among the federal banking supervisory agencies, the Department of Justice and the judiciary through the establishment of a single set of standards for testing the legality of all bank mergers.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

HN11[] Removal, Specific Cases Removed

The courts will not permit plaintiff to use artful pleadings to close off defendant's right to a federal forum. A removal court will always seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization.

Banking Law > Federal Acts > General Overview

Constitutional Law > Supremacy Clause > General Overview

Banking Law > Regulators > General Overview

HN12[] Banking Law, Federal Acts

The regulations of the National Banking System are a matter of federal law and preempt any state law to the contrary.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN13[] Supplemental Jurisdiction, Pendent Claims

Non-federal claims are within the pendent jurisdiction of a federal district court where they are closely related to and arise out of a common nucleus of operative facts upon which the federal claims are based.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN14[] Pleadings, Rule Application & Interpretation

Courts condemn the practice of splitting a single cause of action, the practice of bringing only some of the theories of recovery applicable to a single cause of action in a proceeding, or suing only some of the potential defendants.

Civil Procedure > Preliminary Considerations > Removal > General Overview

Governments > Federal Government > Claims By & Against

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > Cases Involving Federal Officers

Civil Procedure > ... > Removal > Procedural Matters > General Overview

Governments > Federal Government > Employees & Officials

HN15 [blue icon] Preliminary Considerations, Removal

If a federal officer acts to remove a cause of action against him to federal court, the power of the state court is ended not only as to his case, but as to any other removed cases which have been consolidated with his case. Moreover, even if subsequent to removal, the federal officer is eliminated from the case, the federal court does not lose jurisdiction over the related consolidated cases. [28 U.S.C.S. § 1442\(a\)\(1\)](#) authorizes removal of the entire case even though only one of its controversies might involve a federal officer or agency; thus [§ 1442\(a\)\(1\)](#) creates a species of ancillary jurisdiction over the nonfederal elements of the case. In other instances of ancillary jurisdiction over the nonfederal elements of the case. In other instances of ancillary jurisdiction elimination of the "principal" controversy in a case does not deprive the court of power to dispose of the ancillary matters even though the court would not have had jurisdiction over these matters but for ancillarity.

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Civil Procedure > Trials > Consolidation of Actions

HN16 [blue icon] Commercial Banks, Mergers & Consolidations

[Fed. R. Civ. P. 42\(a\)](#) provides in part that 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 and it may order all the actions consolidated.

Civil Procedure > Trials > Consolidation of Actions

HN17 [blue icon] Trials, Consolidation of Actions

The purpose of [Fed. R. Civ. P. 42\(a\)](#) is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties. In the Fifth Circuit, district judges have been urged to make good use of [Rule 42\(a\)](#) in order to expedite the trial and eliminate unnecessary repetition and confusion.

Civil Procedure > Trials > Consolidation of Actions

HN18 [blue icon] Trials, Consolidation of Actions

The fact that there are some questions not common to all the actions does not bar consolidation so long as there is at least one common question.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > General Overview

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Responses to Requests for Admissions

HN19 [blue icon] Injunctions, Preliminary & Temporary Injunctions

Fed. R. Civ. P. 33(a), 34(b), and 36(a) provide that the court may shorten the time for responses to interrogatories, requests for admission, and requests for production.

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Civil Procedure > ... > Removal > Procedural Matters > Notice of Removal

HN20 [blue icon] Commercial Banks, Mergers & Consolidations

Motions to strike under Fed. R. Civ. P. 12(f) on grounds that allegations are redundant and immaterial are generally not favored, unless it can be shown that no evidence in support of the allegations would be admissible and that the allegations will cause prejudice to the moving party.

Counsel: [*1] Louis R. Koerner, Jr., New Orleans, La., For Plaintiff

Charles W. Lane, III, Herschel L. Abbott, Jr., Howard E. Sinor, Jr., for First Commerce Corporation and First National Bank of Commerce, Robert E. Barkley, Jr., Louis Y. Fishman, Frances R. White, III, for New Orleans Bancshares and The Bank of New Orleans and Trust Company, Eugene J. Metzger, Michael E. Friedlander, Samuel S. Jones, Jr., for First Commerce Corporation, First National Bank of Commerce, New Orleans Bancshares and The Bank of New Orleans and Trust Company, Charles H. McEnerney, Jr., Donald N. Lamson, Ruth Morris Force, for C. T. Conover, Comptroller of the Currency, Louis Jones, Assistant Attorney General, for Hunter O. Wagner, Jr., Commissioner of Financial Institutions of Louisiana

Opinion by: SCHWARTZ

Opinion

ORDER

This matter came on for hearing before the Court on May 4, 1983, on the following motions of the above-captioned parties: (1) the motions of the bank defendants in C.A. 83-1908 to intervene in each of the other two suits above; (2) the motions of plaintiff to remand to state court both the suit against the bank defendants, C.A. 83-1908, and the suit against Mr. Wagner, C.A. 83-2261; (3) the motions of [*2] the bank defendants in C.A. 83-1908 to consolidate all three suits above; (4) the motion of plaintiff for ex parte consideration of motion for summary judgment and of

motion for preliminary injunction in the suit against the bank defendants, C.A. 83-1908; and (5) the motion of plaintiff to schedule a hearing on a preliminary injunction in the suit against Mr. Conover, C.A. 83-2021; (6) the motion of plaintiff for shortened discovery in the suit against the bank defendants; and (7) the motion of plaintiff to strike in the suit against the bank defendants.

At the hearing, pursuant to [F.R.C.P. 42\(a\)](#), the Court ordered initially that there would be a joint hearing and trial of all matters at issue. Following oral argument, and considering the record in this matter and the applicable law, for the reasons hereinafter set out, the Court ruled as follows on the above-numbered motions: (1) granted; (2) denied; (3) granted; (4) denied; (5) granted, with hearing set for May 17, 1983 at 9:00 A.M. on the preliminary injunction; (6) granted pursuant to a schedule to be arranged by the parties and approved by the Court; and (7) denied.

Before setting forth the bases for the Court's rulings [*3] on the various motions heard, a background history of the case is in order.

On November 9, 1982, defendants First Commerce Corporation ("FCC") and New Orleans Bancshares, Inc. ("NOBS") entered into Agreement and Plan of Reorganization ("the Agreement"), whereby the Bank of New Orleans and Trust Company ("BNO"), a state-chartered bank, would be merged into First National Bank of Commerce ("FNBC"), a national bank, with FNBC being the surviving institution.¹ In accordance with federal law, [12 U.S.C. § 1828\(c\)](#) and [12 U.S.C. § 215\(a\)](#), application for approval to consummate this transaction was submitted to the United States Comptroller of the Currency ("OCC"). Following receipt of competitive reports from the Attorney General of the United States and the Board of Governors of the Federal Reserve System, each of whom reported that the transaction would not be in violation of the federal antitrust laws, and after receiving public comment, the OCC issued its approval on April 12, 1983. (Exhibit A).

[*4] On February 25, 1983, prior to the OCC having approved the proposed merger, plaintiff's counsel filed suit in this Court on behalf of Frederic P. Aiken ("Aiken") against defendants, which was docketed as Civil Action No. 83-866 and allotted to Section "A" of the Court. This suit complained that the proposed merger constituted a violation of [Sections 1 and 2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2](#), as well as Section 7 of the Clayton Act, [15 U.S.C. § 18](#), and sought to enjoin the transaction. Not insignificantly, it is these same antitrust statutes, as modified by provisions of the Bank Merger Act of 1966, [12 U.S.C. § 1828\(c\)](#), which must be found not to be violated by the merger, in order for the OCC to issue its approval.

Shortly after filing the first suit in federal court, plaintiff's counsel filed a second suit on behalf of Aiken in the Civil District Court for the Parish of Orleans, State of Louisiana, No. 83-3265, which also sought to enjoin the merger. The facts recited in the state court suit were identical in all material respects to the facts recited in the first suit filed on behalf of Aiken in this Court. The only difference in the two suits was the fact that [*5] plaintiff claimed a violation of the Louisiana antitrust laws in the state court action.

On March 7, 1983, at a status hearing in the federal action complaint, this Court advised counsel for plaintiff, that in the event a preliminary injunction were granted, a substantial bond would be imposed, in accordance with [15 U.S.C. § 26](#). On March 14, 1983, the suit filed on behalf of Aiken in the state court was removed to this Court, was docketed as Civil Action No. 83-1195, and was subsequently transferred to Section "A" as a case related to Civil Action No. 83-866. On March 18, 1983, a motion was filed with this Court to withdraw Aiken as the plaintiff in Civil Action No. 83-866 and to substitute Louis R. Koerner, Jr., plaintiff's counsel, as the plaintiff in that action. This

¹ Pursuant to the Agreement, NOBS will first merge into NOBS Financial Corporation, all of the stock of which will be owned by BNO (the "preliminary merger"). As a result of this preliminary merger, shareholders of NOBS will become shareholders of BNO and NOBS will cease to exist. At this point in the reorganization BNO stock will no longer be owned by NOBS or by any other bank holding company. BNO, which after the preliminary merger will be a publicly held state banking association, will then merge into FNBC, a national banking association, and the separate existence of BNO will cease pursuant to [12 U.S.C. § 215a\(e\)](#). Thus, prior to the time of the merger challenged herein, BNO will be a separate and independent state bank, unaffiliated with any bank holding company.

Court denied the motion of Mr. Koerner to substitute himself as plaintiff and dismissed the suit with prejudice as to Aiken in Civil Action Nos. 83-866 and 83-1195.

During the conference on March 18, 1983, plaintiff's counsel advised the Court that he believed that he had "another plaintiff" and that he would refile the suit in state court. Subsequently, a state court action on behalf of Stephen R. Vial [*6] ("Vial") was filed by Mr. Koerner on March 22, 1983, in the Civil District Court for the Parish of Orleans, Docket No. 83-4834. The state action on behalf of Vial alleges the same facts as the two prior actions filed on behalf of Aiken, and , like Aiken's state court suit, alleges that the proposed bank merger violates the Louisiana antitrust laws, LSA-R.S. 51:122 et seq. In addition, the state court action filed on behalf of Vial alleges, for the first time, that the proposed bank merger violates the Louisiana Bank Holding Company Act, LSA-R.S. 6:1001 et seq. Similarly, the Vial suit also seeks to enjoin the proposed merger.

Shortly thereafter, on April 18, 1983, Mr. Koerner instituted suit on behalf of Vial against C. T. Conover, Comptroller of the Currency, in the Civil District Court for the Parish of Orleans, Deocket No. 83-4834, alleging many of the same facts and reciting the same state statutes as are present in the instant litigation, plus the further allegations that the OCC violated provisions of the National Bank Act, [12 U.S.C. § 36](#), the Bank Merger Act, [12 U.S.C. § 1828\(c\)](#), as well as the Administrative Procedure Act, [5 U.S.C. § 701](#), by allegedly failing to take [*7] into consideration the comments of plaintiff and his counsel opposing the merger.² This suit also attempts to enjoin the merger by seeking to nullify the OCC's approval.

The Vial suit against the banks was removed to this Court on April 13, 1983, on the grounds that plaintiff's claim was entirely federal in nature. On April 20, 1983, the OCC also removed his suit to this Court, Civil Action No. 83-2021, pursuant to [28 U.S.C. § 1442\(a\)\(1\)](#).

On April 27, 1983, Vial instituted suit in the 19th [*8] Judicial District Court for the Parish of East Baton Rouge, Docket No. 266-248, against Hunter O. Wagner, Jr., Commissioner of Financial Institutions of Louisiana ("Commissioner"). This suit seeks effectively to enjoin the consummation of the merger by seeking to have the act of the Commissioner to issue a "Certificate of Merger" declared illegal. On May 2, 1983, the Commissioner removed this suit to the United States District Court for the Middle District of Louisiana, which Court that same day transferred the matter to this Court.

Thus, at this juncture, there are three separate actions pending in federal court instituted by plaintiff against separate defendants or groups of defendants, each directly seeking to prevent the proposed merger herein.

1. Motions of Bank Defendants to Intervene

Defendants move for intervention of right in both the suit against the OCC and the suit against the Commissioner Wagner, pursuant to [F.R.C.P. 24\(a\)](#).

The Fifth Circuit, in [International Tank Terminals, Ltd. v. M/V Acadia Forest](#), 579 F.2d 964, 967 (5th Cir. 1978), has held that [HN1](#) Rule 24(a) sets up a four-prong test for intervention of right:

- (1) The application for intervention must [*9] be timely; (2) the applicant must have an interest relating to the property or transaction which is subject of the action; (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately presented by the existing parties to the suit.

² It should be noted by way of background that in early March 1983, Mr. Koerner, acting as counsel for Aiken, submitted a comment to the OCC opposing the approval of the application to merge on the grounds that the merger was violative of Section 7 of the Clayton Act and [Sections 1](#) and [2](#) of the Sherman Act. As recently as March 20, 1983, Mr. Koerner filed additional comments in opposition to the merger with the OCC urging alleged violation of federal [antitrust law](#) and state laws. It is not clear whether Mr. Koerner was representing himself or either Aiken or Vial in connection with the submission to the OCC, since the most recent submission occurred inter-plaintiff, as it were.

In order to intervene as a matter of right, all four of the aforementioned requirements must be met. [*Id. at 967.*](#)

It is obvious and beyond argument that the motions to intervene have been timely filed.

The second requirement that must be fulfilled in order to intervene as of right is that of an "interest" relating to the property or transaction which is the subject of the action.

Clearly, each of the applicants has the requisite interest in the subject of this lawsuit to be entitled to intervene herein as of right. The issue of this lawsuit is the legality and permissibility of the proposed merger between FNBC and BNO. Not only do applicants have property interests involved herein, but they are inextricably entangled in the transaction which is sought to be enjoined by this lawsuit. Applicants may have [*10] an even greater interest in this lawsuit than the original defendant himself; they clearly have a greater interest than the plaintiff. Surely applicants have the direct and litigable interest in the lawsuit required by [F.R.Civ.P. 24\(a\)](#) to entitle them to intervene as of right. [Donaldson v. U.S., 400 U.S. 517 \(1971\); Nuesse v. Camp, 385 F.2d 694 \(D.C. Cir. 1976\).](#)

[HN2](#) The "interest" requirement contained in [Rule 24\(a\)](#) cannot be viewed separately from the third requirement of intervention of right, that of impairment of the interest. [Natural Resources Defense Counsel, Inc. v. The United States Nuclear Regulatory Commission, 578 F.2d 1341, 1345 \(10th Cir. 1978\).](#) Clearly, the applicants' ability to protect their interest would be impaired or impeded by the disposition of this action. A decision in this case will, for all practical purposes, determine the applicants' right and ability to go forward with the proposed merger.

[HN3](#) The final requirement for intervention as a matter of right is that the applicant's interest be inadequately represented by the existing parties to the suit. According to the U.S. Supreme Court, this requirement of the rule is satisfied "if the applicant shows that [*11] representation of his interest "may be" inadequate. . . ." [Trbovich V. United Mine Workers of America, 404 U.S. 528](#), 538 N. 10 (1972). In Trbovich, the Supreme Court further ruled that "the burden of making that showing should be treated as minimal." *Id.* (Emphasis supplied.)

In the two suits at issue, neither plaintiff nor the defendants can or will adequately represent any of the applicants' interest in the subject of the litigation. The plaintiff's interests are completely adverse to those of each of the applicants. The interests of the Comptroller and the Commissioner are also dissimilar to those of the applicants. Both are public officials charged with the duty of protecting the interests of the public generally. As such, this duty would conflict with its ability to represent the more particularized interests of the applicants in this lawsuit. The Comptroller is not concerned with protecting the applicants' interests but with protecting the interests of the public at large. **[HN4](#)** There is a likelihood, therefore, that the applicants, if permitted to intervene in this suit, would more vigorously represent themselves and present more compelling arguments on their own behalf. The [*12] courts have held this factor sufficient to fulfill the requirement of inadequate representation. See, e.g., [N.Y. Pub. I.R.G. v. Regents, 516 F.2d 350 \(2d Cir. 1975\)](#). Moreover, **[HN5](#)** numerous cases recognize the inadequacy of governmental representation of the interests of private parties. See, e.g., [National Farm Lines v. I.C.C., 564 F. 2d 381 \(10th Cir. 1977\); Planned Parenthood v. Citizens for COMM. ACTION, 558 F.2d 861 \(8th Cir. 1977\); Holmes v. Government of Virgin Islands, 61 F.R.D. 3 \(D. St. Croix 1973\); General Motors Corp. v. Burns, 50 F.R.D. 401 \(D. Hawaii 1970\).](#)

Therefore, since the bank defendants satisfy all requirements necessary for intervention of right, the motions to intervene in plaintiff's suits against the Comptroller and the Commissioner are granted.

2. Motions of Plaintiff to Remand

Plaintiff has moved to remand based on the fact that his complaints in both the suit against the banks and the suit against the state commissioner contain no allegations other than violations of the laws of Louisiana. Defendants contend, on the other hand, that the complaints reveal the existence of a federal question which entitles them to removal.

[HN6](#) A party seeking removal [*13] bears the burden of satisfying each of the following conditions: (1) a federal question must be an essential element of plaintiff's cause of action; (2) the federal question that is the predicate for

removal must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal; and (3) the federal question raised must be a substantial one. *Gully v. First National Bank of Meridian*, 299 U.S. 109 (1936); *Hagans v. Lavine*, 415 U.S. 528 (1974); *Maxwell v. First National Bank of Monroeville*, 638 F.2d 32 (5th Cir. 1981); In *Re Carter*, 618 F.2d 1093 (5th Cir. 1980); *Matter of Marriage of Smith*, 549 F. Supp. 761 (W.D. Tex. 1982).

In this case, plaintiff's state court petitions, on their face, necessarily raise a federal question under [HN7](#)[] the Bank Merger Act of 1966, 80 Stat. 7, Pub. L. 89-356, [12 U.S.C. § 1828\(c\)](#). That law provides:

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 [section 2](#) of Title 15 [[section 2](#) of the Sherman Antitrust Act], the standards applied by the Court shall be identical with [*14] those that the banking agencies are directed to apply under paragraph (5). [12 U.S.C. § 1828\(c\)\(F\)](#).[HN8](#)[]

These standard set forth in the 1966 Act are 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. [12 U.S.C. § 1828\(c\)\(5\)](#).[HN9](#)[]

Subparagraph (A) of this section tracks the language of the Sherman Antitrust Act, [Section 2](#), [15 U.S.C. § 2](#), and subparagraph (B) of this section tracks the language of [Section 1](#) of the Sherman Act and Section 7 of the Clayton Act, [15 U.S.C. §§ 1, 18](#). In addition, [*15] the last sentence of this section provides that even a merger where the effect "may be substantially to lessen competition" shall be approved if 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."

[HN10](#)[] The language of the Bank Merger Act of 1966, its legislative history and the relevant case law all confirm that it was intended to impose a uniform federal standard to be applied in any judicial review of a bank merger of insured banks, be they state or federally chartered. See, e.g., [Washington Mutual Savings Bank v. Federal Deposit Insurance Corporation](#), 482 F.2d 459 (9th Cir. 1973).

Indeed, state courts which are asked to review a proposed merger under state antitrust laws are required to apply the federal standards set forth in the 1966 Act. There is no statement in the legislative history of the 1966 Act or any case law which would suggest or imply that a state court could continue to apply state antitrust standards following the enactment of the 1966 Act with respect to actions challenging bank mergers. House Report (Banking and Currency Committee) [*16] No. 1221, January 24, 1966, summarized the legal effect of the bill as follows: "The bill would establish a single set of standards for the consideration of future mergers by the banking supervisory agencies, the Department of Justice, and the courts under the antitrust laws . . . U.S. Code Cong. & Admin. News 1860 (1966)."

Thus, there is no question but that is was Congress' intent to create a pervasive regulatory scheme designed to assure "uniformity" among the federal banking supervisory agencies, the Department of Justice and the judiciary through the establishment of a single set of standards for testing the legality of all bank mergers.

Moreover, as the term "antitrust laws" in the Bank Merger Act is not limited to federal antitrust laws, since the Act defines the term "antitrust laws" as the Sherman Act, the Clayton Act, and "any other acts in pari materia," U.S.

Code Cong. & Admin. News at 1865, a state court proceeding testing the legality of a bank merger must in its decision yield to the standards set forth in the Bank Merger Act. Thus, any judicial review of the instant bank merger will involve the interpretation and application of federal law and is therefore within [*17] the federal question jurisdiction of this Court.

An examination of plaintiff's state court petitions demonstrates that all the operative facts relate to the pending merger of the BNO into the FNBC. While plaintiff mentions no federal statute in his state court proceedings and asserts that he does not rely or plan to rely on federal law, the facts and allegations in his pleadings disclose a claim cognizable under federal law. [HN11](#)[¹¹] The courts will not permit plaintiff to use artful pleadings to close off defendant's right to a federal forum. A removal court will always seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization. [*Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S. Ct. 2424, 2427, n.2 \(1981\)*](#).

Simply stated, plaintiff seeks through his three separate proceedings only one goal: to prevent a bank merger by substituting criteria for such other than the scheme devised by Congress to assure a uniform method of providing for mergers of insured banks.³ To conclude that there is no federal jurisdiction here would require this Court to disregard a century and a half of case law beginning with *McCulloch v. Maryland* [*18] which has established that [HN12](#)[¹²] the regulations of the National Banking System are a matter of federal law and preempt any state law to the contrary. See e.g., [*First National Bank of Logan, Utah v. Walker Bank and Trust Co., 385 U.S. 252 \(1966\)*](#); [*Franklin National Bank v. New York, 347 U.S. 373, 378 \(1954\)*](#); [*Mercantile National Bank v. Langdeau, 371 U.S. 555, 558-59 \(1962\)*](#).

Therefore, this Court concludes that a substantial federal question exists in this case which entitles defendants to removal.

Finally, [*19] to the extent that plaintiff raises any non-federal claims in these suits, [HN13](#)[¹³] such claims are within the pendent jurisdiction of this Court, as being closely related to and arising out of a common nucleus of operative facts upon which the federal claims are based. [*Gibbs v. United Mine Workers, 383 U.S. 715, 725 \(1966\)*](#). Considerations of judicial economy, expense, and convenience and fairness to the litigants compel this Court to thus exercise its discretion to find pendent jurisdiction over such non-federal claims. [*Id. at 726*](#).

By instituting separate actions on the same factual predicate, plaintiff has attempted to split whatever causes of action he had in order to get three bites of the apple. [HN14](#)[¹⁴] Courts have long condemned the practice of splitting a single cause of action, the practice of bringing only some of the theories of recovery applicable to a single cause of action in a proceeding, or suing only some of the potential defendants. See e.g., [*Norman Tobacco and Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 \(5th Cir. 1961\)*](#); [*Harper Plastics, Inc. v. Amoco Chemicals Corp., 657 F.2d 939 \(7th Cir. 1981\)*](#). Unless this Court asserts its removal jurisdiction and hears all the theories [*20] of recovery against all of the potential defendants, those defendants, as well as the courts, will be subjected to a massive waste of time and energy.

Furthermore, extensive precedent supports the proposition that [HN15](#)[¹⁵] if a federal officer acts to remove a cause of action against him to federal court, the power of the state court is ended not only as to his case, but as to any other removed cases which have been consolidated with his case. Moreover, even if subsequent to removal, the federal officer is eliminated from the case, the federal court does not lose jurisdiction over the related consolidated cases. As stated in [*IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc., 676 F.2d 152, 158 \(5th Cir. 1982\)*](#):

³ Plaintiff's actions reveal that while masquerading as a state antitrust claimant, he is in reality pursuing a federal remedy, pursuant to [5 U.S.C. § 705](#). He was not content to rely solely upon his state court antitrust proceeding and his state action directed against Commissioner Wagner. He also felt compelled to seek injunctive (and other) relief against the OCC, admittedly a proceeding involving a federal question. This tactic, in itself, results in a tacit admission of the involvement of a federal question, since it demonstrates that these actions are totally interrelated, raise identical issues, arise out of the same operative facts, and seek the same ultimate relief.

Section 1442(a)(1) authorizes removal of the entire case even though only one of its controversies might involve a federal officer or agency . . . thus § 1442(a)(1) creates a species of ancillary jurisdiction over the nonfederal elements of the case. In other instances of ancillary jurisdiction over the nonfederal elements of the case. In other instances of ancillary jurisdiction elimination of the "principal" controversy in a case does not deprive [*21] the court of power to dispose of the ancillary matters even though the court would not have had jurisdiction over these matters but for ancillarity . . .

See also, Allman v. W. H. Hanley, 302 F.2d 559 (5th Cir. 1962); D. Fowler v. Southern Bell Telephone & Telegraph Company, 343 F.2d 150 95th Cir. 1965); and, State of Tennessee v. Davis, 100 U.S. 257 (1880).

Therefore, plaintiff's motions to remand both the suit against the banks and the suit against Commissioner Wagner are denied.

3. Motions of Bank Defendants to Consolidate

The bank defendants have moved to consolidate all three of the above-captioned suits ⁴ for all purposes, pursuant to HN16 [↑] Rule 42(a) of the Federal Rules of Civil Procedure, which provides, "[w]hen 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 [and] it may order all the actions consolidated. . . .

The purpose of Fed.R.Civ.Proc. 42(a) "is to give the court broad discretion to decide how cases on its docket are to be tried [*22] so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." Wright and Miller, Federal Practice and Procedure, § 2381 at 253 (1971).

"In this Circuit, district judges have been urged to make good use of Rule 42(a) . . . in order to expedite the trial and eliminate unnecessary repetition and confusion." "In re Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1013 (5th Cir. 1977), quoting Gentry v. Smith, 487 F.2d 571, 581 (5th Cir. 1973), which quoted Dupont v. Southern Pacific Co., 366 F.2d 193, 195 (5th Cir. 1966), cert. den., 386 U.S. 958, 87 S. Ct. 1027, 18 L.Ed.2d 106 (1967).

Consolidation is particularly appropriate here. The named plaintiff is the same in both actions. The operative facts -- the proposed merger of BNO into FNBC -- are the same in both actions; and virtually all of the plaintiff's legal theories -- violations of federal and state antitrust and banking laws -- are identical. ⁵

[*23] In a similar factual situation, Pinehurst Airlines, Inc. v. Resort Air Services, Inc., 475 F. Supp. 543 (M.D.N.C. 1979), the court ordered consolidation. In that case plaintiff brought two suits against different defendants, alleging that each defendant violated state and federal antitrust laws. Both suits arose from the same factual situation. The court ordered the suits consolidated, stating:

"the plaintiff is the same in both actions, common questions of law and fact abound, and a consolidation of the actions should result in a substantial savings of time and effort." Pinehurst Airlines, 476 F. Supp. at 559.

Here, as in Pinehurst, the same plaintiff is suing different defendants, alleging violations of antitrust laws arising from the same factual context. The court there, recognizing the judicial waste and inconvenience arising from two separate actions which would use the same evidence and require proof or disproof of the same facts, consolidated the cases.

⁴ Neither the Comptroller nor the Commissioner objects to this consolidation, though plaintiff does. HN17 [↑]

⁵ However, HN18 [↑] the fact "that there are some questions not common to all the actions [does not bar consolidation] so long as there is at least one common question." 9 Wright and Miller, Federal Practice and Procedure, § 2384 at 267-69 (1971); Central Motor Co. v. United States, 583 F.2d 470 (10th Cir. 1978) Jordan v. Jones, 563 F.2d 148 (5th Cir. 1977); Botazzi v. Petroleum Helicopters, Inc., 664 F.2d 49 (5th Cir. 1981).

Similarly, in this case, considerations of judicial economy, avoidance of a multiplicity of actions, possible prejudice to the merging defendants, and the absence of prejudice to the plaintiff, all militate in favor [*24] of consolidation. Accordingly, the motion of the bank defendants to consolidate is granted.

4. Motion of Plaintiff for ex parte consideration of motion for summary judgment and of motion for preliminary injunction in C.A. 83-1908

Plaintiff's motion is too frivolous to merit comment, except to say it is in obvious contravention of [28 U.S.C. § 1446\(e\)](#), [F.R.C.P. 81\(c\)](#), and the relevant case law. See e.g., [Granny Goose Foods, Inc. v. Brotherhood of Teamsters](#), [415 U.S. 423, 438 \(1974\)](#); [Bush v. Allstate Ins. Co.](#), [425 F.2d 393 \(5th Cir. 1970\)](#), cert. denied [400 U.S. 833](#), reh. denied [400 U.S. 985](#). Therefore, the motion is denied.

5. Motion to set hearing on preliminary injunction

Since the bank merger is due to proceed to completion on May 23, 1983, a preliminary injunction hearing must be held prior to that time. Therefore, the motion to set a hearing on the preliminary injunction is granted, such hearing to be on May 17, 1983, at 9:00 A.M.

6. Motion of plaintiff to shorten discovery

Plaintiff has requested that the Court shorten the time within which the defendants may respond to discovery so that answers or other responses are due to interrogatories, requests for admission, [*25] and requests for production prior to the hearing on the preliminary injunction. Plaintiff argues that the documents and other information which are the subject matter of these discovery requests are critical to the ability of plaintiff to adequately prepare for such hearing.[HN19](#)[

[Rules 33\(a\), 34\(b\), and 36\(a\) of the Federal Rules of Civil Procedure](#) provide that the court may shorten the time for each of these types of discovery. Defendants' responses to plaintiff's discovery requests are presently due to be filed no later than May 19, 1983. The Court, therefore, finds that plaintiff's motion will not cause substantial inconvenience to defendants and will substantially further the interests of justice in determining whether a preliminary injunction should issue. Thus, it is ordered that the parties set up a discovery schedule, with approval of the Court, to insure that said discovery will be completed prior to the hearing on the preliminary injunction.

7. Motion of plaintiff to strike

Plaintiff has moved the Court to strike all allegations of the petition of removal in the bank defendants' case concerning or referring to Frederic P. Aiken or any actions filed by him in connection [*26] with the bank merger as redundant and immaterial defenses, pursuant to [F.R.C.P. 12\(f\)](#).[HN20](#)[

Motions to strike on such grounds are generally not favored, unless it can be shown that no evidence in support of the allegations would be admissible and that the allegations will cause prejudice to the moving party. See, e.g., [Lipsky v. Connecticut, Commonwealth United Corp.](#), [551 F.2d 887 \(2nd Cir. 1976\)](#); [Tivoli Realty, Inc. v. Paramount Pictures, Inc.](#), [80 F. Supp. 800 \(D.C. Del. 1948\)](#); Wright & Miller, Federal Practice and Procedure, Civil § 1382, p. 806, et. seq.

In this case, the plaintiff has not satisfied either requirement. First, the references to Mr. Aiken and his lawsuit against the banks may be relevant to a determination of the present plaintiff's standing in the present controversy, and, in any case, is certainly relevant in connection with an understanding of the procedural background to this case. Second, there has been absolutely no showing of prejudice to plaintiff by the inclusion of these allegations. This is not a jury case, and the Court is perfectly able to disregard allegations which may later turn out to be immaterial. Therefore, the motion to strike is denied.

[*27] EXHIBIT NO. A

DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION TO MERGE THE BANK OF NEW ORLEANS AND TRUST COMPANY, NEW ORLEANS, LOUISIANA, INTO FIRST NATIONAL BANK OF COMMERCE, NEW ORLEANS, LOUISIANA, UNDER THE CHARTER AND TITLE OF FIRST NATIONAL BANK OF COMMERCE

DECISION

Introduction

On January 4, 1983, application was made to the Office of the Comptroller of the Currency, pursuant to the Bank Merger Act, 12 U.S.C. 1828(c), for permission to merge The Bank of New Orleans and Trust Company, New Orleans, Louisiana (FNBC). The application is based on a written agreement executed by the banks on November 9, 1982.

Financial Institutions Involved

FNBC, established in 1933, is a wholly-owned subsidiary of First Commerce Corporation (Corporation), and is the second largest of 33 commercial banking institutions in the New Orleans market, with total deposits of \$851 million as of December 31, 1981. It operates 14 branches in Orleans Parish and is prohibited from branching outside its home office parish.

BNO, established in 1943, is a wholly-owned subsidiary of New Orleans Bancshares, Inc. (Bancshares), and is the fourth largest commercial banking institution [*28] in the New Orleans market, with total deposits of \$525 million as of December 31, 1981. It operates 18 offices in Orleans Parish and cannot branch outside the home office parish.

Bancshares will merge into a wholly-owned subsidiary of BNO and BNO will then merge into FNBC. The resulting bank will be a wholly-owned subsidiary of Corporation.

The Competitive Analysis

FNBC and BNO are located and compete directly with other depository institutions in the New Orleans metropolitan area. The relevant geographic market of both FNBC and BNO consists of the New Orleans Racially Metropolitan Area (RMA), less the portion lying within St. Charles Parish and adding the community of Covington in St. Tammany Parish. The RMA includes all of Orleans Parish, the northern portions of Jefferson and St. Bernard Parish, the southern portion of St. Tammany Parish and the northern portion of Plaquemines Parish.

There are 33 commercial banking organizations and 45 savings and loan associations in the New Orleans RMA. FNBC ranks second in the market with 9.1 percent of total deposits and BNO ranks fourth with 4.8 percent of total deposits. The combined institution will rank second in the market [*29] with 13.9 percent. The before merger Herfindahl Index is 509 and the consummation of the proposed merger will result in a modest increase of 88 points, for a total of 597. The relevant market will remain very unconcentrated and the merger cannot be expected to result in a substantial lessening of competition.

There has been a shift of population and economic activity from New Orleans to the surrounding parishes. This shift has caused the major New Orleans banks to seek customers from the suburban areas, despite restrictive branching laws which limit a bank's offices to its home parish. The New Orleans banks are losing ground and their deposit position has been deteriorating rapidly. The applicants have been soliciting customers from all the surrounding parishes. Despite the fact that FNBC and BNO offices are confined to Orleans Parish, they are convenient alternatives for customers throughout the RMA. Because of the movement to the surrounding parishes and the effort of the New Orleans banks to promote business with customers in the suburbs, the geographic market within which FNBC and BNO compete is the New Orleans RMA. Because alternative suppliers of financial services [*30] abound in this market, the combining of FNBC and BNO will have a negligible effect on the market structure. After the merger, a total of 32 commercial banking organizations will continue to serve the area's businesses. Savings and loans, which unlike commercial banks, are permitted to establish branches throughout the metropolitan area, and in fact statewide, have grown rapidly in recent years than their commercial bank

competitors, and will continue to become stronger competitors when they begin to use their new authority to solicit business loans and deposits in the same way as commercial banks.

The merger of FNBC and BNO will add to the competitive performance of the New Orleans market by strengthening the capabilities of the combined bank to compete with the dominant firm in the New Orleans business market. The largest competitor in the market, Whitney National Bank with 31 percent of the market's commercial loans, is able to compete aggressively by offering below prime rate loans because of its low overhead and low non-interest expenses. The resulting bank, with its increased resources and economies, will likely provide Whitney National Bank with some strenuous competition. [*31] See e.g. Department of Justice Merger Guidelines, page 20, line 33. Such improved capabilities will be particularly important during the 1980's, because of the changes in the retail banking environment that will result from deregulation of deposit interest rates, increased competition from savings and loans and other nonbank competitors, increased utilization of telecommunications and computer technology, and increased sophistication of customers in their demand for services.

The Banking Factors

The Bank Merger Act requires this Office to consider ". . . 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 financial and managerial resources of both FNBC and BNO are satisfactory and the future prospects of the combined entity are good. The merger will provide the combined bank with greater financial and managerial resources and will result in the bank being better able to serve the financial needs of the community. The combined entity will be in a better position to compete for larger customers as its capital base will enable it to increase its loan limit to individual [*32] customers. It will also have broader branch coverage and will be in a better position to develop innovative retail services to respond to the initiatives of competitors.

Community Reinvestment Act

A review of the record of this application and other information available to this Office as a result of its bank regulatory responsibilities revealed no evidence that the applicants' record of helping to meet the credit needs of their community, including the low and moderate income neighborhoods, is less than satisfactory.

Conclusion

This decision is the prior written approval required by the Bank Merger Act for the applicant to proceed with the proposed merger.

End of Document



J.T. Gibbons, Inc. v. Crawford Fitting Co.

United States Court of Appeals for the Fifth Circuit

May 9, 1983

No. 82-3025

Reporter

704 F.2d 787 *; 1983 U.S. App. LEXIS 28139 **; 1983-1 Trade Cas. (CCH) P65,359

J. T. GIBBONS, INC., Plaintiff-Appellant Cross-Appellee, v. CRAWFORD FITTING CO., et al., Defendants-Appellees Cross-Appellants

Subsequent History: [\[**1\]](#) As Amended.

Prior History: Appeals from the United States District Court for the Eastern District of Louisiana.

Disposition: AFFIRMED.

Core Terms

distributor, valves, district court, antitrust, manufacturing, interrogatory, pipe fitting, prejudicial, conspiracy, damages, monopolize, blanket, resale price, good faith, subsidiaries, warehouses, products, cases, conspire, customer, orders, costs, purchasing, delivery, opposing, sales, motion for a new trial, malicious prosecution, conspiracy claim, directed verdict

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

[**HN1**](#) **Trials, Judgment as Matter of Law**

On motions for directed verdict and for judgment notwithstanding the verdict, the court should consider all of the evidence -- not just that evidence which supports the non-mover's case -- but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied and the case submitted to the jury.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

704 F.2d 787, *787L^A 1983 U.S. App. LEXIS 28139, **1

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

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

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

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN2 [down] **Sherman Act, Claims**

In order to collect damages for a violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), a plaintiff must prove (1) the existence of an agreement (2) which unreasonably restrains trade (3) to the damage of the plaintiff.

Antitrust & Trade Law > Clayton Act > Claims

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

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

HN3 [down] **Clayton Act, Claims**

Section 4 of the Clayton Act, [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 and recover treble damages. Thus, § 4 engrafts on any private cause of action proof of some damage or injury. Its requirements are: the plaintiff must prove that the defendants violated the antitrust laws, that this breach caused injury in fact, and the actual dollar amount of the damage.

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN4 [down] **Private Actions, Remedies**

Once antitrust plaintiffs have proved the fact of damage, their burden on proving the measure of damages becomes lighter. A plaintiff must prove fact of damage by a preponderance of the evidence.

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

HN5 [down] **Private Actions, Remedies**

Conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation are not sufficient.

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

704 F.2d 787, *787L^A 1983 U.S. App. LEXIS 28139, **1

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

HN6 Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

While a plaintiff is not required to prove that a refusal to deal is the sole cause of its business's decline, it must show that the refusal to deal was a material cause of the decline.

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

HN7 Price Fixing & Restraints of Trade, Vertical Restraints

A case of illegal resale price maintenance is made out when a price is announced and some course of action is undertaken or threatened contingent on the willingness or unwillingness of the retailer to adopt the price. The action need not necessarily fit under the rubric "coercion," but it must involve making a meaningful event depend on compliance or non-compliance with the suggested or stated price.

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

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

HN8 Monopolies & Monopolization, Conspiracy to Monopolize

As a matter of law, it appears that a parent corporation may conspire with its subsidiaries, and subsidiaries of the same parent may conspire. However, an important element in this capacity to conspire has been that the separate corporations be in the position of competitors. To determine whether corporate entities are separate enough to be capable of conspiracy, a court must examine the particular facts of the case before it. If the intra-enterprise entities hold themselves out as competitors, the rule that they cannot avoid Sherman Act, [15 U.S.C.S. § 1 et seq.](#) liability by hiding behind their common ownership and control is especially applicable.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

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

HN9 Antitrust & Trade Law, Sherman Act

The elements of an attempt to monopolize are: (1) specific intent to accomplish the illegal result; and (2) a dangerous probability that the attempt will be successful. However, monopoly cannot be judged in a vacuum. A necessary backdrop to any [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#) attempt claim is the definition of the relevant product and geographic market.

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

[**HN10**](#) [blue icon] **Monopolies & Monopolization, Attempts to Monopolize**

A single manufacturer's products might be found to comprise, by themselves, a relevant market for the purposes of a monopolization claim, if they are so unique or so dominant in the market in which they compete that any action by the manufacturer to increase his control over his product virtually assures that competition in the market will be destroyed.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

[**HN11**](#) [blue icon] **Scope, Monopolization Offenses**

The elements for a conspiracy to monopolize offense under [Section 2](#) of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#) differ from the attempt offense. A plaintiff must prove: (1) the existence of a combination or conspiracy; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon a substantial amount of interstate commerce; and (4) the existence of specific intent to monopolize.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

[**HN12**](#) [blue icon] **Standards of Review, Abuse of Discretion**

It is well-established that a motion for new trial based upon inflammatory remarks is addressed to the sound discretion of the trial judge, and his ruling thereon will not be disturbed absent an abuse of that discretion.

Counsel: Alioto & Alioto, San Francisco, California, Joseph L. Alioto, Sessions, Fishman, Rosenson, Boisfontaine & Nathan, NOLA, Robert E. Barkley, Jr., for Appellant.

(For Crawford & Lennon), McGlinchey, Stafford & Mintz, NOLA, Dando B. Cellini, Mansour, Gavin, Gerlack & Manos Co., Cleveland, Ohio, Ernest P. Mansour, Cleveland, Ohio, (For Capital Valve & Jennings), Dale, Owen, Richardson, Taylor & Matthews, Baton Rouge, Louisiana, Thomas E. Balhoff, Baton Rouge, Louisiana, (For Thomas Read & Co), Charles E. Hamilton, III, NOLA, for Appellee.

Judges: Thornberry, Gee and Reavley, Circuit Judges.

Opinion by: REAVLEY

Opinion

[*789] REAVLEY, Circuit Judge:

Plaintiff brought this antitrust suit under [§§ 1](#) and [2](#) of the Sherman Act. [15 U.S.C. § 1 et seq.](#) The defendants counterclaimed for malicious prosecution. The district court directed a verdict against plaintiff on the antitrust claims but allowed the malicious prosecution claim to go to the jury. The jury returned a verdict for plaintiff. Both sides appeal. We affirm the district court's disposition on all points.

[2] *The Parties***

Plaintiff is J.T. Gibbons, Inc. ("Gibbons") located in New Orleans. It is principally an exporter of a variety of goods, ranging from foodstuffs to valves and pipe fittings. The two principals of Gibbons are Cecil Keeney, chairman of the Board, and his son Richard, president.

Defendant Crawford Fitting Co. ("Crawford") is an Ohio-based corporation engaged in manufacturing valve and pipe fittings. Crawford's corporate structure includes a complicated system of separately incorporated manufacturing and warehousing subsidiaries. There are five manufacturing companies, producing different product lines. Crawford also has several incorporated regional warehouses, enabling it to reduce the lag time between receipt of orders and delivery of the product. Two of these warehouses are relevant to this suit: Southern Swagelok in Birmingham, Alabama and Microventil, the European warehouse [*790] located in Switzerland. All of these companies are owned and managed by two men, Fred Lennon and his nephew (by marriage), Francis Callahan.

Crawford's products are sold to end-users through a network of independent distributors, who buy at wholesale prices from the regional [**3] warehouses. There are two distributors named as defendants: Capital Valve and Fitting Co., in south Louisiana owned by Robert Jennings and Thomas A. Read & Co., located in Houston and owned by Thomas Read. Several other distributors are involved in this suit: Glasgow Valve and Aberdeen Valve, the Crawford distributors in Scotland; and Potomac Valve, a Maryland distributor.

Background Facts

The valve and pipe fitting industry is a highly competitive industry. As of 1977, there were over 700 manufacturers of valves and pipe fittings. Crawford is not one of the four top companies in the industry, and the four top companies do not control even 20% of the market.

Crawford, to compete in the industry, devised a system of independent distributors. Its marketing strategy emphasizes the need for the distributor to service the product and the customer, by conducting safety meetings and inspecting or replacing damaged parts. As part of this strategy, Gibbons devised its 5% plan. This plan requires a distributor who ships the product into another distributor's territory to pay 5% of the invoice price to Crawford, who sends it to the second distributor. This payment is to compensate [**4] the second distributor for any service performed.

In 1977 the Keeneys acquired Gibbons. Richard Keeney had, prior to coming to Gibbons, worked as a salesman for Capital. Richard had Gibbons expand into sales of valves and pipe fittings and solicit business in Scotland and the North Sea area. In 1977 and the first half of 1978, Gibbons' sales expanded rapidly. Gibbons initially bought Crawford Products from Capital, and then shipped directly to Prestwick Airport in Scotland.

In May of 1978, however, Capital refused to deal further with Gibbons. Gibbons then approached Read, Crawford's Houston distributor, who also refused to deal with Gibbons. Gibbons then contacted Crawford directly, threatening litigation for these refusals to deal. Crawford responded by arranging a meeting and offer from Crawford's Birmingham distributor. Gibbons rejected this offer, and proposed that Crawford make it a distributor. Unbeknownst to Crawford, however, Gibbons had obtained another source of supply through Potomac Valve and Fitting, Crawford's Maryland distributor.

Plaintiff then brought this suit. It claimed: (1) that defendants' refusal to deal constituted an unreasonable restraint [**5] of trade; (2) that all defendants conspired to eliminate Gibbons' competition in the North Sea market; (3) that Crawford set resale prices for its distributors; and (4) that Crawford's subsidiary and manufacturing companies engaged in horizontal price fixing. Defendants counterclaimed for malicious prosecution alleging that Gibbons filed this suit to extort a distributorship from Crawford. The district court directed a verdict against plaintiff on all antitrust claims. The defendant's counterclaim went to the jury, who decided for plaintiff. Defendant's motions for judgment n.o.v. and for a new trial were overruled.

I. The Antitrust Claims

A. Standard of Review

Preliminarily, we note that we review plaintiff's claims in light of *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc):

HN1 [↑] On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just that evidence which supports the nonmover's case -- but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor [**6] of one party that the Court believes that reasonable men could not arrive at a [*791] contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied and the case submitted to the jury.

B. Concerted Refusal to Deal

Gibbons claims that Crawford, Capital and Read engaged in a concerted refusal to deal. Gibbons argues that because Crawford had an equity interest in the Scottish distributorship, it had a motive to eliminate Gibbons' competition in the North Sea market. Gibbons then points to the specific evidence that Capital and Read refused to deal with Gibbons.¹

[**7] **HN2** [↑]

In order to collect damages for a violation of § 1 of the Sherman Act: "plaintiff must prove (1) the existence of an agreement (2) which unreasonably restrains trade (3) to the damage of the plaintiff." *Abadir & Co. v. First Mississippi Corp.*, 651 F.2d 422, 424 (5th Cir. 1981). Because we conclude that plaintiff has failed to prove any damage, we affirm the directed verdict.

HN3 [↑] Section 4 of the Clayton Act [15 U.S.C. § 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 and recover treble damages. Thus, § 4 engrafts on any private cause of action proof of some damage or injury. We have described its requirements as:

the plaintiff must prove that the defendants violated the antitrust laws, that this breach caused injury in fact, and . . . the actual dollar amount of the damage.

Jot-Em-Down Store (JEDS) Inc. v. Cotter & Co., 651 F.2d 245, 247 (5th Cir. 1981). See *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 852 (5th Cir.), cert. denied, 454 U.S. 1125, 102 S. Ct. 975, 71 L. Ed. 2d 113 (1981).

¹ An unspoken premise of this argument is that Crawford took some action to force both Capital and Read to cooperate in this scheme, since, as a practical matter, Gibbons did not compete with either Capital or Read. We need not dwell on the validity of this premise, however, given our disposition on the lack of damage.

Traditionally, somewhat different standards apply in proving the [**8] fact of damage versus the amount of damage. In *In re Plywood Antitrust Litigation*, 655 F.2d 627, 635 (5th Cir. 1981), cert. granted *sub nom* Weyerhaeuser Co. v. Lyman Lamb Co., 456 U.S. 971, 102 S. Ct. 2232, 72 L. Ed. 2d 844 (1982), we described this difference as, **HN4**[¹] "once anti-trust plaintiffs have proved the fact of damage, their burden on proving the measure of damages becomes lighter." Plaintiff must prove fact of damage by a preponderance of the evidence. See L. Sullivan, Handbook of the Law of Antitrust § 251 (1977) ("There has been no tendency to lighten plaintiff's burden [on the fact of damage]; the preponderance of the evidence rule applies in unqualified form.") Of course, since this case arises on a directed verdict, plaintiff need only show that reasonable minds could differ as to its proof of injury.

We do not think the Supreme Court's recent decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981) disturbed these differing standards of proof. The Court vacated our opinion directing a dismissal because of the plaintiff's failure to prove injury. The petitioner argued that its proof should have [**9] been evaluated in light of the more lenient standard for proving the amount of damages. The Court vacated because the lenient standard of proof is applied only once an antitrust violation has been proved and no finding on this issue had been made. The Court stated:

If the court determines on remand that respondent did violate the Act, the court should then consider the sufficiency of petitioner's evidence of injury in light of the cases discussed above. We, of course, intimate no views as to how that issue should be decided. We emphasize that even if there has been a violation . . . petitioner is not excused from his burden of proving antitrust injury and damages. [*792] It is simply that once a violation has been established, that burden is to some extent lightened.

451 U.S. at 568, 101 S. Ct. at 1930. This language could be construed as abolishing the differing standards of proof. We do not think, however, that the Court would have abolished such a well established rule without some discussion. We also note that both the majority and dissent cite *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931), from [**10] which the distinction between the fact and the amount of damage arose. There is no indication that the majority intended to overrule *Story Parchment*.

We have not interpreted *Truett* as changing the *Story Parchment* rule. In *Truett* upon remand, we stated: "only when the plaintiff has demonstrated the fact of injury may the court be lenient in the amount of evidence required to prove damages." *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 582 (5th Cir. 1982), cert. denied, 459 U.S. 908, 103 S. Ct. 212, 74 L. Ed. 2d 169 (1982).

Thus, the plaintiffs may not take advantage of the more lenient standards of proof in showing the fact of damage. We note however, that we have assumed for purposes of this discussion, that the defendants did in fact conspire to eliminate Gibbons' competition. As we stated in *Malcolm*, "in cases where the defendants' acts are motivated by intent to injure the plaintiff, the inferential leap to the finding of fact of damage, is not great." *642 F.2d at 855*. In light of the unique facets of this case, however, we find that this "inferential leap" cannot be made.

We start with the nature of the antitrust violation here: [**11] a refusal to deal. The *sine qua non* of the injury caused by a refusal to deal would be inability to obtain the product. From this failure to obtain the product would flow subsidiary consequences: loss of sales or market share because of the failure to sell or utilize the product.

Our first inquiry should therefore be, was Gibbons unable to obtain supplies of Crawford valves and pipe fittings? The answer to this question is clearly no. Gibbons stipulated that it never received an order for Crawford products which it was unable to fill.

This does not end our inquiry however. As we said in *Malcolm*:

a plaintiff who does tap an alternative source may still prove some injury if a change of suppliers results in other losses such as increased costs or decreased revenues.

642 F.2d at 863, n. 29. Thus, if plaintiff could show some damage from its having to switch from Capital to Potomac, it would have demonstrated sufficient injury in fact.

Plaintiff alleges three factors showing that switching suppliers damaged it: (1) increased costs in the price of the product; (2) longer transportation delays and delivery costs; and (3) evidence that Gibbons' sales in **[**12]** the North Sea decreased after Capital stopped selling to Gibbons. We deal with each of these contentions separately.

Appellant's strongest point is that in purchasing from Potomac, it paid Bernie Pemberton a commission of 1.5% to place Gibbons' orders with Potomac in Pemberton's name. This was done, according to Richard Keeney, because of his fear that Crawford would cut him off if it found out that the orders were from Gibbons.

We first note that there is no evidence that this subterfuge was necessary. In fact, by the time of trial, Gibbons was placing its orders directly with Crawford. In light of the fact that it may not be plaintiff's burden to justify this cost,² however, and that Cecil Kenney testified that Pemberton performed certain services that Gibbons' employees could have performed, we assume that the cost of Pemberton's commission must be figured in the cost to Gibbons of purchasing Crawford products through Potomac.

[13] [*793]** The record shows, however, that even adding Pemberton's commission to the actual cost of Gibbons' purchases, the cost was lower. This was due to the difference in Capital's and Potomac's "blanket" with Gibbons. A blanket is a discount to the customer based on the volume purchased. Even adding in Pemberton's commission, Potomac's cost to Gibbons was substantially cheaper.³ Therefore, Gibbons was not damaged by increased costs in purchasing from Potomac.

[14]** Gibbons also claims that delivery time from Potomac to Scotland was longer than that from Capital to Scotland. Plaintiff relies on Richard Keeney's testimony that having Pemberton place the orders was not an efficient way to do business, and on deposition testimony by one of its customers, Simon Thornhill, that Gibbons' delivery time was longer in 1979 than in 1978.

This testimony does not raise a jury question. As we stated in *Truett*, [HN5](#) "conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation are not sufficient." 670 F.2d at 581. The only specific evidence produced in this case regarding processing time for filling orders and the transit time for those orders was produced by defendants. They showed through expert testimony that processing time, transit time, and transportation costs were actually faster and cheaper from Potomac than from Capital.⁴ Thornhill's testimony is also not supported by the record. His statement that "it [delivery time] was

² In *Malcolm*, we held that the plaintiff in a refusal to deal case is not required to show a lack of alternative supply. Thus, it may well be Crawford's burden to disprove the reasonableness of this cost.

³ From June 1978 to October 31, 1978, Gibbons placed \$207,330.80 worth of orders with Potomac. Pemberton's commission would have been \$3,110. The total cost of these same products through Capital would have been \$212,699.56. Invoicing through Potomac was \$2,253.76 cheaper overall. From November 1, 1978 to February 28, 1979, Potomac invoiced \$149,869.25 to Gibbons. Pemberton's commission would have been \$2,248. The cost of the same goods from Capital was \$152,617.99. Purchasing through Potomac for this period therefore saved Gibbons approximately \$500.

We also note that for some periods, Pemberton's commission was only 1%. Thus, the difference in cost between Capital and Potomac would be even greater.

⁴

Average

Average

Delivery

Transportation

longer in 1978 than in the first half of 1978" contradicts his prior statements. Earlier in his deposition, Thornhill stated he always received [**15] fittings from Gibbons in the latter half of 1978 "in exact accordance with our requirement." He also stated that he had no idea what the average delivery time for products was from Gibbons. In light of defendant's testimony and plaintiff's failure to come forward with other than conclusory statements, reasonable men would have to find that utilizing Potomac did not impose any increased transportation costs or delays on Gibbons.

Gibbons bases much of its case on damages on evidence showing that after Capital refused to deal with Gibbons, Gibbons' rate of growth in the North Sea slowed substantially. Gibbons relies on *Lehrman v. Gulf Oil Corp.* [**16] [500 F.2d 659-68 \(5th Cir.1974\)](#), cert. denied, 420 U.S. 929, 95 S. Ct. 1128, 43 L. Ed. 2d 400 (1975), for the proposition that proof of injury by showing sales before and after the cutoff is accepted.

Time Per**Cost Per****Shipment****Shipment**

Shipments to Scotland from:

Capital - New Orleans, La.

12.1 days

\$ 264.33

Potomac - Rockville, Md.

10.95 days

\$ 222.70

Shipments to Norway from:

Capital - New Orleans, La.

12.3 days

\$ 188.62

Potomac - Rockville, Md.

11.35 days

\$ 160.83

We first note that *Lehrman* dealt with the measurement of damages, not the fact of damage. Second, we think that given the admittedly unique facts of this case, this proof is irrelevant. As stated previously, the *sine qua non* of the refusal to deal here would be a failure to obtain the product, or increased costs or transportation delays. Since none of these consequences from the refusal to deal arose here, it follows that the before and after proof is irrelevant.

Another way of viewing the problem with the before and after evidence is in terms of causation. [HN6\[!\[\]\(d8c72e656701e95965778abdbf815cd0_img.jpg\)\]](#) While Gibbons is not [[*794](#)] required to prove that the refusal to deal was the sole cause of its business' decline, it must show that the refusal to deal was a material cause of the decline. [Malcolm, 642 F.2d at 861](#). Since, as shown above, the refusal to deal caused no adverse effect on Gibbons' ability to obtain Crawford valves and fittings, the refusal to deal could not be a cause of Gibbons' decline [[**17](#)] in growth. Defendants also showed that this decline was caused by other factors. Gibbons had two main customers in the North Sea area: Roermateriel in Norway and Hydrasun in Scotland. The evidence showed that Roermateriel made a large purchase of pipes and fittings for inventory in the first half of 1978. In the second half of 1978 and 1979, because much of this product did not sell and because of a depression in Norway, Roermateriel reduced its purchases from Gibbons and ceased stocking Crawford valves and fittings. In regard to Hydrasun, Gibbons had agreed to sell only to Hydrasun in Scotland. Gibbons had therefore tied its fortunes to Hydrasun's, and any decrease in Gibbons' sales is directly attributable to a decrease in Hydrasun's business.⁵

From the foregoing, it is clear that plaintiff did not submit sufficient "substantial evidence . . . of such quality and weight that reasonable [[**18](#)] and fair-minded men . . . might reach different conclusions" regarding the fact of damage. The district court properly directed a verdict against plaintiff on the refusal to deal claim.

C. Resale Price Maintenance

Plaintiff claims that Crawford engaged in resale price maintenance. As evidence of this, plaintiff cites correspondence from Capital to Crawford indicating that Crawford established a "blanket" for Gibbons. There are two types of blankets: (1) a factory blanket between the distributor and the factory and (2) a customer blanket between the distributor and the customer. A factory blanket is noncancelable and commits the distributor to purchasing a specific quantity of valves or fittings. Capital argues that the correspondence refers to a factory blanket and gives rise to no inference of resale price maintenance. Gibbons responds that it is for the jury to decide whether the correspondence referred to a factory or a customer blanket.

Even assuming that the jury should have been allowed to draw this inference, Gibbons has not established all the elements of resale price maintenance. In [Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107 \(5th Cir.1979\)](#) we discussed [[**19](#)] these elements:

[HN7\[!\[\]\(18db75d244ef12adc43a6e1d0d7d8c68_img.jpg\)\]](#) a case of illegal resale price maintenance is made out when a price is announced and some course of action is undertaken or threatened contingent on the willingness or unwillingness of the retailer to adopt the price. The action need not necessarily fit under the rubric "coercion", but it must involve making a meaningful event depend on compliance or non-compliance with the 'suggested' [sic] or stated price.

[*Id. at 1117-18*](#), quoting [Butera v. Sun Oil Co., 496 F.2d 434, 436-37 \(1st Cir.1974\)](#).

Gibbons argues that *Aladdin* does not control here, and that [Greene v. General Foods Corp., 517 F.2d 635 \(5th Cir.1975\)](#), cert. denied, 424 U.S. 942, 96 S. Ct. 1409, 47 L. Ed. 2d 348 (1976), shows that Gibbons does not have to prove some action by Crawford to enforce its resale prices. Gibbons' reliance on *Greene* is misplaced. *Greene*

⁵ We note that there is no evidence in the record of any anti-competitive activity's effect on Hydrasun's business.

involved whether a distributor's participation in the price fixing barred its antitrust suit. The case addresses the distributor's actions, not the manufacturer's activities in enforcing its resale prices.⁶

[**20] [*795] Applying *Aladdin* here, it is clear that the district court properly directed the verdict. There is no evidence that Crawford took any action to enforce its price list or even its suggested price to Capital. Gibbons approached four different Crawford distributors and received four different price quotations.

D. Horizontal Price Fixing

Gibbons alleges that Crawford is guilty of conspiring to set the prices for its manufacturing subsidiaries and its regional warehouses. It is undisputed that Lennon and Callahan set the prices for all these companies. Lennon and Callahan also owned all the stock in these corporations. Gibbons argues, however, that since these entities were separately incorporated and at the same level in the distribution chain, the elements of a conspiracy to fix prices existed.

HN8 [↑] As a matter of law, it appears that a parent corporation may conspire with its subsidiaries, *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978), and subsidiaries of the same parent may conspire. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215, 71 S. Ct. 259, 261, 95 L. Ed. 219 (1951). However, an important [**21] element in this capacity to conspire has been that the separate corporations be in the position of competitors. *Id.*, H & B, 577 F.2d at 244. In *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir.), cert. denied, 447 U.S. 906, 100 S. Ct. 2988, 64 L. Ed. 2d 855 (1980), the court explained:

To determine whether corporate entities are separate enough to be capable of conspiracy, a court must examine the particular facts of the case before it (citations omitted). If the intra-enterprise entities "hold themselves out as competitors," the rule that they cannot avoid Sherman Act liability by hiding behind their common ownership and control is "especially applicable."

Applying these principles to the case before us, it is apparent that the directed verdict was proper. Gibbons produced no evidence that Crawford's manufacturing and warehouse subsidiaries either competed or held themselves out as competitors. The manufacturing subsidiaries each produced a separate product line that did not compete. The regional warehouses were limited to specific territories and there is no evidence that they competed for distributors' business. This lack of [**22] competition, in combination with the fact that this alleged conspiracy is, as a practical matter, the unilateral decision of the two men who own these companies, convinces us that the manufacturing companies and regional warehouses lacked the capacity to conspire.

E. Attempt to Monopolize

Gibbons alleged a claim under § 2 of the Sherman Act for an attempt to monopolize the North Sea valve and pipe fitting market. **HN9** [↑] The elements of an attempt to monopolize are: "(1) specific intent to accomplish the illegal result; and (2) a dangerous probability that the attempt will be successful." *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), cert. denied, 440 U.S. 939, 99 S. Ct. 1289, 59 L. Ed. 2d 499 (1979). However, monopoly cannot be judged in a vacuum. A necessary backdrop to any § 2 attempt claim is the definition of the relevant product and geographic market. *In re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 441 (5th Cir. 1982).

Gibbons asserts that the relevant product market here is the market for Crawford valves and fittings. The Supreme Court in *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, [**23] 76 S. Ct. 994, 100 L. Ed. 1264

⁶Indeed, it was clear from the facts of *Greene* that a "meaningful event" did occur when the distributor ceased to comply -- namely, General Foods terminated Greene's distributorship.

Gibbons also advances *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 64 S. Ct. 805, 88 L. Ed. 1024 (1944) as support for its contention. Yet the Court there noted specifically that material deviations from the manufacturer's resale price would result in termination of the wholesaler's franchise. *Id. at 719-20, 64 S. Ct. at 811-12.*

(1956) discussed at length the definition of the relevant product market. The Court stated: "that market is composed of products that have reasonable interchangeability for the purposes which they are produced -- price, use and qualities considered." Id. at 404, 76 S. Ct. at 1012. The Court implied however, that the relevant product market could, under certain circumstances, be limited to one manufacturer's product.

This possibility has been discussed in later cases. In Bushie v. Stenocord Corp., 460 F.2d 116, 121 [**796] (9th Cir. 1972) the court stated:

HN10[ A single manufacturer's products might be found to comprise, by themselves, a relevant market for the purposes of a monopolization claim, if they are so unique or so dominant in the market in which they compete that any action by the manufacturer to increase his control over his product virtually assures that competition in the market will be destroyed.

(Citations omitted). In Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980), cert. denied, 450 U.S. 1030, 101 S. Ct. 1740, 68 L. Ed. 2d 226 (1981), we upheld a jury finding limiting **[**24]** the relevant product market to the outfitting of one particular model of airplane, instead of all similar aircraft. We held:

there was ample evidence of high entry barriers and of the difficulty outfitters encountered in switching back and forth from one model of aircraft to the next to allow the jury to find a relatively narrow market.

624 F.2d at 1349 (footnotes omitted).

Gibbons asserts two bases for defining the relevant product market as only Crawford fittings. First, that many of the fittings were patented. Second, that Crawford fittings are not compatible with its competitor's fittings, i.e., that once installed, replacement parts must be from Crawford.

We think these facts are insufficient to raise a question for the jury. The fact that an article is patented does not affect the question of whether other products are reasonably interchangeable. For example, in *Du Pont*, the fact that cellophane was patented did not prevent the court from holding that the relevant product market could not be limited solely to cellophane.

Gibbons' second point, we think, is irrelevant. The evidence was overwhelming that the valve and pipe fitting industry **[**25]** was intensively competitive, and that there existed other valves or pipe fittings which performed the same functions for approximately the same price. The fact that Crawford fittings were not compatible with its competitor's fittings has no significance. For that matter, Ford cars cannot have GM parts installed on them, yet this does not mean that in determining the relevant product market, the product market may be limited solely to Ford cars.

Gibbons failed to define the relevant product market. We think, however, that as a matter of law, Crawford's evidence established the relevant product as all pipes and valve fittings. As part of the attempt claim however, Gibbons needed to prove a dangerous probability that the attempt would be successful. Given the competitive nature of the valve and pipe fitting industry, and Crawford's small share of that market, as a matter of law there was no dangerous probability of success. We therefore affirm the district court's directed verdict on the attempt to monopolize claim.

F. Conspiracy to Monopolize

HN11[ The elements for a conspiracy to monopolize offense under Section 2 differ from the attempt offense. Plaintiff must prove: **[**26]**

(1) the existence of a combination or conspiracy; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon a substantial amount of interstate commerce; and (4) the existence of specific intent to monopolize.

Cullum Electric & Mechanical, Inc. v. Mechanical Contractors Association of South Carolina, 436 F. Supp. 418, 425 (D.S.C.1976), affirmed, 569 F.2d 821 (4th Cir.1978), cert. denied, 439 U.S. 910, 99 S. Ct. 277, 58 L. Ed. 2d 255 (1978). 3 J. Von Kalinowski, Antitrust Laws & Trade Regulation § 9.02[1] (1982).

There is some uncertainty within this circuit as to whether a plaintiff need prove the relevant product and geographic market in a conspiracy claim. The rule in other circuits is that such proof is not required. Salco Corp. v. General Motors Corp., 517 F.2d 567, 576 (10th Cir.1975) ("Specific intent to monopolize is the heart of a conspiracy [*797] charge, and a plaintiff is not required to prove what is the 'relevant market. "'); see United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir.1961). Our cases have not spoken to this issue specifically. In Sulmeyer v. Coca Cola Co. [**27] , 515 F.2d 835, 851 (5th Cir.1975), cert. denied, 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 341 (1976), however, we did state in regard to a conspiracy claim that: "a jury could reasonably have found that Coca Cola did not have the specific intent to prevent Bubble-Up from obtaining lemon-lime franchises *in the relevant market*". It may be that even in a conspiracy claim under Section 2, plaintiff must prove the relevant market.

We need not delve into this rather murky area of **antitrust law** however, because of our holding regarding plaintiff's Section 1 conspiracy claim. While a conspiracy claim under Section 1 is different from a similar claim under Section 2, see United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n. 59, 60 S. Ct. 811, 845 n. 59, 84 L. Ed. 1129 (1940), the requirement of injury in fact under Section 4 of the Clayton Act applies equally to Sections 1 and 2. Since Gibbons did not prove any injury for its Section 1 conspiracy it follows that the exact same actions would not constitute injury under Gibbons' Section 2 conspiracy.

II. The Cross Appeal

Appellees contest the district court's entry of the verdict on the malicious prosecution [**28] counterclaim. They assert two grounds for reversal: (1) that the special interrogatories contained erroneous statements of the law; and (2) that the district court should have granted appellees' motion for new trial because of opposing counsel's prejudicial argument. We address each issue separately.

A. Malicious Prosecution

The malicious prosecution issue was presented to the jury by special interrogatories. The ones relevant to this appeal are:

- (1) Did Gibbons bring this lawsuit in good faith after full disclosure of the facts within the knowledge of Messrs. Richard and Cecil Keeney to their attorneys?
- (2) Did Gibbons bring this lawsuit in bad faith for the purpose of obtaining a distributorship arrangement from Crawford?

The jury was told that if it responded "yes" to the first interrogatory it should not proceed to the second interrogatory.

Defendants argue that under Louisiana law, the first interrogatory is erroneous. Crawford asserts that under Louisiana law, good faith and full disclosure to one's attorney are discrete elements, *i.e.*, that even if the Keeneys informed their attorneys of all the relevant facts, the Keeneys are still liable [**29] if their purpose in bringing the suit was to extort a distributorship from Crawford and not to vindicate any legal rights that their attorneys told them had been violated.

We decline to speculate on Louisiana law in this area, because defendants waived their right to protest any error. Federal Rule of Civil Procedure 51 governs objections to the court's charge, stating:

no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict . . .

Defendants concede that they did not object to the form of the first interrogatory or the order in which the questions were submitted. They argue, however, that subsequent events during the course of the jury's deliberations restored their right to object.

After the jury retired, they sent a series of questions to the judge regarding the definition of good faith in the first interrogatory. After receiving the first request from the jury, the district court discussed the charge and gave the jury several definitions of good faith.⁷ Defendants at this juncture again did not object to the charge.

[30] [*798]** The court received a second inquiry from the jury, stating: "Judge, we agree that Gibbons gave all of the information to their attorneys, however, we can't agree on the term good faith." It was at this point that counsel objected to the interrogatories and suggested that the jury answer the second interrogatory even if they answered the first interrogatory "yes." The district court overruled the objection stating: "There is too much water over the dam for me to give this instruction."

Defendants argue that this case falls within the rule of *Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037 (5th Cir. 1982) and *Mercer v. Long Mfg. N.C., Inc.*, 671 F.2d 946 (5th Cir. 1982). These cases are inapposite. They deal with whether failure to make a motion to resubmit jury issues waives the point on appeal when the jury has reached inconsistent answers to special issues. These cases deal with a situation not covered by Rules 49 and 51. Here, the express terms of Rule 51 govern, and defendants waived their objection.

Defendants advance one other argument to avoid the consequences of their failure to object. They argue that the district court, in answering the jury's second **[**31]** question, essentially redefined the second issue and told the jury it could equate full disclosure with good faith.⁸

We disagree. The court, **[**32]** after a prolonged discussion with counsel, decided to repeat his earlier instructions, which did not equate good faith and full disclosure. Secondly, a fair reading of Judge Palmieri's statement convinces us that the instructions did not redefine this issue.⁹ Lastly, we note that defense counsel did not object to the language allegedly equating good faith and full disclosure. If Judge Palmieri misspoke, a prompt

⁷ We note that the district court's description of the issue comported with defendant's contention on appeal. There is no indication from reading the instruction that full disclosure equaled good faith. For example, Judge Palmieri said:

I also told you that you could find that there was full disclosure by the Keeneys if there was a conscientious attempt by them to tell their attorneys . . . whatever they knew about the case, whether the Keeneys acted *in good faith for the purpose* of seeking guidance from the attorneys, *and* whether they made a full and complete report to them are questions for you to determine.

⁸ Defendants rely upon the following section of Judge Palmieri's discussion:

The problem as I see it is for you to determine whether in making this disclosure to the attorneys they were setting in motion a series of legal events which added up to a legal process that was all done for a collateral and ulterior purpose.

If that was done for that purpose, if this was all set in motion for the purpose of coercing the defendants to make a distributorship arrangement, with Gibbons, then it would be a bad motive; it would not be good faith.

If, on the other hand, the full disclosure was made to the attorneys, *irrespective of any such motivation*, and *solely for the purpose of vindicating the rights which they had based upon that full disclosure*, then there would not be any question of bad faith or the absence of good faith. . . . (Emphasis ours)

⁹ Judge Palmieri in discussing this issue with counsel said:

if they [the Keeneys] put facts before the attorneys but really not intending to do anything except to force these defendants into giving them a distributorship, they were not seeking advice in good faith; they were seeking to abuse legal process for an ulterior purpose.

This indicates that Judge Palmieri did not, at least at this point, equate good faith and full disclosure.

objection could have cured the error. We therefore hold that the defendants waived any errors in the interrogatories, and the entry of the jury's verdict was proper.¹⁰

[33] B. Prejudicial Closing Argument**

Defendants argue that the district court erred in denying their motion for new trial. This motion was based on the prejudicial nature of opposing counsel's closing argument. We affirm the district court's denial of this motion.

[*799] Our standard of review on this issue is necessarily limited:

HN12 it is well established that a motion for new trial based upon inflammatory remarks is addressed to the sound discretion of the trial judge, and his ruling thereon will not be disturbed absent an abuse of that discretion.

[Meyers v. Moody, 693 F.2d 1196, 1220-21 \(5th Cir. 1982\).](#)

The district court, in a lengthy opinion agreed that opposing counsel's argument was prejudicial,¹¹ but found that countervailing considerations indicated that the motion should be denied. These considerations were: (1) the court's instruction to the jury; (2) defense counsel's ability to reply to plaintiff's allegations; and (3) this was not a case which tended to incite the jury's emotions.

[34]** We agree with the district court's characterization of the argument as prejudicial. We cannot, furthermore, say that the district court abused its discretion in denying the new trial motion. The court's lengthy instruction to the jury made it clear that the jury was to decide the case on the evidence and not the statements of counsel. Defense counsel did answer many of opposing counsel's charges and responded effectively to opposing counsel's argument of its antitrust claims.

Defendants assert that [Edwards v. Sears, Roebuck & Co., 512 F.2d 276 \(5th Cir. 1975\)](#) and [Draper v. Airco, Inc., 580 F.2d 91 \(3d Cir. 1978\)](#) mandate reversal. In both cases the court reversed the district court's denial of a motion for new trial. The court in *Draper*, for example stated:

Counsel for the plaintiff breached a number of the rules of proper argument. Specifically, he committed the following improprieties: (1) he attempted to prejudice the jurors through repeated inappropriate references to the defendants' wealth; (2) he asserted his personal opinion of the justness of his client's cause; (3) he prejudicially referred to facts not in evidence; and (4) without provocation or **[**35]** basis in fact, he made several prejudicial, vituperative and insulting references to opposing counsel.

[580 F.2d at 95](#). Defendants argue that opposing counsel's remarks fit the improprieties set out in *Draper*.

¹⁰ Defendants also assert that, the district court should have granted judgment n.o.v. on this issue. We think that, applying the *Boeing* standard, reasonable men could reach different conclusions regarding the motives of the Keeneys in bringing this lawsuit. While there was much evidence that the Keeneys brought this suit to extort a distributorship, the Keeneys testified to the contrary. Such credibility choices are traditionally the province of the jury. ***Doucet v. Diamond M. Drilling Co., 683 F.2d 886, 889, n.2 (5th Cir. 1982), cert. denied, 459 U.S. 1127, 103 S. Ct. 1234, 75 L. Ed. 2d 468 (1983).***

¹¹ The district court made clear in no uncertain terms that Gibbons' counsel had overstepped the bounds of proper closing argument. The court stated:

At times, counsel for plaintiff presented arguments and made references to defendants based on facts wholly unsupported by the record and unduly inflammatory in nature . . . Plaintiff's counsel repeatedly characterized defendants . . . in a manner prejudicial to defendants. Defendants were repeatedly referred to, explicitly and implicitly, in terms denoting unsavory and illegal characteristics

The district court acknowledged the force of these cases, but distinguished them because they involved wrongful death actions by individuals against large corporate defendants. Defendants argue that this distinction is irrelevant and the law should treat the individual and the corporation equally. We agree with the district court, however. This distinction does not treat the parties differently. Instead it looks to the jury and the potential prejudicial/inflammatory effects that the remarks may have. The purpose of the district court's inquiry is to determine whether the remarks were prejudicial, and if so, were they so prejudicial as to require a new trial. This inquiry does not proceed in a vacuum -- it must be undertaken in light of the totality of the circumstances -- including, among other things, the relative positions of the parties. The district court properly denied the motion for new trial.

The judgment of the district court is, in all respects,

[36] AFFIRMED.**

End of Document

Kimmel v. Peterson

United States District Court for the Eastern District of Pennsylvania

May 9, 1983

No. 82-2752

Reporter

565 F. Supp. 476 *; 1983 U.S. Dist. LEXIS 17101 **; Fed. Sec. L. Rep. (CCH) P99,225

MURRAY H. KIMMEL, et al. v. CARL JOHN PETERSON, et al.

Subsequent History: [**1] As Modified May 27, 1983.

Core Terms

organized crime, cause of action, enterprise, defendants', amended complaint, allegations, private right of action, motion to dismiss, securities fraud, sections, racketeering, antitrust, private remedy, plaintiffs', purposes, infliction of emotional distress, predicate act, outrageous, courts, fraudulent, pattern of racketeering activity, violations, cases, private cause of action, legislative history, sale of securities, treble damages, transactions, specificity, provisions

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

[HN1](#) [] Heightened Pleading Requirements, Fraud Claims

The Federal Rules require only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a). Fed. R. Civ. P. 9(b) articulates a stricter standard to be applied when alleging fraud. It requires the circumstances constituting fraud to be stated with particularity. Reconciling these two rules to strike a sound balance is not an easy task. However, it is a serious matter to charge a person with fraud and hence no one is permitted to do so unless he is in a position and is willing to put himself on record as to what the alleged fraud consists of specifically.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Environmental Law > Hazardous Wastes & Toxic Substances > Toxic Torts

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

565 F. Supp. 476, *476L^A983 U.S. Dist. LEXIS 17101, **1

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

[**HN2**](#) [down] Heightened Pleading Requirements, Fraud Claims

S.E.C. [Rule 10b-5](#) violations will not pass scrutiny if they do not allege with some specificity the statements allegedly constituting fraud. Mere conclusory allegations are insufficient. The pleading must apprise the defendants of the substance of plaintiffs' claim with sufficient detail to enable the defendants to answer. However, this rule is not to be applied with draconian strictness.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

[**HN3**](#) [down] Pleadings, Heightened Pleading Requirements

[Fed. R. Civ. P. 9\(b\)](#) must be read in conjunction with the liberal pleading rules, which eschew technicalities. [Rule 9](#) lists the actions in which slightly more is needed for notice.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Governments > Courts > Rule Application & Interpretation

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

[**HN4**](#) [down] Pleadings, Heightened Pleading Requirements

From a practical standpoint, if defendants have access to all of the records of the transactions and can glean from them the information needed to respond, and if it is unclear whether plaintiffs have access to such detailed information, a plaintiff should not be precluded from suing if he or she does not. Fundamentally, although [Fed. R. Civ. P. 9\(b\)](#) requires specificity, to demand this quantum of detail at this stage would totally undermine the letter and spirit of [Fed. R. Civ. P. 8\(a\)](#) and the liberalized pleading envisaged under the Federal Rules of Civil Procedures.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

[**HN5**](#) [down] Pleadings, Heightened Pleading Requirements

Generally, allegations plead on "information and belief" do not satisfy the specificity requirements of [Fed. R. Civ. P. 9\(b\)](#). However, the objective of this rule may be satisfied if the allegations are accompanied by a statement of the facts upon which the belief is founded. The rule may also be relaxed as to matters within the adverse party's knowledge, although some courts have required an accompanying statement of facts as well.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Securities Law > ... > Civil Liability > Fraudulent Interstate Transactions > General Overview

Securities Law > Initial Offerings of Securities > Securities Act Actions > General Overview

[**HN6**](#) [down] Federal & State Interrelationships, Federal Common Law

565 F. Supp. 476, *476L^A983 U.S. Dist. LEXIS 17101, **1

On the basis of statutory construction and the superior reasoning of those courts who follow the minority rule, the court decline to imply a private cause of action under § 17(a) of the Securities Act of 1933, [15 U.S.C.S. § 77q\(a\)](#).

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

Securities Law > Blue Sky Laws > Offers & Sales

Securities Law > Initial Offerings of Securities > Securities Act Actions > General Overview

Securities Law > ... > Civil Liability > Fraudulent Interstate Transactions > General Overview

Securities Law > ... > Civil Liability > Fraudulent Interstate Transactions > Scienter

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > General Overview

[HN7](#) [↓] Implied Private Rights of Action, Deceptive & Manipulative Devices

Section 17(a) of the Securities Act of 1933, [15 U.S.C.S. § 77q\(a\)](#), is not limited to fraud in the purchase or sale of securities. Most importantly, it appears that scienter is not required to state a cause of action under §§17(a)(2) or (a)(3) of the Act. Scienter is required under § 17(a)(1) of the Act, but not under §§ (a)(2) or (a)(3). It is doubtful that a different interpretation would be given if an implied private cause of action is found to exist. Thus, the implication of a private right of action under § 17(a) of the Act would allow and encourage the total circumnavigation of the new restrictions the U.S. Supreme Court has placed on a cause of action under § 10(b) of the Securities Exchange Act of 1934, [15 U.S.C.S. § 78j](#).

Securities Law > ... > Civil Liability > Fraudulent Interstate Transactions > General Overview

Criminal Law & Procedure > ... > Fraud > Securities Fraud > Elements

Securities Law > Blue Sky Laws > Offers & Sales

Securities Law > Civil Liability Considerations > Remedies > General Overview

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

[HN8](#) [↓] Civil Liability, Fraudulent Interstate Transactions

By its very language, § 17(a) of the Securities Act of 1933, [15 U.S.C.S. § 77q\(a\)](#), is broader than § 10(b) of the Securities Exchange Act of 1934, [15 U.S.C.S. § 78j](#), as it encompasses fraud in the "offer" or "sale" of securities, rather than just fraud in the purchase or sale.

Criminal Law & Procedure > ... > Fraud > Securities Fraud > Elements

Securities Law > ... > Civil Liability > Fraudulent Interstate Transactions > General Overview

Securities Law > Blue Sky Laws > Offers & Sales

HN9 [blue download icon] **Securities Fraud, Elements**

See [15 U.S.C.S. § 77q\(a\)](#).

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Governments > Legislation > Interpretation

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN10 [blue download icon] **Federal & State Interrelationships, Federal Common Law**

In determining whether to imply a private right of action, the touchstone is Congressional intent -- not whether this court thinks it can improve upon that statutory scheme that Congress enacted into law. In order to divine this Congressional intent, the Court established a four prong analysis in *Cort v. Ash*. This analysis asks: First, is the plaintiff one of the class for whose especial benefit the statute was enacted, -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law? While all four factors are relevant, they are not accorded equal weight. The first three, which more directly impact upon Congressional intent, are more important.

Governments > Legislation > Interpretation

Securities Law > ... > Civil Liability > Fraudulent Interstate Transactions > General Overview

HN11 [blue download icon] **Legislation, Interpretation**

The legislative history of the Securities Act of 1933 indicates that §§ 11 and 12 of the Act, [15 U.S.C.S. §§ 77k](#) and [77l](#), were perceived as the only civil liability provisions of the statute. In addition, the existence of express remedies within the same statute militates against a finding of Congressional intent to imply further remedies. This is especially true for § 17 of the Act, [15 U.S.C.S. § 77q\(a\)](#), as § 17(a) of the Act is sufficiently broad to cover virtually all activities addressed by §§ 11 and 12 of the Act. Section 17(a) of the Act does not have the internal restrictions and defenses found in §§ 11 and 12 of the Act. Thus, if a private right of action were to be implied under § 17(a) of the Act, it would become the preferable remedy, rendering §§ 11 and 12 of the Act entirely superfluous. The complex scheme which Congress wove in the express civil liability sections would be totally undermined.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

HN12 [blue download icon] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Under the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), [18 U.S.C.S. §§ 1961-1968](#), engaging in a "pattern of racketeering" within the confines of an "enterprise" becomes an offense separate from the

565 F. Supp. 476, *476L^A983 U.S. Dist. LEXIS 17101, **1

predicate violations. To understand the structural mechanism of RICO, some definitions are in order. [18 U.S.C.S. § 1961\(1\)](#) defines "racketeering activity" as specified state law offenses punishable by incarceration for more than one year, as well as any violation of a long list of federal statutes. A "pattern of racketeering activity" is defined as the commission of at least two predicate acts within ten years. [18 U.S.C.S. § 1961\(5\)](#). The statutory definition of "enterprise" is broad enough to encompass just about any group of individuals. [18 U.S.C.S. § 1961\(4\)](#). However, it is [18 U.S.C.S. § 1962](#) which actually sets out the proscribed activities.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

[HN13](#) [] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See [18 U.S.C.S. § 1962\(4\)](#).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

[HN14](#) [] Racketeer Influenced & Corrupt Organizations, Remedies

In addition to criminal remedies, the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), [18 U.S.C.S. §§ 1961-1968](#), provides a private right of action for any person injured in his business or property by reason of a violation of [18 U.S.C.S. § 1962](#). Treble damages attach to a RICO verdict as well. [18 U.S.C.S. § 1964\(c\)](#). However, the civil plaintiff is not required to prove a prior conviction, and must only prove the statutory elements of a cause of action by a preponderance of the evidence. Finally, in interpreting and applying all of RICO's provisions, Congress has dictated that the statute shall be liberally construed to effectuate its remedial purposes.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

[HN15](#) [] Racketeering, Racketeer Influenced & Corrupt Organizations Act

The overwhelming majority of courts to address this issue have concluded that the Racketeer Influenced and Corrupt Organizations Act of 1970, [18 U.S.C.S. §§ 1961-1968](#), was not intended to be, and should not be limited to, the organized crime context.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > ... > Elements of Proof > Pattern > Fraud as Predicate Act

565 F. Supp. 476, *476A 1983 U.S. Dist. LEXIS 17101, **1

Securities Law > RICO Actions > General Overview

[**HN16**](#) [L] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

In light of Congress's recognition of the broad scope of the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), [18 U.S.C.S. §§ 1961-1968](#), the refusal to omit such offenses as securities fraud from the list of predicate acts and in light of the liberal construction mandate, the court concludes that a link to organized crime is not a requirement of a civil RICO cause of action.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

[**HN17**](#) [L] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

In order to collect treble damages under [18 U.S.C.S. § 1964\(c\)](#), a plaintiff must show that his injuries arise by reason of a violation of [18 U.S.C.S. § 1962](#). [18 U.S.C.S. § 1964\(c\)](#).

Securities Law > RICO Actions > General Overview

[**HN18**](#) [L] **Securities Law, RICO Actions**

A racketeering injury is indistinguishable from a competitive or commercial injury.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Securities Law > RICO Actions > General Overview

[**HN19**](#) [L] **Racketeer Influenced & Corrupt Organizations Act, Elements**

The goal of **antitrust law** is to promote free competition. Frivolous antitrust suits might ruin defendants, who are legitimate business persons. One less business in a given area will increase concentration, thus decreasing competition. In the organized crime context, it does not matter if an illegal business activity is ruined -- indeed that is exactly what the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), [15 U.S.C.S. §§ 1961-1968](#), is endeavoring to accomplish. Thus, the policy underlying the limits placed on private antitrust suits is inapposite in the RICO milieu.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > Remedies

Securities Law > RICO Actions > General Overview

[**HN20**](#) [L] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Reading a competitive injury requirement into [18 U.S.C.S. § 1964\(c\)](#) would create an insurmountable practical problem. This approach would literally require plaintiff to be in competition with defendant. In the situation where an illegitimate enterprise is endeavoring to infiltrate and take over a competing business, this requirement would not be a problem. However, all potential plaintiffs will not fit into this category, leaving certain targeted behavior unpunished. The difficulty in proving causation may be significant for those plaintiffs who cannot prove infiltration. This interpretation would be inconsistent with the broad remedial purposes behind the Racketeer Influenced and Corrupt Organizations Act of 1970, [18 U.S.C.S. §§ 1961-1968](#). To conclude otherwise would leave undisturbed racketeers whose activity does not infringe on their competitor's markets. It is untenable to suggest that Congress intended such a result.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

[HN21](#) [+] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), [18 U.S.C.S. §§ 1961-1968](#), does not require proof of a commercial or competitive injury. RICO was broadly aimed at striking a mortal blow against the property interests of organized crime. The court is reluctant to undermine that broad mission of RICO by engrafting onto its civil provisions a competitive injury requirement.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

[HN22](#) [+] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

A Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), [18 U.S.C.S. §§ 1961-1968](#), plaintiff must prove the existence of both an "enterprise" and a "pattern of racketeering activity." The "enterprise" is not the "pattern of racketeering activity;" it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proven. On a very common-sense level, the enterprise is the actors and the pattern is the unlawful acts. The enterprise need not be a legitimate entity and RICO applies with as much force to enterprises formed for wholly illegal purposes.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

[HN23](#) [+] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

An enterprise under the Racketeer Influenced and Corrupt Organizations Act of 1970, [18 U.S.C.S. §§ 1961-1968](#), is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering is, on the other hand, a series of criminal acts as defined by the statute.

565 F. Supp. 476, *476A 1983 U.S. Dist. LEXIS 17101, **1

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Securities Law > RICO Actions > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN24 [blue icon] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Enterprise is defined as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. [18 U.S.C.S. § 1961\(4\)](#). Thus an enterprise can either be a legal entity or an association of some form.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

HN25 [blue icon] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

[18 U.S.C.S. § 1962\(a\)](#) basically prohibits an individual from using money received through a pattern of racketeering to invest in the enterprise.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

HN26 [blue icon] **Intentional Torts, Intentional Infliction of Emotional Distress**

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

HN27 [blue icon] **Intentional Torts, Intentional Infliction of Emotional Distress**

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society. Generally, the case is one in which the recitation of facts to an average member of the community would arouse his resentment against the action, and lead him to exclaim "outrageous."

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN28 [blue icon] **Securities Act Actions, Civil Liability**

In order to establish a claim of aiding and abetting, a plaintiff must satisfy a tripartite test. The plaintiff must allege and prove that (1) there was an underlying violation of the securities laws; (2) that the aider-abettor had knowledge of the violation and (3) that the aider-abettor knowingly and substantially participated in the wrongdoing.

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

[HN29](#) [blue icon] **Securities Act Actions, Civil Liability**

An aider-abettor have conscious involvement in impropriety or constructive notice of intended impropriety or even a general awareness that his role was part of an overall activity that is improper.

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

[HN30](#) [blue icon] **Securities Act Actions, Civil Liability**

Substantial assistance or participation is required to establish liability as an aider-abettor. Mere inaction without conscious participation does not rise to the level of aiding and abetting.

Counsel: David B. Zlotnick, Greenfield & Chimicles, P.C., for Plaintiff.

Daniel Segal, Claire Rocco & Leslie Haves, Goodman & Ewing, for Carl John Peterson.

Melvin Simensky, Gersten, Scherer & Kaplowitz, David Braverman, for Raymond and Jessie Dirks.

Raymond J. De Raymond, Coffin, DeRaymond, Shipman, Stitt, Lewis & Walters, for Mario Andretti.

Judges: Giles, J.

Opinion by: GILES

Opinion

[*479] MEMORANDUM

GILES, J.

Various defendants have filed motions to dismiss the amended complaint in this action. For the reasons which follow, their motions shall be granted in part and denied in part.

This now complex securities fraud case had rather humble beginnings. On June 25, 1982, Murray Kimmel filed a four page, two count complaint against John Peterson, alleging a violation of section 10(b), [Rule 10b-5](#) and common law fraud. However, this relative simplicity was short-lived. On September 10, 1982, an amended complaint was filed. Dr. Kimmel was joined by four other plaintiffs -- his wife and children -- in suing sixteen defendants. The amended complaint, stretching some thirty four pages, contains twelve counts which allege violations of sections 11, 12(2), 15 [*2] and 17(a) of the Securities Act of 1933, [15 U.S.C. § 77k](#), [77l\(2\)](#), 77o, 77q(a) (1976), sections 10(b) and 20 of the Securities Exchange Act of 1934, [15 U.S.C. § 78j](#); 78t (1976), as well as claims under the Racketeer Influenced and Corrupt Organizations Act of 1970 ["RICO"], 18 U.S.C. § 1961-68 (1976). Pendent state claims include common law fraud, misrepresentation, negligence, infliction of emotional distress, and a count under the Pennsylvania Securities Act, [Pa. Stat. Ann. tit. 70 § 1-201 et seq.](#) (Purdons 1982-1983 Supp.).

I. FACTS

Taking as true the well-pled allegations in the complaint, as I must on a motion to dismiss,¹ the factual scenario giving rise to this litigation may be summarized as follows: Dr. Kimmel responded to an advertisement in a financial journal placed by Muir, an investment banking and brokerage firm.² He was contacted by defendant Peterson, one of Muir's brokers, and Dirks, a partner in and manager of Muir. Kimmel related that he had a thriving medical practice and wanted to make some prudent investments. As a busy physician, he had little time to follow the wanderings of the stock market. Therefore, he needed a broker upon whom he [**3] could rely heavily to choose investments. He emphasized that although he was seeking investments which would be profitable, they must be safe. Peterson and Dirks detailed their expertise in the area and assured him that all investments chosen would be thoroughly investigated to ensure their safety.

The fraudulent activities alleged fall into two related categories. The first involves the types of securities purchased by defendants. Despite Kimmel's admonitions, Peterson acquired highly speculative stock for the account. Many of the high risk purchases were new issues underwritten by Muir. Kimmel was often consulted and urged to purchase [**4] these securities on the basis of insufficient, false or misleading information. The prospectus contained similarly deficient information, causing artificial overvaluation and thus manipulation of the market for these securities. In addition, Kimmel was advised to increase his holdings by purchasing stock on margin, without being apprised of the accompanying risks. In essence, Dirks and Peterson actively ignored Kimmel's wishes, utilizing his money to inure to the benefit of Muir.

The second category of alleged fraudulent transactions relates to the evolution of the relationship between Kimmel and Muir. On the advice of Peterson and Dirks, Kimmel became a subordinated creditor of Muir. Defendants continually tried to convince him that Muir was a safe investment, pointing to its famous general partners, such as Mario Andretti, Jimmy Connors and John Denver. When Peterson invited the Kimmel family to the Montreal Grand Prix, Mario Andretti was introduced as a general partner of Muir and did not protest or deny [*480] the title.³ Thereafter, Peterson and Dirks tried to persuade Kimmel to increase his holdings in Muir, again representing it to be a safe investment. This time, [**5] Kimmel became a limited partner with an investment of an additional \$200,000. However, defendants did not disclose the risks inherent in this investment or the fact that Muir was fast becoming a vehicle for the underwriting of speculative new issues. The complaint further alleges a course of fraudulent conduct surrounding Kimmel's partnership interest in Muir, all revolving about the non-disclosure of crucial information on the firm's financial health. For example, it is alleged that a financial statement misrepresented Muir's status by failing to reflect the overvaluation of the new issues. An increased investment of \$450,000.00 which was to be applied to Kimmel's subordinated loan was, without his knowledge, used to increase his partnership interest. Unfavorable publicity caused Kimmel to once again inquire into the safety of his investments. Even after Muir had called in the Securities and Exchange Commission, Peterson still insisted that all investments were safe. On August 17, 1981, Muir closed and a trustee was appointed. It was only then that Peterson advised Kimmel to remove his investments from Muir. However, by that point, he was unable to save his investments. Both [**6] Dirks and Peterson promised to reimburse Kimmel for part of his losses; however, both refused to put that promise in writing or honor it.

Although Peterson and Dirks allegedly were principally responsible for these events, many Muir associates and affiliates were also implicated. As a result of defendants' activities, the Kimmels lost their life savings and allegedly suffered tremendous mental anguish. In addition, the funds earmarked for their children's educations were lost.⁴

¹ See, e.g., *Miree v. DeKalb County*, 433 U.S. 25, 27, 53 L. Ed. 2d 557, 97 S. Ct. 2490 n.2 (1977); *Rogin v. Bensalem Township*, 616 F.2d 680, 685 (3d Cir. 1980); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 444 (3d Cir. 1977).

² Muir was a limited partnership which, according to the complaint, went into receivership in August of 1981. Amended Complaint para. 5.

³ During the period involved, from the summer of 1978 until 1981, Peterson and his associate Nancy Rochford, regularly entertained Dr. and Mrs. Kimmel to further cement their relationship of trust.

Peterson moves to dismiss, or in the alternative, for [**7] a more definite statement. In support of his motion, he raises four grounds: (1) the entire complaint lacks adequate specificity; (2) there is no private right of action under section 17(a) of the Securities Act of 1933; (3) the RICO count should be dismissed for failure to state a cause of action and (4) the count claiming infliction of emotional distress should also be dismissed for failure to state a cause of action. Raymond and Jessie Dirks move to dismiss, relying upon the grounds and arguments offered by Peterson. Mario Andretti also moves to dismiss for failure of the amended complaint to state a cause of action against him.

II. DISCUSSION

A. Overall Specificity

Peterson argues that the complaint lacks the specificity required under [Rule 9\(b\) of the Federal Rules of Civil Procedure](#). In support of his claim that the complaint is so vague that it defies intelligent response, Peterson cites the absence of details surrounding each securities transaction. In addition, the complaint is assailed for its use of "information and belief" pleading. Plaintiffs counter, asserting that the complaint gives defendants adequate notice with sufficient detail to allow them to answer. [**8] Responding to the "information and belief" contention, plaintiffs argue that the matters are peculiarly within defendants' knowledge. Moreover, it is a "technical point of pleading," see Plaintiffs' Memorandum in Opposition to the Motion to Dismiss at 10, and plaintiffs offer to stipulate with defendants to remove the offending language and stand on their allegations in the complaint.

[Rule 8\(a\) of the Federal Rules of Civil Procedure](#) sets the general tone of the federal pleading rules. Unlike its pleading predecessors, [HN1](#) the Federal Rules require only "a short and plain statement of the claim showing that the pleader is entitled to relief." [*481] [Fed. R. Civ. P. 8\(a\)](#). [Rule 9\(b\)](#) articulates a stricter standard to be applied when alleging fraud. It requires "the circumstances constituting fraud . . . [to] . . . be stated with particularity." [Fed. R. Civ. P. 9\(b\)](#). Reconciling these two rules to strike a sound balance is not an easy task. See [Credit Finance Corp., Ltd. v. Warner & Swasey Co.](#), 638 F.2d 563, 566 (2d Cir. 1981); [Schlick v. Penn-Dixie Cement Corp.](#), 507 F.2d 374, 378-80 (2d Cir. 1974), cert. denied, 421 U.S. 976, 44 L. Ed. 2d 467, 95 S. Ct. 1976 [*9] (1975). However, the oft quoted language from Wright and Miller endeavors to explore the rationale behind [Rule 9\(b\)](#): "It is a serious matter to charge a person with fraud and hence no one is permitted to do so unless he is in a position and is willing to put himself on record as to what the alleged fraud consists of specifically." 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1298 at 413 (1969) (footnotes omitted) see [Segal v. Gordon](#), 467 F.2d 602, 607 (2d Cir. 1972). In *Segal*, the Second Circuit attempted to articulate a standard, noting that "10b-5 [HN2](#) violations will not pass scrutiny if they do not allege with some specificity the statements allegedly constituting fraud." [467 F.2d at 607](#). The court went on to note that "mere conclusory allegations . . . are insufficient." *Id.* Accord [Decker v. Massey-Ferguson, Ltd.](#), 681 F.2d 111, 115 (2d Cir. 1982); [Mauriber v. Shearson/American Express, Inc.](#), 546 F. Supp. 391, 393 (S.D.N.Y. 1982); [Merrill Lynch, Pierce, Fenner & Smith v. Del-Valle](#), 528 F. Supp. 147, 149 (S.D. Fla. 1981). The pleading must apprise the defendants of the substance of plaintiffs' claim with sufficient detail to enable the defendants [**10] to answer. See, e.g., [Gottreich v. San Francisco Investment Co.](#), 552 F.2d 866 (9th Cir. 1977); [Landmark Savings & Loan v. Rhoades](#), 527 F. Supp. 206, 207 (E.D. Mich. 1981); [Beascochea v. Sverdrup & Parcel Assoc., Inc.](#), 486 F. Supp. 169, 174 (E.D. Pa. 1980). However, this rule is not to be applied with draconian strictness. As the court in *Beascochea*, noted, [Rule 9\(b\)](#) [HN3](#) "must be read in conjunction with the liberal pleading rules, which eschew technicalities." [486 F. Supp. at 174](#). Similarly, in [Adair v. Hunt International Resources Corp.](#), 526 F. Supp. 736 (N.D. Ill. 1981), after noting that [Rules 8](#) and [9](#) are to be "read together," the court stated; "with these principles in mind, the purpose of [Rule 9](#) becomes clear. [Rule 9](#) lists the actions in which *slightly* more is needed for notice." [526 F. Supp. at 744](#) (quoting [Tomera v. Galt](#), 511 F.2d 504, 508 (7th Cir. 1975)) (emphasis in original).

After reviewing the amended complaint, I conclude that the dictates of [Rule 9\(b\)](#) have been satisfied. With respect to the purchase of securities, other than the interests in Muir, the complaint identifies the parties and their roles in the transactions involved. Dr. [**11] Kimmel's request for safe investments is emphasized and the repeated breaches of his trust are detailed. Specific acts of knowing misrepresentations and omissions are alleged. As

⁴ Defendants' had also convinced the Kimmels to make their children subordinated creditors of Muir as well.

defendant points out, the complaint does fail to describe each of the alleged transactions by date, name of stock, amount and purchase price. Defendant fears that the complaint "encompasses every single stock transaction engaged in by Kimmel from 1978 to August 1981." See Defendants' Memorandum in Support of the Motion to Dismiss at 12-13. This may well be the case. Yet, dismissal is not warranted. This case does not involve one or two or even ten isolated allegations of fraud, but rather over two years of continued fraudulent securities transactions. The complaint contains more than mere conclusory allegations of wrongdoing. It details a course of conduct during which defendants invested Dr. Kimmel's money for their own or Muir's benefit. Concerns over frivolous assertions of fraud, which originally prompted the enactment of [Rule 9\(b\)](#), do not apply here. Plaintiff has alleged far more than boilerplate claims of misrepresentation. The basic charge is very specific -- managing Dr. Kimmel's entire [\[**12\]](#) investment portfolio in a manner involving great risk without his knowledge and against his express wishes. I find the complaint adequately places defendants on notice and allows them to respond.

HN4 From a practical standpoint, defendants have access to all of the records of the [\[*482\]](#) transactions and can glean from them the information needed to respond. It is unclear whether plaintiffs have access to such detailed information and a plaintiff should not be precluded from suing if he or she does not. Fundamentally, although [Rule 9\(b\)](#) requires specificity, to demand this quantum of detail at this stage would totally undermine the letter and spirit of [Rule 8\(a\)](#) and the liberalized pleading envisaged under the Federal Rules of Civil Procedures.⁵ Finally, assuming plaintiff does have access to the information, requiring amendment will accomplish little more than delay. Plaintiffs would add detail to the allegations and defendants would, in all probability, make the same denials as would be made without the added detail. Only through discovery will both sides gain the information required to assert their respective claims and defenses.

[\[**13\]](#) As regards the allegations surrounding the loans to and interest in Muir, their specificity is sufficient. The complaint sets out dates, the sums lent, the express representations made by defendants and why those representations were fraudulent.

HN5 Generally, allegations plead on "information and belief" do not satisfy the specificity requirements of [Rule 9\(b\)](#). 2A *Moore's Federal Practice* para. 9.03 (2d ed. 1982). However, the objective of this rule may be satisfied if the allegations are accompanied by a statement of the facts upon which the belief is founded, see [Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 379 \(2d Cir. 1974\)](#), cert. denied, 421 U.S. 976, 44 L. Ed. 2d 467, 95 S. Ct. 1976 (1975). The rule may also be relaxed as to matters within the adverse party's knowledge, although some courts have required an accompanying statement of facts as well. See [Segal, 467 F.2d at 608; Arpet Ltd. v. Homans, 390 F. Supp. 908, 913 \(W.D. Pa. 1975\)](#). The amended complaint does detail the factual allegations upon which the beliefs are grounded and much of the substance of the allegations is within defendants' knowledge. Moreover, plaintiffs have stated that they are [\[**14\]](#) willing to strike the offending language and stand on their allegations. Plaintiff's Memorandum in Opposition of the Motion to Dismiss at 10-11. In light of that concession, defendants' objections are moot. Since I conclude that the amended complaint in no way offends [Rule 9\(b\)](#), defendants' motion to dismiss on this ground shall be denied.

B. Section 17(a) of the Securities Act of 1933

Plaintiffs' complaint contains a count brought under section 17(a) of the Securities Act of 1933, [15 U.S.C. § 77q \(1976\)](#). Defendants argue that there is no private cause of action under that section and, as an unspoken corollary,

⁵ The Ninth Circuit eschewed an overly stringent reading of [Rule 9\(b\)](#) and expressed a similar concern over losing sight of the liberality of the pleading rules. In [Gottreich, 552 F.2d 866 \(9th Cir. 1977\)](#) the court stated:

Defendants say that an allegation that they knew that the representations were false is not the equivalent of an allegation that they were false. How could defendants know that they were false if they were not false? We had thought that this kind of nit-picking had disappeared in 1938, when the Federal Rules of Civil Procedure were first adopted.

[552 F.2d at 867](#). Although I do not mean to suggest that defendants' contentions are along the same vein, the expressed concern over the Federal Rules is applicable to this case.

urge that one should not be implied. Although the numerical weight of authority is in favor of implying a private right of action,⁶ [**16] neither the Third [*483] Circuit nor the Supreme Court has spoken. See *Aaron v. SEC*, 446 U.S. 680, 689, 64 L. Ed. 2d 611, 100 S. Ct. 1945 (1980) (declining to rule on the issue); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733-34, 44 L. Ed. 2d 539, 95 S. Ct. 1917 n.6 (1975) (same). This is a difficult issue, especially in light of the implication of a private right of action under section 10(b) on the one hand, [**15] and the Supreme Court's recent retrenchment from the implication of private remedies on the other. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979) (refusal to imply private remedy under section 206 of the Investment Advisors Act); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 570-71, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979) (refusal to imply private right of action under section 17(a) of the Securities Exchange Act of 1934). See also *Walck v. American Stock Exchange, Inc.*, 687 F.2d 778, 780 (3d Cir. 1982) (no implied right of action under sections 6 and 7 of the Securities Exchange Act of 1934). But see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 102 S. Ct. 1825, 1847-48, 72 L. Ed. 2d 182 (1982) (private cause of action implied under the Commodities Exchange Act).⁷

A majority of the courts which have implied a private right of action under section 17(a) have done so with little discussion or analysis. In the first case to imply a private remedy, *Osborne v. Mallory*, 86 F. Supp. 869 (S.D.N.Y. 1949), the court simply paralleled section 17(a) to section 10(b), deciding that if a private right existed under the latter, it should also exist under the former. *86 F. Supp. at 879*. More recent decisions cite only to Judge Friendly's concurrence in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), cert. denied, sub nom., *Coates v. SEC*, 394 U.S. 976, 22 L. Ed. 2d 756, 89 S. Ct. 1454 (1969), where he noted that although a private [**17] remedy was never intended, "there seemed little practical point in denying the existence of such an action under § 17 . . . once it had been established . . . that an aggrieved buyer has a private action under § 10(b) of the 1934 Act." *401 F.2d at 867*. See, e.g., *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 815 (9th Cir. 1981); *Kirshner v. United States*, 603 F.2d 234, 241 (2d Cir. 1978). In *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975), the Fourth Circuit concluded a private right of action should be implied by merely citing to an earlier case, *Johns Hopkins University v. Hutton*, 488 F.2d 912 (4th Cir. 1973), which had assumed without discussion the existence of a private remedy. *Newman*, 518 F.2d at 99. In sharp contrast, many of those who refuse to imply a private right of action have written scholarly and persuasive opinions. See, e.g., *Landry v. All American Assurance Co.*, 688 F.2d 381 (5th Cir. 1982); *Hill v. Der*, 521 F. Supp. 1370 (D. Del. 1981); *Reid v. Mann*, 381 F. Supp. 525 (N.D. Ill. 1974). **HN6** [↑] On the basis

⁶ Of the courts of appeal to address the issue, four have implied a private right of action, see *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 815 (9th Cir. 1981); *Lincoln National Bank v. Herber*, 604 F.2d 1038, 1040 n.2 (7th Cir. 1979); *Kirshner v. United States*, 603 F.2d 234, 241 (2d Cir. 1978); cert. denied, sub nom., *Goldberg v. Kirshner*, 444 U.S. 995, 62 L. Ed. 2d 426, 100 S. Ct. 531 (1979); *Newman v. Prior*, 518 F.2d 97, 99 (4th Cir. 1975); two have refused to do so, see *Landry v. All American Assurance Co.*, 688 F.2d 381, 391 (5th Cir. 1982); *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 159 (8th Cir. 1977), cert. denied, 434 U.S. 1086, 55 L. Ed. 2d 792, 98 S. Ct. 1281 (1978) and one appears undecided, leaning slightly toward joining the majority, see *Gutter v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 1194, 1196 (6th Cir. 1981), cert. denied, 455 U.S. 909, 71 L. Ed. 2d 447, 102 S. Ct. 1256 (1982). However, the implied right of action under § 17(a) has not fared as well on the district court level. See, e.g., *Hill v. Der*, 521 F. Supp. 1370, 1378 (D. Del. 1981); *Ingram Industries v. Nowicki*, 502 F. Supp. 1060, 1069 (E.D. Ky. 1980); *McFarland v. Memorex Corp.*, 493 F. Supp. 631, 652 (N.D. Cal. 1980); *Martin v. Howard, Weil, Labouisse, Friedricks, Inc.*, 487 F. Supp. 503, 507 (E.D. La. 1980); *Reid v. Mann*, 381 F. Supp. 525, 528 (N.D. Ill. 1974); *Dyer v. Eastern Trust & Banking Co.*, 336 F. Supp. 890, 903 (D. Me. 1971). But see, *Campito v. McManus, Longe, Brockwehl, Inc.*, 470 F. Supp. 986, 993 (N.D.N.Y. 1979); *DeMarco v. Security Planning Service, Inc.*, 462 F. Supp. 1066, 1069 (D. Ariz. 1978); *In re Gap Stores Securities Litigation*, 457 F. Supp. 1135, 1142 (N.D. Cal. 1978). In this district a private right of action has been implied. See, e.g., *Engl v. Berg*, 511 F. Supp. 1146, 1151-52 (E.D. Pa. 1981); *Wulc v. Gulf & Western, Inc.*, 400 F. Supp. 99, 103 (E.D. Pa. 1975); *B & B Investment Club v. Kleinert's, Inc.*, 391 F. Supp. 720, 726 (E.D. Pa. 1975). See also *Mifflin Energy Sources Inc. v. Brooks*, 501 F. Supp. 334, 336-37 (W.D. Pa. 1980).

⁷ The trend away from implying private remedies can be witnessed outside the securities area. See, e.g., *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981); *California v. Sierra Club*, 451 U.S. 287, 68 L. Ed. 2d 101, 101 S. Ct. 1775 (1981); *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 67 L. Ed. 2d 662, 101 S. Ct. 1451 (1981).

of statutory construction and the superior reasoning of those courts who follow the minority rule, I decline to imply a private [**18] cause of action under section 17(a) of the 1933 Act.

[*484] Before embarking on the familiar [Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 \(1975\)](#) analysis, a historical note will lend perspective to the issue. As one court observed: "the main reason for the somewhat awkward development of the law under § 17(a) of 1933 Act is the fact that it has traditionally lived in the shadow of another area of securities law: [Rule 10b-5](#)." [Landry, 688 F.2d 381, 386 \(5th Cir. 1982\)](#). A private right of action was initially implied under section 10(b) of the Securities Exchange Act of 1934, and its implementing [rule, 10b-5, 17 C.F.R. § 240.10b-5 \(1982\)](#), in this district. [Kardon v. National Gypsum, 69 F. Supp. 512, 513-14 \(E.D. Pa. 1946\)](#). For several decades thereafter, the parameters of this cause of action were defined largely by the lower federal courts. See generally, [Wachovia Bank and Trust Corp. v. National Student Marketing Co., 209 U.S. App. D.C. 9, 650 F.2d 342, 351](#) and 351 n.20 (D.C. Cir. 1980), cert. denied, 452 U.S. 954, 101 S. Ct. 3098, 101 S. Ct. 3099, 69 L. Ed. 2d 965 (1981). When the Supreme Court finally considered the issue, it affirmed the [**19] implication of a private right of action without much discussion. See [Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6, 13, 30 L. Ed. 2d 128, 92 S. Ct. 165 n.9 \(1971\)](#). However, the Supreme Court later characterized this decision as mere acquiescence to a twenty-five year tradition established by the lower federal courts. See [Cannon v. University of Chicago, 441 U.S. 677, 690-93, 60 L. Ed. 2d 560, 99 S. Ct. 1946 n.13 \(1979\); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730, 44 L. Ed. 2d 539, 95 S. Ct. 1917 \(1975\)](#). Therefore, the private remedy under section 10(b) was essentially thrust upon a Court unwilling to overturn twenty-five years worth of precedent.

Until recently section 10(b) was an extremely broad remedy -- lacking the internal restrictions found in the express remedy provisions.⁸ The judicially evolved cause of action was even being utilized as a vehicle for the redress of breaches of state-created fiduciary duties. See [Superintendent of Insurance, 404 U.S. at 10-12](#). However, the Supreme Court intervened and began to narrow the scope of the remedy. In *Blue Chip Stamps*, the Court ruled that an individual must be either [**20] a purchaser or seller of securities in order to have standing under section 10(b).⁹ [**22] [421 U.S. at 754-55](#). In [Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 51 L. Ed. 2d 480, 97 S. Ct. 1292 \(1977\)](#), the Supreme Court ruled that essentially state created causes of action for mismanagement and other breaches of fiduciary duties were not cognizable under section 10(b). [Santa Fe, 430 U.S. at 477, 479-80](#). Perhaps most importantly, [Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201, 47 L. Ed. 2d 668, 96 S. Ct. 1375 \(1976\)](#) added a scienter requirement to the section 10(b) cause of action.¹⁰ As it has now become more difficult to state a cause of action under section 10(b), plaintiffs are turning increasingly to the heretofore ignored anti-fraud provisions of section 17(a). Section 17(a) [HN7](#)[↑] is not limited to fraud in the [*485] purchase or sale of securities, see note 9 *supra*. Most importantly, it appears that scienter is not required to state a cause of action under section 17(a)(2) or (a)(3). In [Aaron v. SEC, 446 U.S. 680, 64 L. Ed. 2d 611, 100 S. Ct. 1945 \(1980\)](#), in the context of an SEC enforcement action, the Court held that scienter was required under section [**21] 17(a)(1), but not under subsections (a)(2) or (a)(3). [446 U.S. at 697](#). It is, as the *Landry* Court noted; "doubtful that a different interpretation would be given if an implied private cause of action is found to exist," [688 F.2d at 387](#). Compare [Aaron v. SEC, 446](#)

⁸ For example, sections 11 and 12 of the 1933 Act are subject to the statute of limitations contained in section 13. As an implied cause of action, there is no statutory statute of limitations for actions brought under section 10(b). The most nearly analogous state statute applies, which is often longer than the period found in section 13.

⁹ [HN8](#)[↑] By its very language, section 17(a) is broader than section 10(b), as it encompasses fraud in the "offer" or "sale" of securities, rather than just fraud in the purchase or sale.

¹⁰ In [Herman & MacLean v. Huddleston, 459 U.S. 375, 103 S. Ct. 683, 74 L. Ed. 2d 548, 51 U.S.L.W. 4099 \(1983\)](#) the Supreme Court reiterated the logic employed in *Ernst & Ernst*. The coverage of section 10(b), because of its broad language, necessarily overlaps with some of the express remedies granted in the Securities Act of 1933, specifically section 11. Section 11, which can be triggered by negligent conduct, has certain procedural safeguards, such as a set statute of limitations and a bond for costs provision. Section 10(b) lacks these procedural obstacles. Thus, were 10(b) to cover negligent actions, section 11 and its procedures would be rendered superfluous, "thereby nullify[ing] the effectiveness of the carefully drawn procedural restrictions on these express actions." [Herman, 51 U.S.L.W. at 4102](#), (quoting [Ernst and Ernst, 425 U.S. at 210](#)). This statutory analysis is applicable to section 17(a) as well.

U.S. at 695. (scienter required in SEC injunctive suit under [Rule 10b-5](#)) with [Ernst & Ernst, 425 U.S. at 201](#) (scienter required in private cause of action under 10b-5). Thus, the implication of a private right of action under section 17(a) would allow and encourage the total circumnavigation of the new restrictions the Court has placed on a section 10(b) cause of action.¹¹

[**23] Section 17(a) provides:

- (a) [HN9](#) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --
 - (1) to employ any device, scheme, or artifice to defraud, or
 - (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
 - (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

[15 U.S.C. § 77q \(1976\)](#). This anti-fraud provision is found in the Securities Act of 1933, flanked by the express private remedy provisions of sections 11 and 12. The latter provisions are complex and carefully crafted, containing internal defenses and restrictions unknown to section 17(a). For example, although section 11 is triggered by negligent conduct, a potential defendant, other than the issuer, is granted a "due diligence" defense. Section 11(b), [15 U.S.C. \[**24\] § 77k\(b\) \(1976\)](#). In addition, a defendant may be absolved of liability under section 11(a) if it can be proven that the plaintiff knew about the misstatement or omission. [15 U.S.C. § 77k\(a\)](#). The same is true under section 12(2) and liability thereunder is limited to the victim's immediate seller. Section 12(2) also contains a due diligence defense. [15 U.S.C. § 77l](#). By contrast, section 17(a) is written as an absolute liability provision and its language is sufficiently broad to encompass all of the behavior addressed by sections 11 and 12.

[HN10](#) In determining whether to imply a private right of action, the touchstone is Congressional intent -- "not whether this court thinks it can improve upon that statutory scheme that Congress enacted into law." [Touche-Ross & Co. v. Redington, 442 U.S. 560, 578, 99 S. Ct. 2479, 61 L. Ed. 2d 82 \(1979\)](#). See also [Walck v. American Stock Exchange, Inc., 687 F.2d 778, 782 \(3d Cir. 1982\)](#). In order to divine this Congressional intent, the Court established a four prong analysis in [Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 \(1975\)](#). This analysis asks:

First, is the plaintiff "one of the class for whose especial [**25] benefit the statute was enacted," -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And [*486] finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

[422 U.S. at 78](#) (citations omitted). The Court in *Redington* indicated that while all four factors are relevant, they are not accorded equal weight. The first three, which more directly impact upon Congressional intent, are more important. [Redington, 442 U.S. at 575-76](#).

By proscribing fraudulent activities in the offer or sale of securities, section 17(a) was obviously enacted to prevent fraud, thus protecting potential victims. Accord [Hill v. Der, 521 F. Supp. 1370, 1376 \(D. Del. 1981\)](#). See also [Transamerica, 444 U.S. at 24](#) (section 206 of Investment Advisors Act, worded much [**26] like section 17(a), designed to benefit a particular class); [Walck v. American Stock Exchange, Inc., 687 F.2d 778, 783 \(3d Cir. 1982\)](#)

¹¹ Many lower courts have developed interesting solutions to this perceived procedural escapism. See, e.g., [Feldman v. Simkins Industries, Inc., 679 F.2d 1299, 1305 \(9th Cir. 1982\)](#) (under section 17(a)) must prove scienter or a duty to disclose non-public information); [Collins v. Signetics Corp., 443 F. Supp. 552, 555 \(E.D. Pa. 1977\)](#) (implied right of action under section 17(a) subject to limitations found in section 12(2) of the 1933 Act).

(section 6 of the 1934 Act, setting registration standards for securities exchanges, was enacted to protect investors). In [United States v. Naftalin, 441 U.S. 768, 60 L. Ed. 2d 624, 99 S. Ct. 2077 \(1979\)](#), the Court reviewed the legislative history behind section 17(a) and concluded that its purpose was "to protect the investing public and honest business. . ." [441 U.S. at 775-76](#) (quoting S. Rep. No. 47, 73d Cong., 1st Sess., 1 (1933)). Accord, [Reid v. Mann, 381 F. Supp. 525, 526 \(N.D. Ill. 1974\)](#). Thus, I find that the first prong of the *Cort* test is satisfied -- plaintiff, as an investor, is a member of the class "for whose especial benefit the statute was enacted." ¹² However, "the mere fact that the statute was designed to protect [investors] does not require the implication of a private cause of action for damages on their behalf . ." [Walck, 687 F.2d at 783-84](#) (quoting [Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 24, 62 L. Ed. 2d 146, 100 S. Ct. 242 \(1979\)](#) (citations omitted)).

[**27] The second factor under *Cort* is whether there is any legislative intent to create or deny a cause of action. [HN11](#) [↑] The legislative history of the 1933 Act indicates that sections 11 and 12 were perceived as the only civil liability provisions of the statute. See [SEC v. Texas Gulf Sulphur, 401 F.2d 833, 867](#) (2d Cir.), cert. denied *sub nom.*, [Coates v. SEC, 394 U.S. 976, 22 L. Ed. 2d 756, 89 S. Ct. 1454 \(1968\)](#) (Friendly, J., concurring) (citing H. Rep. No. 85, 73d Cong., 1st Sess. 9-10 (1933)). Accord, [Landry, 688 F.2d at 389](#) and n. 35; [Dyer v. Eastern Trust and Banking Co., 336 F. Supp. 890, 904-05 \(D. Me. 1971\)](#); Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent*, 57 Nw. U.L. Rev. 627, 656-57 (1963). In addition, the existence of express remedies within the same statute militates against a finding of Congressional intent to imply further remedies. See, e.g., [Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 14-15, 69 L. Ed. 2d 435, 101 S. Ct. 2615 \(1981\)](#); [Transamerica, 444 U.S. at 19-21](#); [Redington, 442 U.S. at 571-74](#); [Walck, 687 F.2d at 784](#). This is especially true here, as section 17(a) [**28] is sufficiently broad to cover virtually all activities addressed by sections 11 and 12. As mentioned earlier, however, section 17(a) does not have the internal restrictions and defenses found in sections 11 and 12.¹³ [**30] [*487] Thus, if a private right of action were to be implied under section 17(a), it would become the preferable remedy, rendering sections 11 and 12 entirely superfluous. The complex scheme which Congress wove in the express civil liability sections would be totally undermined. As the Court noted in *Redington*, it is "reluctant to imply a cause of action in § 17(a) that is significantly broader than the remedy that Congress chose to provide." [442 U.S. at 574](#). Along the same lines, in [Reid v. Mann, 381 F. Supp. 525 \(N.D. Ill. 1974\)](#) the Court noted that "[to] impose a greater responsibility [than that provided by §§ 11 and 12] . . . would unnecessarily restrain the conscientious administration of honest business with no compensating advantage to the public." [381 F. Supp. at 526](#) (quoting [Texas Gulf Sulphur, 401 F.2d at 867](#) (Friendly, J., concurring)). This same reasoning led the Supreme Court to require scienter under section 10(b), which again [**29] lacks the procedural barriers written into sections 11 and 12. A negligence standard under section 10(b) would similarly eviscerate the structure of the express liability sections, as plaintiffs would always prefer the former to the latter.¹⁴ See note 10

¹² In *Landry*, the Fifth Circuit found the first prong of *Cort* wanting, as "the statutory language does not suggest a private cause of action." [688 F.2d at 389](#). The provision is only "a general censure of fraudulent practices." *Id.* This argument is specious. A statute which lacks an express cause of action will rarely have language which "suggests a private cause of action." That the provision is a general proscription does not impact upon whether it was intended to protect a certain group of people. The mere fact that someone can be enjoined or criminally punished under section 17(a) inures to the benefit of potential victims. Finally, this conclusion ignores the Supreme Court's ruling to the contrary in *Naftalin*.

¹³ Section 13 is the statute of limitations section that applies to sections 11 and 12. See note 8 *supra*. Professor Loss notes that to allow an implied cause of action 17(a) would be "to attribute to Congress the rather elaborate intention that a purchaser may avoid the statute of limitations prescribed in § 13, as well as the possibility of having to post security for costs and perhaps the necessity of proving his own lack of knowledge of the falsity as in § 12(2) . ." 3 L. Loss, *Securities Regulation* at 1786 (2d ed. 1961) [hereinafter cited as Loss].

¹⁴ While discussing the propriety of implying a private remedy under section 10(b), Professor Loss explained the interrelationship of all of the statutory provisions:

The question is simply whether there is the same justification for implying such liability under the 1933 act as there is under the 1934 act. It is one thing to imply a private right of action under § 10(b) or the other provisions of the 1934 act, because the specific liabilities created by [§§ 9\(e\), 16\(b\)](#) and [18](#) do not cover all the variegated activities with which that act is concerned. But it is quite another thing to add an implied remedy under § 17(a) of the 1933 act to the detailed remedies

supra. As noted earlier, if *Aaron v. SEC* is any indicator, scienter will not be required under section 17(a)(2), and (a)(3). Therefore, the implication of a private remedy under section 17(a) would also undermine the Supreme Court's efforts to narrow the scope of a section 10(b) cause of action. The barriers placed around section 10(b) were established, at least in part, to save the remaining vitality of sections 11 and 12. See *Herman, 51 U.S.L.W. at 4102; Ernst & Ernst, 425 U.S. at 210*. Thus, the implication of a private cause of action under section 17(a) would not only write sections 11 and 12 out of the statute, but would also render meaningless the Supreme Court's efforts in the 10(b) area.

[**31] Interestingly, the language of section 17(a) is very similar to section 206 of the Investment Advisors Act of 1940, a provision under which the Supreme Court refused to imply a private right of action. See *Transamerica, 444 U.S. 11, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979)*. There, the court decided that the second prong of *Cort* was not satisfied, noting that the provision was proscriptive and was not intended to create civil liabilities. *Id. at 19*. Since Congress had provided other judicial and administrative methods for enforcing section 206, the Court stated it was "highly improbable that Congress absentmindedly forgot to mention an intended private action." [*488] *Id. at 20*. This applies with stronger force here, where Congress has indeed provided an explicit private remedy. The Court remarked that "obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." *Id. at 21*.

Nor is the third prong of *Cort* met, which requires consistency with the underlying purposes of the statutory scheme. In *Piper v. Chris-Craft Industries, 430 U.S. 1, 51 L. Ed. 2d 124, 97 S. Ct. 926 (1977)*, the court phrased [**32] the inquiry in terms of whether the legislative purposes "are likely to be undermined absent private enforcement" or whether it "is necessary to effectuate Congress' goals." *430 U.S. at 25, 26*. Measured against any of those standards, an asserted private right of action under section 17(a) fails. Rendering sections 11 and 12 effectively impotent is neither necessary to, nor consistent with, the legislative purposes of the 1933 Act. In those sections, Congress accorded aggrieved individuals private remedies, limiting these remedies as it saw fit. The broader sweeping provisions of section 17(a) were meant to be used and are still available for purposes of SEC enforcement.

In light of the foregoing conclusions respecting the first three parts of the *Cort* test, analysis of the fourth and least important element is not necessary. Being convinced that Congress did not intend section 17(a) to be used as a private remedy, I must respect that intent.¹⁵ Hence, the count of the complaint purporting to assert a claim thereunder shall be dismissed.

[**33] C. THE RICO COUNT

specifically created by §§ 11 and 12. The 1933 act is a much narrower statute. It deals only with disclosure and fraud *in the sale of securities*. It has but two important substantive provisions, §§ 5 and 17(a). Non-compliance with § 5 results in civil liability under § 12(1). Faulty compliance results in liability under § 11 and § 17(a) has its counterpart in § 12(2). It all makes a rather neat pattern. Within the area of §§ 5 and 17(a), §§ 11 and 12 (unlike §§ 9(e), 16(b) and 18 of the 1934 act) are all embracing. This is not to say that the remedies afforded by §§ 11 and 12 are complete. But the very restrictions contained in those sections and the differences between them -- for example, the fact that § 11 but not § 12 imposes liability on certain persons connected with the issuer without regard to their participation in the offering and the fact that § 12(2) does not go so far in relation to § 17(a) and § 12(1) goes in relation to § 5 -- make it seem the less justifiable to permit plaintiffs to circumvent the limitations of § 12 by resort to § 17(a). Particularly is this so in view of the fact that § 11, together with the statute of limitations in § 13, was actually tightened in the 1934 amendments to the Securities Act.

Loss at 1785.

¹⁵ Many of the same arguments could be made as regards the implication of a private right under section 10(b). The arguments would not be as persuasive, however. As Professor Loss pointed out, the express remedies in the 1934 Act are not as broad as in the 1933 Act. See note 14 *supra*. Thus, there is arguably more need for a private action under section 10(b). The fact that a private right of action has been implied thereunder is not a determining factor. As noted earlier, the section 10(b) right of action was essentially thrust on the Supreme Court, which like many of the lower federal courts, accepted its existence without much analysis. See *Redington, 442 U.S. at 577-78 n. 19; Hill v. Der, 521 F. Supp. at 1378 n.4*.

Defendants move to dismiss Count VI of the amended complaint which asserts a civil claim under the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. § 1961-1968 (1976). Plaintiffs seek to recover treble damages under the statute's civil remedy provision, [18 U.S.C. § 1964\(c\)](#). Defendants rest their contention that the complaint fails to state a cause of action on four grounds: (1) use of RICO in the absence of any alleged link to organized crime contravenes the statute's purpose; (2) the complaint fails to adequately allege injury "by reason of" a violation of [18 U.S.C. § 1962](#); (3) the complaint does not distinguish the "enterprise" from the "pattern of racketeering activity" and (4) the complaint does not state a violation of [18 U.S.C. § 1962\(a\)](#) against defendant Peterson.

1. The Statute

RICO was enacted as Title IX of the Organized Crime Control Act of October 15, 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). It represents the culmination of two decades of inquiry into potential solutions to the pervasive problem of organized crime.¹⁶ The statute was envisaged as a much needed weapon with which to battle organized crime's **[**34]** infiltration into legitimate business. As Congress stated in its findings:

[*489] The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow **[**35]** because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. Pub. L. No. 91-452, 84 Stat. 922, title IX § 1 (1970). The result is a sweeping statute with a whole panoply of procedural tools to aid law enforcement officials, as well as a civil treble damage provision.

[36] [HN12](#)** Under RICO, engaging in a "pattern of racketeering" within the confines of an "enterprise" becomes an offense separate from the predicate violations. To understand the structural mechanism of RICO, some definitions are in order. [Section 1961\(1\)](#) defines "racketeering activity" as specified state law offenses punishable by incarceration for more than one year, as well as any violation of a long list of federal statutes. A "pattern of racketeering activity" is defined as the commission of at least two predicate acts within ten years. [18 U.S.C. § 1961\(5\)](#). The statutory definition of "enterprise" is broad enough to encompass just about any group of individuals. [18 U.S.C. § 1961\(4\)](#). However, it is [section 1962](#) which actually sets out the proscribed activities. It provides in pertinent part:

¹⁶ The infiltration of organized crime into legitimate business was isolated by the Kefauver Committee as early as 1951. The McClellan Committee documented the infiltration of labor unions and the existence of "La Cosa Nostra." The problem was also studied in 1967 by the President's Commission on Law Enforcement and Administration of Justice. See generally, Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts -- Criminal and Civil Remedies, 53 Temp. L.Q. 1009, 1014-15 (1980). For an exhaustive legislative history of RICO, see Blakey, The RICO Civil Fraud Action in Context: Reflections on *Burnett v. Berg*, [58 Notre Dame L. Rev. 237, 249-80 \(1982\)](#). [Hereinafter cited as *Blakey*].

(a) [HN13](#) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of [section 2, title 18, United States Code](#), to use or invest, directly or indirectly, any part of such income, or the proceeds of such **37 income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity **490 or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person **38 employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[18 U.S.C. § 1962 \(1976\)](#)

[HN14](#) In addition to criminal remedies, RICO provides a private right of action for "any person injured in his business or property by reason of a violation of [section 1962](#)." Treble damages attach to a RICO verdict as well. [18 U.S.C. § 1964\(c\)](#). However, the civil plaintiff is not required to prove a prior conviction, see, e.g., [Usaco Coal Co. v. Carbomin Energy, Inc.](#), 689 F.2d 94, 95 n.1 (6th Cir. 1982); [Mauriber v. Shearson/American Express, Inc.](#), 546 F. Supp. 391, 396 (S.D.N.Y. 1982); [State Farm Fire & Cas. Co. v. Estate of Caton](#), 540 F. Supp. 673, 675-77 (N.D. Ind. 1982); [Glusband v. Benjamin](#), 530 F. Supp. 240, 241 (S.D.N.Y. 1981); [Heinold Commodities, Inc. v. McCarty](#), 513 F. Supp. 311, 314 (N.D. Ill. 1979), and must only prove the statutory elements of a cause of action by a preponderance of the evidence, see [United States v. Cappetto](#) **391, 502 F.2d 1351, 1357 (7th Cir. 1974); [Parnes v. Heinold Commodities, Inc.](#), 487 F. Supp. 645, 647 (N.D. Ill. 1980); [Farmers Bank of Delaware v. Bell Mortgage Company](#), 452 F. Supp. 1278, 1280 (D. Del. 1978). Finally, in interpreting and applying all of RICO's provisions, Congress has dictated that the statute "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, 84 Stat. 922, title IX § 904(a) (1970).

2. Connection With Organized Crime

Resting on RICO's articulated purpose, defendants argue that the failure of the complaint to allege any link to organized crime is fatal to plaintiffs' claim. Citing [United Steelworkers of America v. Weber](#), 443 U.S. 193, 201, 61 L. Ed. 2d 480, 99 S. Ct. 2721 (1979), defendants contend that although the claim may be within the letter of the statute, it does not fall within its spirit. Defendant's Memorandum in Support of their Motion to Dismiss at 39. Implicit within defendants' position is the notion that the RICO treble damage provision was not intended to be used to supplant or supplement the already extant remedies under the federal securities laws. This argument, limiting RICO to the organized **40 crime context, has a facial appeal and has garnered some judicial support. See, e.g., [Wagner, et al. v. Bear, Stearns & Co., et al.](#), [Current]Fed. Sec. L. Rep. (CCH) P 99,032 at 94,913 (N.D. Ill. 1982) (RICO not intended to apply to securities fraud cases in absence of any nexus to organized crime); [Noonan v. Granville-Smith](#), 537 F. Supp. 23, 29 (S.D.N.Y. 1981) (same); [Waterman Steamship Corp. v. Avondale Shipyards, Inc.](#), 527 F. Supp. 256, 260 (E.D. La. 1981) (no cause of action under RICO for failed couplings installed on ships absent link to organized crime); [Adair v. Hunt International Resources Corp.](#), 526 F. Supp. 736, 747-48 (N.D. Ill. 1981) (land sale scam, while technically within the ambit of RICO, should not be accorded a cause of action without involvement of organized crime); [Barr v. WUI/TAS, Inc.](#), 66 F.R.D. 109, 112-13 (S.D.N.Y. 1975) (price fixing did not state a cause of action without organized crime involvement). However, defendants' purported allegiance to the purpose of the statute ignores both the language of RICO and its legislative history.

Congress clearly intended RICO to be applicable in the securities fraud area in certain situations [**41] as one of the predicate offenses listed is "fraud in the sale of securities." [18 U.S.C. § 1961\(1\)\(D\)](#). The more fundamental issue presented here is whether RICO was intended to apply to *any* predicate offense in the absence of some allegation of the involvement of organized crime. [HN15](#)¹⁵ The overwhelming majority of courts to address this issue have concluded that RICO [*491] was not intended to be, and should not be limited to, the organized crime context. See e.g., [Schacht v. Brown, 711 F.2d 1343](#), slip op. at 20 (7th Cir. 1983); [Bennett v. Berg, 685 F.2d 1053, 1063 \(8th Cir. 1982\)](#), pet. for reh. en banc granted, September 17, 1982; [Cenco, Inc. v. Seidman & Seidman, 1982 Fed. Sec. L. Rep. P 98,615 at 93,057 \(7th Cir. 1982\)](#); [United States v. Thordarson, 646 F.2d 1323, 1328-29 n. 10](#) (9th Cir.) cert. denied, 454 U.S. 1055, 102 S. Ct. 601, 70 L. Ed. 2d 591 (1981); [United States v. Uni Oil, Inc., 646 F.2d 946, 953 \(5th Cir. 1981\)](#), cert. denied sub nom., [Corbitt v. United States, 455 U.S. 908, 102 S. Ct. 1254, 71 L. Ed. 2d 446 \(1982\)](#); [United States v. Aleman, 609 F.2d 298, 303 \(7th Cir. 1979\)](#) cert. denied, 445 U.S. 946, 63 L. Ed. 2d 780, 100 S. Ct. [**42] 1345 (1980); [United States v. Forsythe, 560 F.2d 1127, 1136 \(3d Cir. 1977\)](#); [United States v. Campanale, 518 F.2d 352, 363 \(9th Cir. 1975\)](#); cert. denied sub nom., [Grancich v. United States, 423 U.S. 1050, 96 S. Ct. 777, 46 L. Ed. 2d 638 \(1976\)](#); [Mauriber v. Shearson/American Express, Inc., 546 F. Supp. 391, 396 \(S.D.N.Y. 1982\)](#); [Hanna Mining Co. v. Norcen Energy Resources, Ltd., 1982 Fed. Sec. L. Rep. \(CCH\) P 98,742 at 93,737 \(N.D. Ohio 1982\)](#); [Maryville Academy v. Loeb Rhoades & Co., Inc., 530 F. Supp. 1061, 1069 \(N.D. Ill. 1981\)](#); [Hellenic Lines, Ltd. v. O'Hearn, 523 F. Supp. 244, 247-48 \(S.D.N.Y. 1981\)](#); [Spencer Companies, Inc. v. Agency Rent-a-Car, Inc., 1981-82 Fed. Sec. L. Rep. \(CCH\) P 98,361 at 92,214 \(D. Mass. 1981\)](#); [Engl v. Berg, 511 F. Supp. 1146, 1155 \(E.D. Pa. 1981\)](#); [Heinold Commodities, Inc. v. McCarty, 513 F. Supp. 311, 313 \(N.D. Ill. 1979\)](#); [United States v. Vignola, 464 F. Supp. 1091, 1095-96](#) (E.D. Pa.), aff'd mem., 605 F.2d 1199 (3d Cir. 1979), cert. denied, 444 U.S. 1072, 100 S. Ct. 1015, 62 L. Ed. 2d 753 (1980); [United States v. Mandel, 415 F. Supp. 997, 1018-19 \(D. Md. 1976\)](#). Accord, [Blakey](#) supra note 16 at 284-84; [**43] Note *Application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to Securities Violations*, 8 J. Corp. L. 411, 429 (1983). Indeed, to the extent that the Third Circuit has decided this issue, albeit in a criminal context,¹⁷ I am bound by that ruling. In *Forsythe*, the Third Circuit noted that "the legislative intent was to make RICO violations dependent upon behavior, not status." [Forsythe, 560 F.2d at 1136](#). That is the extent of the court's analysis. However, a brief exploration of RICO's legislative history will prove the validity of the *Forsythe* position and that of the other courts cited above.

At the outset, I note that the statute [*44] does not use the term "organized crime" or attempt to define that nebulous concept. According to the legislative history, this was a conscious decision by Congress. Fashioning a definition was recognized as a difficult task which would be of dubious benefit. See, e.g., 116 Cong. Rec. 35,204-206 (Oct. 6, 1970); 116 Cong. Rec. 35, 343-345 (Oct. 7, 1970). For example, an amendment was proposed that would have made the mere membership in La Cosa Nostra an offense. 116 Cong. Rec. 35,343 (Oct. 7, 1970) (Rep. Biaggi). This was rejected as overly narrow and potentially unconstitutional. *Id.* at 35,344-346. However, the topic of the scope of the statute was hotly debated throughout the Congressional hearings. As Professor Blakey noted, during the 1970 House hearings, the Association of the Bar of the City of New York criticized the proposed Title IX as reaching beyond the scope of organized crime. See *Blakey*, supra note 16 at 272-73. A report issued by that body lambasted the addition of certain offenses, including securities fraud cases.¹⁸ [**46] Relating to the Control

¹⁷ Criminal decisions on this issue should have the same precedential import as civil rulings. See [Eaby, et al. v. Richmond, et al., 561 F. Supp. 131](#), slip op. at 4-5 (E.D. Pa. 1983). If a court is amenable to extending criminal sanctions to those not linked with organized crime, no sound reason exists for not extending civil liability.

¹⁸ The Bar Association Report stated:

On the one hand, the crimes listed as "racketeering activity" include several categories which are plainly beyond the intention of the Senate Committee, as expressed in the Report, and which should not, in our view, be subjected to the severe penalties of Title IX. The Senate Report states: "'Racketeering activity' is defined in terms of specific State and Federal criminal statutes now characteristically violated by members of organized crime." Senate Report 34. This statement is not supported, however, by the language of the statute, which includes as racketeering activity such things as theft from an interstate shipment regardless of the value of the property stolen ([18 U.S.C. § 659](#)), unlawful use of a stolen telephone credit card ([18 U.S.C. § 1343](#)), the "mom and pop" variety of illegal gambling business which, as we point out

of Organized Crime in the [*492] United States: Hearings on S.30 and Related Proposals Before Subcomm. [**45] No. 5 of the Comm. on the Judiciary, 91st Cong., 2d Sess. at 329 (1970) (emphasis added). The report stated:

Within the definition of "racketeering activity" is "fraud in the sale of securities." Against the background of expanding securities regulation, this definition could include the various officers, directors, and employees of corporations and underwriters of securities who have been found guilty of fraud in the sale of securities in some of the recent Rule 10(b)5 cases. Fraud in the sale of securities is simply not synonymous with racketeering activity.

Relating to the Control of Organized Crime in the United States: Hearings on S.30 and Related Proposals Before Subcomm. No. 5 of the Comm. on the Judiciary, 91st Cong., 2d Sess. at 401 (1970). Thus, RICO's reach beyond the talismanic "organized crime" into the field of securities fraud was well recognized by the Congress. Yet, section 1961(1)(D) was still enacted listing securities fraud as a predicate offense. The only inference to be drawn is that Congress intended to reach securities fraud cases as well as other types of cases which might not have a nexus to organized crime.¹⁹

In addition, many of the Congressmen verbally recognized that RICO was not intended to be so limited. Representative Poff stated that "the concept of organized criminal activity is broader in scope than the concept of organized crime; it is meant to include any criminal activity collectively undertaken . . ." 116 Cong. Rec. 35,293 (October 7, 1970). Senator McClellan remarked:

the curious objection has been raised to S.30 as a whole, and to several of its provisions in particular, that they are not somehow limited to organized crime itself . . . as if organized crime were a precise and operative legal concept [**47] like murder, rape or robbery. Actually, of course, it is a functional concept like white collar crime, serving simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances.

116 Cong. Rec. 18,913 (June 9, 1970). These comments illustrate not only recognition of the broad scope of the statute, but they also point up some of the practical problems which would ensue, were RICO limited to "organized crime." For example, it would not be easy for a putative plaintiff to prove a defendant's affiliation with a certain organization. If it were easy enough for a private plaintiff to prove, then RICO would probably not have been necessary in the first instance. See e.g., *Hanna Mining*, 1982 Fed. Sec. L. Rep. P 98,742 at 93,736-37. This burden of proof might well emasculate the private remedy provision. See Mauriber, 546 F. Supp. at 396. Perhaps more important, as Representative Poff's statement implied, limiting application of the statute might have the effect of contravening its purpose. Some of the targeted behavior could "slip through the cracks" because it might not fit comfortably into some artificial [**48] [*493] definition of organized crime.²⁰ To define the concept is to limit RICO's application -- a result clearly at odds with the "liberal construction" proviso.

above, would be covered by Title VIII (proposed 18 U.S.C. § 1955), any securities fraud case, and virtually any state felony or federal misdemeanor involving drugs -- which would clearly include marijuana violations.

¹⁹ Commenting on the New York Bar Association's objections, Professor Blakey noted that:

Despite this testimony, Title IX was not only reported out, but the treble damage clause was added. Accordingly, those who seek to have the courts restrict the scope of the statute to curtail its application to fraud are refighting in the judicial forum a battle they lost in the legislative arena

Blakey, *supra* note 16, at 273 n. 112. (Emphasis in original).

²⁰ Senator McClellan, in explaining that RICO attempts to proscribe the type of crimes often committed by organized crime, praised their ingenuity:

Members of La Cosa Nostra and smaller organized crime groups are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit. It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.

HN16[] In light of Congress's recognition of RICO's broad scope, the refusal to omit such offenses as securities fraud from the list of predicate acts and in light of the liberal construction mandate, I conclude that a link to organized crime is not a requirement [****49**] of a civil RICO cause of action. Defendants' motion to dismiss on this ground is therefore denied.

3. Causation

HN17[] In order to collect treble damages under [section 1964\(c\)](#), a plaintiff must show that his injuries arise "by reason of a violation of [section 1962](#)." [18 U.S.C. § 1964\(c\)](#). Defendants contend that the complaint fails to allege a sufficient nexus between plaintiffs' injuries and the alleged violation of [section 1962](#). However, defendants are not really arguing that plaintiff did not suffer monetary damages as a result of the alleged fraudulent transactions. Rather, they are attacking the complaint for its failure to allege the *appropriate kind* of injury. See [Bennett v. Berg, 685 F.2d 1053, 1058-59 \(8th Cir. 1982\)](#) (arguing no injury to property). It is defendants' position that something more than merely the injury occasioned by the commission of two or more predicate acts must be alleged. Specifically, a plaintiff must allege some type of "racketeering enterprise injury" or an injury to commercial or competitive interests. Characterized as a "standing" requirement, this position is not without judicial support. See, e.g., [Harper v. New Japan Securities, I**501 International, Inc., 545 F. Supp. 1002, 1007 \(C.D. Cal. 1982\)](#); [Erlbaum v. Erlbaum, 1982 Fed. Sec. L. Rep. \(CCH\) P 98,772 at 93,922 \(E.D. Pa. 1982\)](#); [Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1136-37 \(D. Mass. 1982\)](#) (commercial, not competitive injury); [Landmark Savings & Loan v. Rhoades, 527 F. Supp. 206, 209 \(E.D. Mich. 1981\)](#) (racketeering enterprise injury); [North Barrington Development, Inc. v. Fauslow, No. 80-2644 \(N.D. Ill. Oct. 9, 1980\)](#). See also [Spencer Cos. v. Agency Rent-A-Car, Inc., 1981 Fed. Sec. L. Rep. \(CCH\) P 98,361 at 92,216 \(D. Mass. 1981\)](#) (discussing infiltration as a possible requirement). But see, e.g., [Schacht, 711 F.2d 1343, slip. op. at 30](#); [Bennett, 685 F.2d at 1059](#); [Hanna Mining, \[Current\]Fed. Sec. L. Rep. \(CCH\) P 98,742 at 93,737](#). Defendants' attempt to erect artificial barriers around a RICO cause of action is not warranted by the language, purpose or history of the statute.²¹

[**51] The concept of competitive or commercial injury is one borrowed from the field of antitrust. Although the courts requiring it have failed to define it, apparently it involves injury to plaintiffs' ability to compete. The court in *Landmark*, allegedly eschewing a competitive injury requirement, defined, by way of illustration, the concept of a "racketeering enterprise injury." [527 F. Supp. at 209](#). A plaintiff can sue under [section 1964\(c\)](#), the court opined, [**494**] "if a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering activity into the enterprise." *Id.* Despite the *Landmark* court's protestations to the contrary, I conclude that, as defined, **HN18**[a racketeering injury is indistinguishable from a competitive or commercial injury. The *Hanna* court, endeavoring to explain the latter concept, drew a scenario remarkably similar to the *Landmark* description. A plaintiff has a cause of action for an "illegal advantage gained by a defendant who operated or invested in an enterprise through racketeering activity." *Hanna*, 1982 Fed. Sec. L. Rep. (CCH) P 98,742 at 93,737.

Borrowing antitrust concepts [****52**] for application in the civil RICO context has a great deal of support in the legislative history. RICO was intended to combat the threat to the free market system posed by racketeer infiltration of legitimate business. Indeed, the antitrust laws were a model for RICO's civil provisions. Senator Hruska, in introducing a version of the civil statute noted:

116 Cong. Rec. at 18,940 (June 9, 1970).

²¹ The requirement of a commercial or competitive injury, like the necessity of proving a link to organized crime, may be reflective of judicial discomfort with the broad sweep of RICO. Indeed, the statute federalizes many state offenses and provides supplemental remedies in areas where remedies already exist. The *Harper* court expressed this sentiment by noting that "it is simply incomprehensible that a plaintiff suing under the securities laws would receive one-third the damages of a plaintiff suing under RICO for the same injury." [545 F. Supp. at 1007-08](#). Although a valid concern, it is one which is within the province of Congress. It is not the place of the judiciary to narrow a purposely broad statute by judicial fiat. As Professor Blakey commented, "the blunt truth is that some lower courts have been more intent on redrafting than reading RICO." *Blakey, supra* note 16, at 285.

Patterned closely after the Sherman Act, it provides for private treble damage suits, prospective injunctive relief, unlimited discovery procedures and all the other devices which bring to bear the full panoply of our antitrust machinery in aid of the businessman competing with organized crime.

...

The bill is innovative in the sense that it vitalizes procedures which have been tried and proven in the antitrust field and applies them where they have been seldom used before.

115 Cong. Rec. 6993 (March 20, 1969). [Section 1964\(c\)](#) closely tracks the language of section 4 of the Clayton Act.²²

[**53] However, there is a limit upon what translates well from the antitrust genre to organized crime. The American Bar Association rejected a proposal for amending the Sherman Act to provide a civil RICO remedy, preferring instead separate statutes. The Report of the Antitrust Division of the American Bar Association noted that "by placing the antitrust-type enforcement and discovery procedures in a separate statute, [from the antitrust statutes] a commingling of criminal enforcement goals *with the goals of regulating competition is avoided.*" 115 Cong. Rec. at 6995 (emphasis added). The Report went on to say:

On the other hand, by inserting in the Sherman Act a provision which does not have as its primary objective the establishment or maintenance of free competition, may result in an undesirable blending of otherwise laudatory statutory objectives. Criminal conduct which violates existing antitrust laws can be proceeded against under those laws. Additional conduct sought to be reached should be attacked under separate legislation.

Moreover, the use of antitrust laws themselves as a vehicle for combating organized crime could *create inappropriate and unnecessary* [**54] *obstacles in the way of persons injured by organized crime who might seek treble damage recovery.* Such a private litigant would have to contend with a body of precedent -- appropriate in a purely antitrust context -- setting strict requirements on questions such as "standing to sue" and "proximate cause."

115 Cong. Rec. at 6995 (emphasis added). This recommendation, which was adopted, recognized as inappropriate the application of the antitrust commercial injury-standing requirement in the RICO context. The court in *State Farm Fire and Cas. Co.*, observed that [section 1964\(c\)](#) was "cast as a separate statute intentionally to avoid the restrictive precedent of antitrust jurisprudence." [540 F. Supp. at 680](#). Along the same vein, Professor Blakey stated, "any suggestion that RICO actions be limited by antitrust-type limitations -- "competitive," "commercial," or "direct/indirect" injuries -- flies in the face of the very consideration that led to the drafting of RICO as a [*495] separate statute from the antitrust statutes that are so limited." *Blakey, supra* note 16, at 255 n. 52.

The American Bar Association Report also points up the different policies underpinning [**55] the antitrust and organized crime laws. The Eighth Circuit noted this policy distinction, stating that "although RICO borrowed the tools of antitrust law to combat organized criminal activity . . . Congress did not see the objectives of RICO and the antitrust laws as coterminous." [Bennett v. Berg, 685 F.2d at 1059](#) (citing S. Rep. No. 617 at 81-82; 115 Cong. Rec. 6993 (statement of Sen. Hruska); *id.* at 9567 (statement of Sen. McClellan); 116 Cong. Rec. at 607 (statement of Sen. Byrd); *id.* at 35, 193 (statement of Rep. Poff)). The limitations simply have no place in the organized crime context. [HN19](#)[↑] The goal of antitrust law is to promote free competition. Frivolous antitrust suits might ruin defendants, who are legitimate business persons. One less business in a given area will increase concentration, thus decreasing competition. In the organized crime context, it does not matter if an illegal business activity is ruined -- indeed that is exactly what RICO is endeavoring to accomplish. [Bennett, 685 F.2d at 1059](#). Thus, the policy underlying the limits placed on private antitrust suits is inapposite in the RICO milieu.

Finally, [HN20](#)[↑] reading a competitive injury requirement [**56] into [section 1964\(c\)](#) would create an insurmountable practical problem. This approach would literally require plaintiff to be in competition with defendant.²³ In the situation where an illegitimate enterprise is endeavoring to infiltrate and take over a competing business,

²² This similarity in language was a result of a suggestion made by the American Bar Association. *Hearings on S.30, 91st Cong., 2d Sess.* at 543-44 (1970) (testimony of Edward Wright, President Elect of the American Bar Association).

this requirement would not be a problem. However, all potential plaintiffs will not fit into this category, leaving certain targeted behavior unpunished. As one commentator noted: "the difficulty in proving causation may be significant for those plaintiffs who cannot prove infiltration." Note, *Application of the Racketeer Influenced and Corrupt Organization Act (RICO) to Securities Violations*, 8 J. Corp. L. 411, 435 (1983). This interpretation would be inconsistent with the broad remedial purposes behind RICO. As the court in *Hanna Mining* noted, "to conclude otherwise . . . would leave undisturbed racketeers whose activity does not infringe on their competitor's markets. It is untenable to suggest that Congress intended such a result." 1982 Fed. Sec. L. Rep. P 98,742 at 93,737. Accord, *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 248 (S.D.N.Y. 1981).

[**57] Given the legislative history and statutory objectives, I conclude that [HN21](#)[↑] RICO does not require proof of a commercial or competitive injury. As the Seventh Circuit recently observed: "RICO was broadly aimed at 'striking . . . a mortal blow against the property interests of organized crime.' This court is reluctant to undermine that broad mission of RICO by engraving onto its civil provisions a competitive injury requirement." *Schacht*, 711 F.1d at 1357 (citations omitted). Plaintiffs' allegations that their monetary losses were a result of defendants' innumerable acts of securities fraud are sufficient to state a cause of action under [section 1964\(c\)](#).

4. Collapse of "Enterprise" Into Predicate Acts

Defendants claim that the amended complaint must be dismissed for failure to allege an "enterprise" separate and distinct from the "pattern of racketeering." Muir is undistinguishable from the alleged acts of securities fraud, they contend, pointing to language in the complaint to the effect that defendants were "transforming the nature of the firm into a vehicle for underwriting speculative new issues." (Complaint at para. 29). This argument misperceives the nature of both [**58] the law and the facts, as set forth in the amended complaint.

Defendants are correct in insisting that [HN22](#)[↑] a RICO plaintiff must prove the existence of both an "enterprise" and a "pattern" [*496] of racketeering activity." As the United States Supreme Court observed; "the 'enterprise' is not the 'pattern of racketeering activity;' it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proven." [United States v. Turkette](#), 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981). On a very common-sense level, the *Turkette* court characterized the enterprise as the actors and the pattern as the unlawful acts.²⁴ *Id.* The court decided that the enterprise need not be a legitimate entity and that RICO applies with as much force to enterprises formed for wholly illegal purposes. [452 U.S. at 584-85](#).

[**59] The enterprise alleged by plaintiffs is the partnership Muir. The statute specifically mentions a "partnership" as an appropriate entity for an enterprise.²⁵ The pattern alleged is an ongoing scheme of securities fraud, perpetrated by defendants, who are affiliated in various ways with Muir. However, Muir has an existence distinct from this pattern of fraud. Even though the complaint alleges that defendants were transforming Muir into a vehicle for the underwriting of speculative issues, it is also alleged that Muir was a brokerage and investment banking firm until it went into receivership in August of 1981. (Complaint at para. 5). As such, it still rendered services to its customers apart from the alleged acts of fraud.

[**60] The Eighth Circuit rejected a remarkably similar argument in [Bennett v. Berg](#), 685 F.2d 1053 (8th Cir. 1982). In *Bennett*, plaintiffs were former residents of the John Knox Village retirement community. They sued the Village,

²³ Plaintiffs pose the following rhetorical question; "who would have standing to sue a group of racketeers who are engaged in a pattern of arson fraud? The gangster's competitors?" Brief in Opposition to Defendants' Motion to Dismiss at 26.

²⁴ The court defined [HN23](#)[↑] the enterprise as "an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." [452 U.S. at 583](#). The pattern of racketeering "is, on the other hand, a series of criminal acts as defined by the statute." *Id.*

²⁵ [HN24](#)[↑] Enterprise is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." [18 U.S.C. § 1961\(4\)](#). Thus an enterprise can either be a legal entity or an association of some form. See [Bennett v. Berg](#), 685 F.2d 1053, 1060 & 1060 n. 9 (8th Cir. 1982).

various officers and directors, its founder, mortgage lender, insurance company, former accountant and attorneys, alleging, *inter alia*, fraud, breaches of fiduciary duties and a RICO claim. [685 F.2d at 1057](#). An Entrance Endowment paid by those wishing to live in the Village entitled them to a specified apartment for life. An additional monthly charge covered food, laundry, medical services, transportation and building maintenance. The alleged fraud surrounded defendants promise of "affordable life care" and misrepresentations with respect to the financial well being of the Village, which was, at the time of suit, on the verge of bankruptcy. [Id. at 1056-57](#). The complaint depicted the Village as "pervasively fraudulent." [Id. at 1060](#). This allegation parallels the averred transformation of Muir. Defendants in *Bennett* argued that there were insufficient allegations of an enterprise distinct from the pattern of racketeering. The court noted [**61] that the complaint alleged that the Village "provided numerous legitimate services," and went on to conclude that "as an entity providing such services, and as an incorporated body under the laws of the State of Missouri, the John Knox Village corporation has an ascertainable structure apart from any predicate acts of mail fraud." *Id.* Muir, like the Village, has a structure apart from the predicate acts and apparently still provided legitimate brokerage services to its customers. Muir is also a legal entity, as was the Village.²⁶ Thus, under the *Bennett* approach, Muir would qualify as an "enterprise" for RICO purposes.

In support of their position, defendants cite [United States v. Lemm, 680 F.2d 1193 \(8th Cir. 1982\)](#), a case which actually undercuts [*497] their contention. In *Lemm*, the Eighth [**62] Circuit found the requisite separation between the enterprise and the pattern where the "enterprise" consisted of a loose federation of persons involved in an arson-insurance fraud ring.²⁷ Mail fraud constituted the predicate acts. [680 F.2d at 1201](#). A licensed insurance adjuster named Gamst recruited individuals to find property to purchase and then hired people to set fires to the properties and collected the insurance proceeds. The defendants in *Lemm* were Gamst's recruits. [Id. at 1196-97](#). The court stated:

The arson ring, through hand-delivery of insurance claims, could have conducted its activities without any predicate acts of mail fraud. In other words, if we eliminate for purposes of argument the predicate acts of mail fraud, the evidence still shows an on-going structure which engaged in legitimate purchases and repairs of property as well as acts of arson.

[Id. at 1201](#). Similarly, if the predicate acts of securities fraud were eliminated, Muir still had an on-going structure as a brokerage house. Moreover, despite the *Lemm* court's distinction, defendants' link to one another was only the perpetration of arson. Here, defendants are linked [**63] through a separate, legitimate business. Thus, I conclude that Muir was an enterprise distinct from the alleged securities fraud. Defendants' motion is therefore denied.

5. [Section 1962\(a\)](#)

Defendants' final RICO argument involves plaintiffs' failure to adequately allege a violation of [section 1962\(a\)](#) against defendant Peterson. [Section 1962\(a\)](#), set out in full *supra*, [HN25](#) [↑] basically prohibits an individual from using money received through a pattern of racketeering to invest in the enterprise. Peterson was a broker for Muir, but the complaint does not allege that he ever had any ownership interest in Muir, nor was it alleged that Peterson used the 5% commission he [**64] earned on plaintiffs' transactions to invest in the partnership. Thus, I conclude that on the face of the complaint, the requisites of a [section 1962\(a\)](#) are absent.²⁸ Defendants' motion on this point shall be granted. The [section 1962\(a\)](#) claim against Peterson is dismissed without prejudice to file a more specific pleading.

D. INFILCTION OF EMOTIONAL DISTRESS

²⁶ The *Bennett* court noted that an entity is more likely to be deemed an "enterprise" distinct from acts of racketeering when it is a creation of the law. [685 F.2d at 1060-61](#) and 1060 n. 9.

²⁷ The court in *Lemm* held that a RICO enterprise must meet three tests: (1) a shared purpose; (2) continuity of personnel and (3) a structure distinct from the pattern. [680 F.2d at 1198](#). The defendants, as affiliates of Muir had a shared purpose to defraud plaintiff. The continuity of personnel and requisite structure are also present.

²⁸ Plaintiffs' only rebuttal to this argument is the assertion that a claim was stated and the suggestion that the appropriate remedy is requiring a more specific pleading, rather than dismissal.

Count XI of the amended complaint purports to set out a claim for infliction of emotional distress, alleging that plaintiffs suffered significant mental and physical trauma as a result of defendants acts and that defendants knew or should have known that this would occur. Defendants move to dismiss this count, asserting that plaintiffs have not stated a cause of action for either negligent or intentional infliction of emotional distress.

At the outset, [**65] I note that it is not altogether clear whether plaintiffs are claiming negligent infliction of emotional distress. Although the count is labeled simply "infliction of emotional distress," the averment that defendants knew or should have known the results of their conduct bespeaks intentional action. In addition, plaintiffs responded to defendants' motion only on the intentional infliction issue, rendering unopposed defendants' motion on the negligent infliction issue. However, in the event that plaintiffs did intend to allege negligent infliction as well, I must agree with defendants that no cause of action has been established. Giving plaintiffs' factual allegations the most expansive reading possible, this case simply does not rise to the [*498] level of negligent infliction of mental distress. See, e.g., *Niederman v. Brodsky*, 436 Pa. 401, 403-04 261 A.2d 84, 90 (1970) (plaintiff can recover for injuries suffered as a result of watching son being struck by automobile when he was also in grave danger of being struck himself); *Sinn v. Burd*, 486 Pa. 146, 173, 404 A.2d 672, 686 (1979) (mother can recover for distress resulting from watching minor daughter struck and [**66] killed by automobile without herself being in the zone of danger); *Yandrich v. Radic*, 495 Pa. 243, 244, 433 A.2d 459, 460-61 (1981) (no recovery for plaintiff not present at all when son injured; equally divided court affirming court below). See also *Kutner v. Eastern Airlines, Inc.*, 514 F. Supp. 553, 558-59 (E.D. Pa. 1981) (no cause of action for distress suffered when plaintiffs drove home by car in bad weather conditions allegedly because airline failed to apprise them of their ability to take a bus or stay overnight).

With respect to the claim of intentional infliction of emotional distress, defendants argue that the alleged behavior does not rise to the level of "extreme and outrageous" conduct. Plaintiffs contend that whether the conduct was extreme and outrageous is a factual question for the jury to decide. Viewing all factual allegations and reasonable inferences drawn therefrom in a light most favorable to the plaintiff, I conclude that plaintiffs' complaint fails to establish outrageous conduct as a matter of law.

Section 46 of the Restatement (Second) of Torts defines the intentional infliction of emotional distress as follows:

HN26 [↑] One who by extreme and [**67] outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Restatement (Second) of Torts § 46(1)(1965). Although Pennsylvania has apparently adopted the Restatement formulation *sub silentio*, see *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co.*, 494 Pa. 501, 511 n.8, 431 A.2d 966, 971-72 n.8 (1981); *Papievas v. Lawrence*, 437 Pa. 373, 379, 263 A.2d 118, 121 (1970); *Jones v. Nissenbaum, Rudolph & Seidner*, 244 Pa. Super. 377, 382, 368 A.2d 770, 772 (1976), there is a paucity of caselaw on this topic. The Restatement definition has been broken into four elements by the Third Circuit: (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress and (4) the distress must be severe. See *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1273 (3d Cir. 1979). For purposes of their motion, defendants assume that plaintiffs have satisfied the last three elements -- contesting only whether the conduct was extreme and outrageous.

[**68] Only in very extraordinary cases have plaintiffs been held to state a cause of action under this tort. In *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979), the Third Circuit, predicting how Pennsylvania Supreme Court would rule, affirmed a district judge's decision to send the intentional infliction issue to the jury. There the team doctor had told a sportswriter that a famous football player was suffering from a fatal disease, polycythemia veria, knowing that he did not have that disease. Plaintiff later read this public prognosis and suffered severe mental anguish. This conduct, reasoned the court "could reasonably be regarded as extreme and outrageous." 595 F. Supp. at 1274. Similarly, in *Papievas v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970) the court found a cause of action for intentional infliction established where defendant struck plaintiff's son, killing him and, without informing anyone except a friend, hid the body. After a few days in his garage, the body was moved and

placed in a hand dug grave. The minor's parents were not informed until the partially decomposed remains were found and returned to plaintiffs. [437 Pa. at 375, 263 A.2d **691 at 121.](#)

These egregious situations must be compared with those cases denying a cause of action for intentional infliction. In [Mullen v. Suchko, 279 Pa. Super. 499, 421 A.2d 310 \[*499\] \(1980\)](#) a woman was asked by her lover to leave her job so she would be more free to travel with him. In return, he promised to care for her financially for the rest of her life. She left a job of thirty-three years and soon thereafter, he followed suit and left her. The court sympathetically noted that although defendant's actions were "inconsiderate and unkind," they were not "extreme and outrageous." [279 Pa. Super. at 505, 421 A.2d at 313.](#) In [Jones v. Nissenbaum, Rudolph & Seidner, 244 Pa. Super. 377, 368 A.2d 770 \(1976\)](#), a law firm hired by a credit company informed plaintiffs, by letter, that their homes were going to be sold from under them to satisfy their debts. The firm knew that under law, they could not hold a sale absent a hearing. Additionally, one plaintiff was verbally told, in front of neighbors, that he had 30 days in which to move his "junk" out. Again the court found that this failed to rise to the level of outrageous conduct. [244 Pa. Super. at 383-85, 368 A.2d at \[**70\] 744.](#) See also [D'Ambrosio, 494 Pa. at 511 n.8, 431 A.2d at 971-72 n.8](#) (insurance company's alleged "bad faith" failure to honor a claim does not rise to level of extreme or outrageous conduct); [Forster v. Manchester, 410 Pa. 192, 199-200, 189 A.2d 147, 151-52](#) (not outrageous to follow an accident victim, conducting surveillance to determine the extent of the injury); [Mazzula v. Monarch Life Insurance Co., 487 F. Supp. 1299, 1302 \(E.D. Pa. 1980\)](#) (not outrageous to refuse to continue to pay disability insurance).

Although this case does not fall neatly into either category, it most certainly is closer to the latter cases than the former. Plaintiffs strenuously argue that this is not a "garden variety" securities fraud case, but rather a course of fraudulent conduct perpetrated by a trusted advisor. However, that does not mean that the case rises to the level of outrageous conduct. It involves the mere loss of money, not the more personal loss of a life or health as in *Papieves* or *Chuy*. Comment (d) to [section 46](#) indicates:

HN27 [↑] Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible [**71] bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society. Generally, the case is one in which the recitation of facts to an average member of the community would arouse his resentment against the action, and lead him to exclaim "outrageous."

This case simply does not fit the above description and Count XI shall be dismissed.²⁹ To hold otherwise would transform every sophisticated confidence scheme into an action for intentional infliction of mental distress in clear derogation of the narrow scope accorded this tort by the Pennsylvania courts.

[**72] E. AIDING AND ABETTING

Defendant Mario Andretti moves to dismiss those counts of the amended complaint which attempt to characterize him as a participant in this securities fraud scheme. According to the amended complaint, Andretti's only involvement surrounds his introduction to the Kimmels during the Montreal Grand Prix in September of 1979. Dirks introduced Andretti as one of Muir's general partners at a party and "Andretti gave plaintiffs no reason to believe he was not a General Partner." Amended Complaint at para. 28. Andretti is apparently only a limited, rather than general, partner. This is the sole allegation against Andretti, with the exception of plaintiff's assertion that his conduct constitutes "aiding and abetting."

Defendant cites several grounds for his motion, some of which rely on extraneous evidence, reference to which would require me to treat this as a motion for summary judgment. Since I can dispose of this issue [*500] on the face of the complaint itself, I will not refer to this extraneous material.³⁰

²⁹ In his motion to dismiss, defendant Mario Andretti also notes that Count XI should be dismissed, as his failure to correct Mr. Peterson as to his status as a limited, rather than general partner in Muir fails to state a cause of action for intentional infliction. For all of the reasons stated above, I agree. Mr. Andretti's conduct is simply not "outrageous," as that term has been defined under Pennsylvania law. Count XI shall be dismissed against all defendants.

[**73] [HN28](#)[↑] In order to establish a claim of aiding and abetting in this Circuit, the plaintiff must satisfy a tripartite test. The plaintiff must allege and prove that (1) there was an underlying violation of the securities laws; (2) that the aider-abettor had knowledge of the violation and (3) that the aider-abettor "knowingly and substantially participated in the wrongdoing." [Monsen v. Consolidated Dressed Beef Co., Inc.](#), 579 F.2d 793, 799 (3d Cir. 1978), cert. denied, 439 U.S. 930, 99 S. Ct. 318, 58 L. Ed. 2d 323 (1979); [Gould v. American-Hawaiian Steamship Co.](#), 535 F.2d 761, 779 (3d Cir. 1976); [Landy v. Federal Deposit Insurance Corp.](#), 486 F.2d 139, 162-63 (3d Cir. 1973), cert. denied, 416 U.S. 960, 40 L. Ed. 2d 312, 94 S. Ct. 1979 (1974); [Keller v. Coyle](#), 499 F. Supp. 1031, 1033 (E.D. Pa. 1980). Many courts have couched the third prong in terms of "substantial assistance" in the achievement of the underlying violation. See, e.g., [SEC v. Seaboard Corp.](#), 677 F.2d 1289, 1296 (9th Cir. 1982); [Herm v. Stafford](#), 663 F.2d 669, 684 (6th Cir. 1981); [ITT, An International Investment Trust v. Cornfeld](#), 619 F.2d 909, 922 (2d Cir. 1980).

I will assume for purposes [**74] of this motion that an underlying violation of the securities laws has been established, thus satisfying the first prong. However, the complaint fails to allege that Andretti had any knowledge of the web of fraud allegedly woven by the other defendants. This violates the Third Circuit's directive that [HN29](#)[↑] an aider-abettor have "conscious involvement in impropriety or constructive notice of intended impropriety" or even a "general awareness that his role was part of an overall activity that is improper." [Monsen](#), 579 F.2d at 799 (citations omitted). In the absence of an allegation that Andretti knew of defendants' scheme, the motion to dismiss must be granted. *Accord*, [Keller v. Coyle](#), 499 F. Supp. 1031, 1034 (E.D. Pa. 1980) (motion for summary judgment granted in favor of defendants lacking knowledge of fraud).

In addition, the amended complaint fails to satisfy the final prong of the test. [HN30](#)[↑] Substantial assistance or participation is required to establish liability as an aider-abettor. The *Monsen* court noted that mere inaction without conscious participation does not rise to the level of aiding and abetting. [579 F.2d at 800](#). That is exactly what occurred here. Andretti [**75] failed to correct Dirks, but as far as the complaint is concerned, did so without knowledge or the intent to participate. Moreover, even if Andretti had knowledge or the necessary intent, there would still be a serious question as to whether his activity could rise to the level of substantial assistance. It is highly unlikely that Andretti's silence as to his type of partnership interest substantially assisted the other defendants in their quest to dupe Kimmel into becoming a partner. Andretti's alleged role in this venture was so minuscule as to be incapable of supporting a claim of aider-abettor liability. For these reasons, Mario Andretti's motion to dismiss for failure to state a claim shall be granted.

An appropriate order follows.

ORDER

AND NOW, this 6th day of May, 1983, for the reasons stated in the foregoing Memorandum, it is hereby ORDERED that Defendants' Motion to Dismiss shall be GRANTED in part and DENIED in part.

1. Count II of the Amended Complaint, asserting a cause of action under section 17(a) of the Securities Act of 1933 is DISMISSED with prejudice.
2. Count XI of the Amended Complaint, asserting a cause of action for infliction of emotional distress [**76] is DISMISSED with prejudice.
3. The allegation in Count VI accusing Peterson of violations of [18 U.S.C. § 1962\(a\)](#) is DISMISSED without prejudice.

³⁰ Defendant argues that since Kimmel had to sign the partnership agreement before becoming a partner and since that agreement listed Andretti as a limited partner, Kimmel had notice and no fraud occurred. Were I to rest my decision on the partnership agreement submitted by Andretti, I would probably agree. This impacts upon the materiality of the misrepresentation. While it is dubious in the abstract, whether Andretti's misrepresentation would be material to Kimmel's decision to become a limited partner in Muir, knowledge would certainly defeat materiality. I note that it is not clear that Andretti had a duty to correct Dirks' misstatement.

4. The aiding and abetting allegations directed at Andretti in Counts I and IV are DISMISSED without prejudice.

ORDER

AND NOW, this 27th day of May, 1983, it is hereby ORDERED that the Memorandum dated May 6, 1983 is MODIFIED as follows:

1. Page 2, line 7 should read "the well-pled allegations"
2. Page 22, line 14 should read "This same reasoning led"
3. Page 22, line 17 should read "would similarly eviscerate"
4. Page 28, line 13 should read "as specified state law"
5. Page 28, line 14 should begin with the word "offenses."
6. Page 28, line 20 should begin "U.S.C. [§ 1961 \(4\)](#)."
7. Page 58, line 12 should read "Mario Andretti's motion"

BY THE COURT: James T.Giles, Judge

End of Document

In re Fertilizer Antitrust Litigation

United States District Court for the Eastern District of Washington.

May 11, 1983

Master File No. MF-75-1.

Reporter

1983 U.S. Dist. LEXIS 17042 *; 1983-1 Trade Cas. (CCH) P65,418

In re Fertilizer Antitrust Litigation (This Document Relates to: Washington, No. C-75-118, Montana, No. C-75-119, Idaho, No. C-75-120, Smith, No. C-75-121, Alaska, No. C-75-156, Oregon, No. C-76-287).

Core Terms

damages, prices, overcharge, wholesale, retail, defendants', plaintiffs', subsidiary, purchaser

LexisNexis® Headnotes

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

Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

HN1[Private Actions, Purchasers

Direct purchasers-retailers of defendants' goods are entitled to their entire damages, even though all or part of those damages may be passed on to plaintiffs' customers. The rule is that a defendant may not use a "defensive pass-on theory."

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

HN2[Private Actions, Purchasers

A pass on theory may not be used offensively by an indirect purchaser. An indirect purchaser would be denied the right to recover for unlawful overcharges by the manufacturers that are passed on to plaintiff-indirect purchasers by the retailers.

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

HN3[Private Actions, Purchasers

Actions by the indirect purchasers is precluded. Exceptions to that rule would be made only where there is no danger that the middleman or subsidiary would also sue, thereby making defendant subject to multiple liability and where there is relatively straight forward proof of the passing on.

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

HN4 **Private Actions, Purchasers**

Under an umbrella theory, the result of any attempt to ascertain with reasonable probability whether the non-conspirators' prices resulted from defendants' purported price-fixing conspiracy or from numerous other pricing considerations would be speculative. The causal effect of each pricing decision would have to be pursued through the chain of distribution.

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

HN5 **Private Actions, Purchasers**

A method of measuring damages, known as the "before and after" theory, may be used only where there is some showing that the market conditions in the two periods are similar but for the impact of the violation.

Counsel: [*1] C. David Sheppard, Christopher C. Kane, of Ferguson & Burdell, Seattle, Wash., Bruce M. Hall, P.C., Portland, Ore., James M. Beaulaurier, Asst. Atty. Gen., Seattle, Wash., for States of Wash., Alas., Idaho, Mont., and Ore., John H. Smith, Edward Minoggie, for plaintiffs

George A. Cumming, Jr., Kelly C. Wooster, of Brobeck, Phleger and Harrison, San Francisco, Cal., Hans E. Menter, Los Angeles, Cal., for Union Oil Co. of Cal.; Peter D. Byrnes, Patricia H. Char, of Bogle & Gates, Seattle, Wash., Andrew H. Schmeltz, Jr., Bartlesville, Okla., for Phillips Petroleum Co. and Phillips Pacific Chemical Co.; Gary H. Anderson, Reginald D. Steer, and Donald J. Puttermann, of Pillsbury, Madison & Sutro, San Francisco, Cal., for Chevron Chemical Co.; James L. Magee and Philip E. Cutler, of Sax & MacIver, Seattle, Wash., Stanton B. Better, Spokane, Wash., for Cominco American, Inc.; Carl J. Schuck, Frederick A. Clark, and Gwen H. Whitson, of Overton, Lyman and Prince, Los Angeles, Cal., Stephen Beebe, Boise, Ida., for J.R. Simplot Co. and Simplot Industries, Inc.; William Simon and Robert G. Abrams, of Howrey & Simon, Washington, D.C., Raymond V. McCord, Houston, Tex., for Shell Oil Co.; Shell [*2] Chemicals, Inc., IND/AG Chemicals, Inc., and Western Fram Service, Inc., for defendants

Opinion by: BILBY

Opinion

Order

BILBY, D.J.: This Matter comes before the Court upon the motions by defendants to strike the report of plaintiffs' expert, Dr. Raymond J. Folwell and for summary judgment.

Background

This antitrust action was filed in 1975. After seven years of litigation, trial was set for September, 1983. Plaintiffs allege that the defendants, who are Pacific Northwest fertilizer manufacturers, conspired from 1971 to 1975 to fix their wholesale prices artificially high. This unlawful wholesale overcharge was passed on to end users who are plaintiffs or potential members of one of the plaintiff classes. Defendants' subsidiary retailers are not named

defendants. No retailer, whether a defendant's outlet or an independent retailer, is alleged to be a co-conspirator or to have participated in any antitrust conduct.

On February 2, 1983, plaintiffs filed the "Statement of Opinions, and Bases Therefor, of Dr. Raymond Folwell." Dr. Folwell is an agricultural economist at Washington State University. His report is the basis of plaintiffs' damages theory, both as to fact of damages [*3] and amount of damages. After his report was filed, defendants deposed Dr. Folwell and submitted the twelve volume deposition to the Court with their motions. Both parties understood that this report would be the entire and final basis of plaintiffs' damages theory and that, therefore, if the Court rejected it, litigation would be at an end.

Defendants claim the Dr. Folwell's report is inadmissible. There are three grounds for their challenge:

1. Plaintiffs' damages claim for the alleged unlawful wholesale overcharge plus the total retail mark-up is wrong as a matter of law.
2. Regardless of the measure of damages to which plaintiffs would be entitled in law, Dr. Folwell's methodology is fatally flawed by the use of a 1971-1973 base period (during which time a federally imposed price freeze was in effect), which is not comparable to the 1973-1975 period of the alleged unlawful conduct.
3. Dr. Folwell's opinions are inadmissible because they are based on matters outside his expertise.

The Measure for the Amount of Damages in an Antitrust "Pass On" Case

The plaintiffs claim that they are entitled to damages in an amount which is the difference between actual retail [*4] prices and what retail prices would have been absent the illegal activity. In essence their claim is based on two arguments. First, they assume that the entire wholesale overcharge was passed on by the retailers to the plaintiffs and that the unlawful overcharge perhaps tainted the retail operation so that cost saving efforts were undermined. Second, to sort out the legitimate retail costs and mark-ups which were unaffected by the wholesale overcharge is too complex and burdensome. Defendants' position is that where an ultimate purchaser is allowed to sue a manufacturer or wholesaler in a "pass on" case, the amount of damages is limited to, at most, the illegal overcharge at the wholesale level.

Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323 (9th Cir. 1980) controls this case. In Royal Printing, two plaintiffs, Haythornewhite and Royal Printing, sued various paper manufacturers for violations of the Sherman Act including price fixing. The district court dismissed the action on the ground that plaintiffs were not direct purchasers as required by *Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)*. After analyzing *Hanover Shoe, Inc. v. United Shoe Machinery Co., 392 F.2d 481 (1968)* and Illinois Brick, the leading "pass on" cases,¹ the Court of Appeals affirmed as to Haythornewhite because its paper purchases were made from independent wholesalers. *621 F.2d at 328*. The Court reversed as to Royal Printing, holding that Illinois Brick does not bar an indirect purchaser's suit where the direct purchaser is a division or subsidiary of a co-conspirator and where there is no danger of multiliability to the defendant and no undue complexity of proof of damages. *Id. at 326*.¹

[*6] The Court made clear that the measure of damages was the unlawful overcharge. The only question was whether or not plaintiffs were entitled to the entire illegal overcharge or had to trace how much of the illegal

¹ In Hanover the Supreme Court held that plaintiffs, *HN1*[↑] direct purchasers-retailers, of defendants' goods were entitled to their entire damages, even though all or part of those damages may have been passed on to the plaintiffs' customers. The case established the rule that a defendant may not use a "defensive pass-on theory." In Illinois Brick the Court again confronted the question of whether the overcharged direct purchaser should be deemed to have suffered the full injury from the alleged wholesale overcharge; but the issue was presented in the context of a suit by an indirect purchaser seeking to show its injury by establishing pass on by the direct purchaser. The Court held that, in keeping with Hanover, *HN2*[↑] a pass on theory may not be used offensively by an indirect purchaser. Indirect purchasers would be denied the right to recover for unlawful overcharges by manufacturers which were passed on to the plaintiff-indirect purchasers by retailers.

overcharge was passed on to them by the wholesaling subsidiary. The Court held that Royal Printing could sue the defendants for the entire illegal overcharge:

Determining what portion of the illegal overcharge was "passed on" to the Royal Printing and what part was absorbed by the middlemen would involve all the evidentiary and economic complexities that Illinois Brick clearly forbade. [431 U.S. at 731-32](#) . . . Thus Royal Printing cannot sue the appellees only for the portion of the overcharge that was passed on to it through the wholesaling subsidiary and division.

[*Id. at 327.*](#)

The Court made clear that Illinois Brick would most often preclude [HN3](#) actions by indirect purchasers. Exceptions to that rule would be made only where there was no danger that the middleman or subsidiary would also sue, thereby making the defendant subject to multiple liability and where there is relatively straight forward proof of the passing on. From the foregoing it held that:

The [*7] only alternatives are to allow Royal Printing to sue the appellees for the entire amount of the overcharge to the wholesalers, or not to allow Royal Printing to sue the appellees at all. *Id.* See also II Areeda and Turner, [**Antitrust Law**](#) P337a, p. 183 (1978).

At oral argument plaintiffs contended that Royal Printing applies only to declining market situations. Nothing in that opinion supports such an interpretation. Furthermore the Ninth Circuit's rejection of the "umbrella theory" of damages in antitrust price fixing cases supports this Court's conclusion. *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, [691 F. 2d 1335 \(9th Cir. 1982\)](#) dealt with a suit brought by various western states against 16 oil companies alleging a conspiracy to raise prices of refined petroleum products. Plaintiffs argued that defendants' successful price fixing conspiracy created a "price umbrella" or market situation where non-conspiring competitors of the defendants were able to raise their prices at or near the fixed price; because defendants created the situation, they should be held responsible for damages resulting from their competitors' higher prices. [691 F. 2d 1338-39](#). The umbrella damages theory is very close to the one which plaintiffs offer here. The Ninth Circuit rejected it under the rationale of Illinois Brick and concluded that the measure of damages could only be the original unlawful overcharge. [*Id. at 1339.*](#)

Although we recognize that the "difficulty of ascertainment should not be confused with a right of recovery . . .," we nevertheless must consider whether "a claim rests at bottom on some abstract conception or speculative measure of harm."

[HN4](#) Under an umbrella theory, the result of any attempt to ascertain with reasonable probability whether the non-conspirators' prices resulted from the defendants' purported price-fixing conspiracy or from numerous other pricing considerations would be speculative to some degree. . . . The causal effect of each pricing decision would have to be pursued through the chain of distribution.

[*Id. at 1341.*](#)

Plaintiff's damages calculation was done using retail prices. Plaintiffs rejected a damages claim for the amount of the unlawful wholesale increase arguing that such a claim would be inadequate recompense for their injury. Their damages claim is wrong as matter of law.

Recognizing [*9] the Court's position on this question, the plaintiffs at oral argument moved to amend their damages report claiming that within two weeks they could gather a wholesale data base to run through the computer and estimate damages based on a wholesale price increase. Counsel represented that the data Dr. Folwell would use would not correspond well with reality, but that plaintiffs were willing to "presume their way out of reality" into the Court's interpretation of Royal Printing. Aside from the fact that such a procedure would most likely take in excess of two months and that the Court had instructed plaintiffs that they would have but one opportunity to present a damages theory, there is an entirely separate basis both for denying plaintiffs' motion to amend and for striking Dr. Folwell's report.

Dr. Folwell's Methodology

Dr. Folwell used a straight line regression analysis to estimate the amount of damages. It is not necessary to discuss how this method works except that Dr. Folwell relies on a base period of 1971 through October, 1973. Pacific Northwest retail fertilizer prices were analyzed so as to chart a sloping straight line which tracked the rate of price increases during [*10] that period. During that time the federal price freeze was in effect. The line was then extended to predict what prices would have been in 1973 to 1975 in the absence of illegal price fixing. Defendants say that, regardless of whether one charts retail or wholesale prices, Dr. Folwell's use of the federal price control period as a period of comparison is irrational and untrustworthy. Logic and common sense suggest that defendants are correct.

In [*Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F. 2d 1196, 1206-1207 \(9th Cir. 1976\)*](#), the Ninth Circuit stated:

Plaintiffs' [HN5](#) method of measuring damages, known as the "before and after" theory, may be used only where there has been some showing that the market conditions in the two periods were similar but for the impact of the violation.

Although Dr. Folwell testified that he knew, in general, how the price controls worked, nothing before the Court shows that he or counsel for the plaintiffs attempted to study how the price controls in fact worked in relation to Pacific Northwest fertilizer prices.

Rather than offering a factual, economic analysis which might justify the use of the freeze period, plaintiffs [*11] offer a logical argument which fails to stand up. They state that whatever price increases did occur during the freeze had to be approved by the federal government based upon costs. They assume without any basis in logic or fact that increases during that time reflected all actual costs. These assumptions are mere speculation which render Dr. Folwell's report invalid and inadmissible. See [*Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F. 2d 71, 86-87 \(9th Cir. 1969\)*](#) cert. denied, 396 U.S. 1062 (1970); [*Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co., Inc., 690 F. 2d 411, 414 \(4th Cir. 1982\)*](#).

Even if the Court were inclined to allow plaintiffs to recalculate damages on the basis of wholesale, rather than retail, prices, the Court finds that Dr. Folwell's method which is based upon an invalid period of comparison is inadmissible under [*Federal Rules of Evidence 702*](#). It is logically unsound and without value for a jury. See [*Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F. Supp. 1313, 1353-54 \(E.D.Pa. 1980\)*](#).

Conclusion

Based on the foregoing reasoning, it is unnecessary to address defendants' third argument.

It Is [*12] Ordered that defendants' motions to strike Dr. Folwell's report and for summary judgment are Granted.



Marrese v. American Academy of Orthopaedic Surgeons

United States Court of Appeals for the Seventh Circuit

February 26, 1982, Argued ; May 11, 1983, Decided

No. 81-2671

Reporter

706 F.2d 1488 *; 1983 U.S. App. LEXIS 28078 **; 1983-1 Trade Cas. (CCH) P65,365; 36 Fed. R. Serv. 2d (Callaghan) 412

R. ANTHONY MARRESE, M.D. and MICHAEL R. TREISTER, M.D., Plaintiffs-Appellees, v. AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, Defendant-Appellant

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 80 C 1405 -- Milton I. Shadur, Judge.

Disposition: Reversed.

Core Terms

discovery, Academy, membership, orthopaedic, files, district court, competitors, surgeons, discovery order, boycott, district judge, cases, plaintiffs', antitrust, consumer, contempt, hardship, en banc, confidentiality, judgment of contempt, surgery

LexisNexis® Headnotes

Civil Procedure > Sanctions > General Overview

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Contempt > General Overview

[**HN1**](#) **Civil Procedure, Sanctions**

The contempt judgment is a final order, reviewable by the court; and if a party is willing to pay the price of being punished for contempt or suffering an equivalent sanction such as dismissal of the complaint if the validity of the order he has disobeyed is ultimately upheld, he may get immediate review of that order by appealing from the contempt judgment.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Contempt > General Overview

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Contempt > General Overview

HN2[ Appellate Jurisdiction, Final Judgment Rule

Where the validity of an underlying order is held not to be reviewable on appeal from the judgment of contempt, the order can be appealed as of right directly, which discovery orders cannot be. The right to have a discovery order reviewed on appeal from a contempt judgment thus serves as a safety valve in the final-judgment rule of [28 U.S.C.S. § 1291](#). Such an order may impose heavy and irrecoverable costs on a party; yet to make discovery orders appealable as of right would lead to unacceptable delays in federal litigation. Confining the right to get appellate review of discovery orders to cases where the party against whom the order was directed cared enough to incur a sanction for contempt is a crude but serviceable method of identifying the most burdensome discovery orders and waiving the finality rule only for them.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Types of Evidence > Testimony > Presentation of Evidence

Civil Procedure > Discovery & Disclosure > General Overview

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

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN3[ Judges, Discretionary Powers

Fed. R. Civ. P. 26(c) empowers the district court to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including that discovery not be had, and *Rule 26(d)* empowers the court, upon motion, for the convenience of parties and witnesses and in the interests of justice, to control by order the sequence and timing of discovery. Although the effective management of complex litigation requires that the district judge be allowed broad discretion in guiding the discovery process and therefore in exercising his powers under *Rules 26(c) and (d)*, his discretion is not unlimited, and if the court has a firm conviction that he has made a mistake the court must reverse.

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

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN4[ Discovery, Methods of Discovery

In ruling on a motion to limit discovery the district judge must compare the hardship to the party against whom discovery is sought, if discovery is allowed, with the hardship to the party seeking discovery if discovery is denied. He must consider the nature of the hardship as well as its magnitude, and thus give more weight to interests that have a distinctively social value than to purely private interests. He must go through the same analysis under *Fed. R. Civ. P. 26(d)* except that obviously an order merely postponing a particular discovery request should be granted more freely than an order denying the request altogether. The hardship to the party seeking discovery is less if he is just being told to complete his other discovery first, or just to let the other party have some discovery first, than if he is being told to do without forever.

706 F.2d 1488, *1488LÁ1983 U.S. App. LEXIS 28078, **1

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

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

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

HN5 Summary Judgment, Opposing Materials

Fed. R. Civ. P. 26(d) provides a method of accommodating competing interests with minimal damage to either. If there is other discovery that the plaintiffs must complete in order to be able to resist a motion by the defendant for summary judgment, and thus a significant chance that the plaintiffs' case will fail regardless of what the internal files that they are seeking may show, the district judge should use his power under *Rule 26(d)* to require the plaintiffs to complete the other, nonsensitive discovery first. His power to do so cannot be questioned. Nor his duty, in an appropriate case. As a threshold matter, the court should be satisfied that a claim is not frivolous, a pretense for using discovery powers in a fishing expedition.

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

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN6 Discovery, Methods of Discovery

Discovery of sensitive documents is sometimes sought not in a sincere effort to gather evidence for use in a lawsuit but in an effort to coerce the adverse party, regardless of the merits of the suit, to settle it in order not to have to disclose sensitive materials. The use of the liberal discovery provisions of the Federal Rules of Civil Procedure to harass opponents is common, and requires the vigilance of the district judges to prevent. The power granted by *Fed. R. Civ. P. 26(d)* to control the sequence and timing of discovery is one of the district courts' too little used tools for preventing the predatory abuse of discovery. Judges should not hesitate to exercise appropriate control over the discovery process.

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

HN7 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se -- for example, price-fixing agreements. Boycotts cannot be deemed illegal per se on the basis of their impact on competitors rather than on the consuming public, if there is no direct effort to influence the supply of, or demand for, a competitor's product.

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

HN8 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Membership restrictions by trade organizations not possessed of significant economic or operational leverage are more appropriately evaluated according to the standards of the rule of reason. What is "significant economic or operational leverage" is a matter of proof.

[Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview](#)

[HN9](#)[] Regulated Industries, Higher Education & Professional Associations

The policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors, and a consumer has no interest in the preservation of a fixed number of competitors greater than the number required to assure his being able to buy at the competitive price.

[Civil Procedure > ... > Discovery > Methods of Discovery > General Overview](#)

[Civil Procedure > Discovery & Disclosure > General Overview](#)

[Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders](#)

[Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery](#)

[HN10](#)[] Discovery, Methods of Discovery

A district court has the power under *Fed. R. Civ. P.* 26(c) and (d), and in a clear case the duty, to defer a burdensome discovery request pending completion of discovery on an issue that may dispose of the entire case and thereby make the request moot.

[Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders](#)

[Civil Procedure > Appeals > Appellate Jurisdiction > General Overview](#)

[HN11](#)[] Appellate Jurisdiction, Interlocutory Orders

When a judge refuses to make a certification in writing that he is of the opinion that an 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, an appellate court has no jurisdiction to review his interlocutory order.

Counsel: Michael T. Sawyier, Foss, Schuman & Drake, Chicago, Illinois John J. Casey, W. Washington, Chicago, Illinois for Plaintiff.

D. Kendall Griffith, Hinshaw, Culbertson, Moelman, Hoban & Fuller, Chicago, Illinois for Defendant.

Judges: Pell, Circuit Judge, Stewart, Justice (Retired), and Posner, Circuit Judge. * Stewart, Justice (Retired), dissenting.

Opinion by: POSNER

Opinion

[*1492] POSNER, Circuit Judge.

This is an appeal from a judgment for criminal contempt for disobeying a discovery order. The appeal was originally decided by this panel in an opinion published at [692 F.2d 1083 \(7th Cir. 1982\)](#), with Justice Stewart dissenting, *id. at 1096*. Rehearing *en banc* was granted, but shortly before argument was scheduled to be [**2] heard it became apparent that the reservations of the judges who had voted to rehear the case concerned the breadth of the panel's majority opinion, and that if the panel majority was willing (as it was) to write a more narrowly focused opinion, *en banc* consideration could be obviated. This is that opinion. It has been circulated to all the members of the court in regular active service so that the court could decide, not whether it wants to adopt this opinion as the opinion of the court *en banc*, but whether it wants to go ahead with the scheduled *en banc* rehearing of the prior opinion; and the court by majority vote has decided to vacate the order granting rehearing *en banc*.

The American Academy of Orthopaedic Surgeons is a private association to which most orthopaedic surgeons in the United States belong. The plaintiffs, two orthopaedic surgeons practicing in Evansville, Indiana, and Chicago, respectively, were denied membership in the Academy without a hearing or a statement of reasons. Although membership in the Academy is alleged to confer certain professional advantages, it is not a prerequisite either to being certified to practice as an orthopaedic surgeon [**3] or to obtaining hospital staff privileges; each of the plaintiffs is certified to practice orthopaedic surgery, and has staff privileges at several hospitals.

The plaintiffs first sued the Academy in an Illinois state court, claiming a right under Illinois law to a hearing on their application and to reasonable standards for membership. They lost; the Illinois Appellate Court held that the complaint failed to state a claim because membership in the Academy is not an "economic necessity." [Treister v. American Academy of Orthopaedic Surgeons, 78 Ill. App. 3d 746, 755-56, 396 N.E.2d 1225, 1232, 33 Ill. Dec. 501 \(1979\)](#). They then sued the Academy in federal district court, seeking injunctive relief and damages under [section 1](#) of the Sherman Act, [15 U.S.C. § 1](#). The complaint alleged that the Academy is "a monopoly in its field, possessed of substantial power to control the market for orthopaedic surgical services," and that the plaintiffs, though fully qualified for membership under the announced criteria of the Academy, were denied membership for "extraneous" reasons, which in the case of Dr. Treister (no particulars were given for Dr. Marrese) included "(a) his supposed willingness [**4] to offer expert testimony against other orthopaedic surgeons in medical malpractice cases; (b) his known willingness to consult surgical out-patients on a relatively high-volume basis; and (c) his nonconformity of personality and personal attitudes with those of most established orthopaedic surgeons and in particular those who were already members of the academy." The complaint alleged that the effect of denying the plaintiffs' applications for membership had been "to limit competition and enforce conformity with current business practices" and to injure the plaintiffs in the practice of their profession.

Discovery began. The plaintiffs asked the Academy to produce all of its correspondence and other documents relating to the denial of the plaintiffs' applications for membership and to all other denials of membership applications between 1970 and 1980. The Academy refused, even after the court ordered it to produce the requested documents. The court held the Academy in criminal contempt and fined it \$10,000, and this appeal followed.

* Judge Sprecher was originally the third member of the panel, but his untimely death prevented his participation in the decision of this case. Judge Posner took his place and read the briefs and pertinent portions of the record and listened to the tape recording of the oral argument.

The Academy asks us to hold that the discovery order was improper, but the plaintiffs point out that it is not a final order and argue that we [**5] cannot review it because the district court has not certified it for an immediate appeal under [28 U.S.C. § 1292\(b\)](#). [HN1](#)[¹] The contempt judgment, however, [*1493] is a final order, reviewable by us; and if a party is willing to pay the price of being punished for contempt or suffering an equivalent sanction such as dismissal of the complaint if the validity of the order he has disobeyed is ultimately upheld, he may get immediate review of that order by appealing from the contempt judgment. E.g., [United States v. Ryan, 402 U.S. 530, 532-33, 29 L. Ed. 2d 85, 91 S. Ct. 1580 \(1971\)](#); [Ryan v. Commissioner of Internal Revenue, 517 F.2d 13, 19-20 \(7th Cir. 1975\)](#); [Hanley v. McHugh Constr. Co., 419 F.2d 955, 957 \(7th Cir. 1969\)](#); [National Util. Serv., Inc. v. Northwestern Steel & Wire Serv., Inc., 426 F.2d 222 \(7th Cir. 1970\)](#); [Hastings v. North East Independent School Dist., 615 F.2d 628, 631 \(5th Cir. 1980\)](#).

True, some cases hold, in apparent contradiction to the above, that where as in this case the judgment is for criminal rather than civil contempt the validity of the underlying order may not be questioned on appeal from the contempt judgment. E.g., [United States](#) [**61] [v. United Mine Workers of America, 330 U.S. 258, 291-94, 91 L. Ed. 884, 67 S. Ct. 677 \(1947\)](#); [ITT Community Development Corp. v. Barton, 569 F.2d 1351, 1356 \(5th Cir. 1978\)](#). Yet our decision in *Hanley*, for example, involved criminal contempt; and the two lines of cases can be reconciled, see [Hanley v. McHugh Constr. Co., supra, 419 F.2d at 957](#); [United States v. Ryan, supra, 402 U.S. at 532 n.4](#); 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3537, at pp. 340-41 (1975), by noting that [HN2](#)[¹] in the cases where the validity of the underlying order was held not to be reviewable on appeal from the judgment of contempt the order could have been appealed as of right directly, which discovery orders cannot be. The right to have a discovery order reviewed on appeal from a contempt judgment thus serves as a safety valve in the final-judgment rule of [28 U.S.C. § 1291](#). Such an order may impose heavy and irrecoverable costs on a party; yet to make discovery orders appealable as of right would lead to unacceptable delays in federal litigation. Confining the right to get appellate review of discovery orders to cases where the party against whom the order was directed [**7] cared enough to incur a sanction for contempt is a crude but serviceable method of identifying the most burdensome discovery orders and waiving the finality rule only for them.

The validity of the discovery order that the Academy disobeyed is therefore properly before us. *Rule 26(c) of the Federal Rules of Civil Procedure* [HN3](#)[¹] empowers the district court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that discovery not be had . . .," and *Rule 26(d)* empowers the court, "upon motion, for the convenience of parties and witnesses and in the interests of justice," to control by order the sequence and timing of discovery. Although the effective management of complex litigation requires that the district judge be allowed broad discretion in guiding the discovery process and therefore in exercising his powers under *Rules 26(c)* and (d), [Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1240 \(6th Cir. 1981\)](#), his discretion is not unlimited, and if we have a firm conviction that he has made a mistake we must reverse. [Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436 \(10th Cir. 1977\)](#). [**8]

[HN4](#)[¹] In ruling on a motion to limit discovery the district judge must compare the hardship to the party against whom discovery is sought, if discovery is allowed, with the hardship to the party seeking discovery if discovery is denied. He must consider the nature of the hardship as well as its magnitude, and thus give more weight to interests that have a distinctively social value than to purely private interests. He must go through the same analysis under *Rule 26(d)* except that obviously an order merely postponing a particular discovery request should be granted more freely than an order denying the request altogether. The hardship to the party seeking discovery is less if he is just being told to complete his other discovery first (or just to let the other party have some discovery first) than if he is being told to do without forever.

[*1494] In an effort to show that more than purely private interests are at stake, the Academy argues that its correspondence and other documents relating to denials of applications for membership are protected by the [First Amendment](#). This argument, if meant to establish a complete immunity from discovery of these materials in a lawsuit, is [**9] untenable. See, e.g., [Memorial Hospital for McHenry Cty. v. Shadur, 664 F.2d 1058, 1063 \(7th Cir. 1981\)](#) (per curiam), rejecting a claim of privilege for a hospital's records of disciplinary proceedings against staff physicians. Even if the Academy were engaged in advocating controversial views and the publication of its internal files would expose members to retaliation for those views, it would not have an absolute privilege against discovery,

though the plaintiffs would then have the burden of showing that the information sought was essential to their case and unobtainable by other means that would be less likely to discourage such advocacy. See [Hastings v. North East Independent School Dist., supra, 615 F.2d at 632](#); [In re Petroleum Prods. Antitrust Litigation, 680 F.2d 5, 7 \(2d Cir. 1982\)](#); [Gray v. Board of Educ. of City of N.Y., 692 F.2d 901, 903-05 \(2d Cir. 1982\)](#).

Yet there is in this case, if not a [First Amendment](#) right, at least a [First Amendment](#) interest -- maybe two [First Amendment](#) interests -- which the discovery sought by the plaintiffs would impair and which differentiates this from the usual antitrust case, where discovery is sought of invoices or salesmen's [**10](#) reports or the minutes of a corporation's board of directors. The Academy is a forum for exchanges of information about surgical techniques and related matters of substantial public interest. These exchanges may be inhibited if the Academy has to disclose its membership files. The protective order that the district judge entered is not a complete answer, not only because it is the kind of lawyers' arrangement that laymen instinctively distrust but also because the particular order allows the plaintiffs themselves, and not just their counsel -- allows, in other words, two disappointed applicants for memberships -- to get hold of their files. If the Academy complies with the discovery order its members may be reluctant to offer candid evaluations of applicants in the future, and the atmosphere of mutual confidence that encourages a free exchange of ideas will be eroded. Cf. [NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 \(1958\)](#), where in a case involving resistance to disclosure of membership information in discovery proceedings the Supreme Court recognized a [First Amendment](#) right of association for the purpose of expression and advocacy of [**11](#) ideas. And setting aside constitutional considerations, one should not have to raise the ghosts of Aristotle and de Tocqueville to be reminded that voluntary associations are important to many people, Americans in particular, that voluntary professional associations are important to American professionals (a proposition that is the premise of the plaintiffs' antitrust suit as it was of their Illinois suit), that confidentiality of deliberations on membership applications is essential to the voluntary character of an association, and therefore that the involuntary disclosure of the membership files of a voluntary association may harm worthy private interests.

Although disclosure of the files sought by the plaintiffs would thus be costly, nondisclosure might make it impossible for them to prove their antitrust case or even to discover whether they have a meritorious case. Since the interest in the confidentiality of an association's membership deliberations is not absolute, the balance of hardships may therefore seem even. But *Rule 26(d) of the Federal Rules of Civil Procedure* (control of the sequence and timing of discovery) [HN5](#) provides a method of accommodating the competing interests [**12](#) with minimal damage to either. If there is other discovery that the plaintiffs must complete in order to be able to resist a motion by the defendant for summary judgment, and thus a significant chance that the plaintiffs' case will fail regardless of what the internal files that they are seeking may show, the district judge should use his power under *Rule 26(d)* to require the plaintiffs to complete the other, nonsensitive discovery first. [*1495](#) His power to do so cannot be questioned. See 8 Wright, Miller & Cooper, *Federal Practice and Procedure* §§ 2040, 2047 (1976). Nor, we think, his duty, in an appropriate case. As the First Circuit stated recently in dealing with the related question of discovery of newsmen's confidential sources, "As a threshold matter, the court should be satisfied that a claim is not frivolous, a pretense for using discovery powers in a fishing expedition. In this case, *plaintiff should show that it can establish jury issues on the essential elements of its case not the subject of the contested discovery.*" [Bruno & Stillman Co. v. Globe Newspaper Co., 633 F.2d 583, 597 \(1st Cir. 1980\)](#) (emphasis added).

[HN6](#) Discovery of sensitive documents is sometimes [**13](#) sought not in a sincere effort to gather evidence for use in a lawsuit but in an effort to coerce the adverse party, regardless of the merits of the suit, to settle it in order not to have to disclose sensitive materials. The use of the liberal discovery provisions of the Federal Rules of Civil Procedure to harass opponents is common, and requires the vigilance of the district judges to prevent. The power granted by *Rule 26(d)* to control the sequence and timing of discovery is one of the district courts' too little used tools for preventing the predatory abuse of discovery and we are at a loss to understand why the power was not used here. "Judges should not hesitate to exercise appropriate control over the discovery process." [Herbert v. Lando, 441 U.S. 153, 177, 60 L. Ed. 2d 115, 99 S. Ct. 1635 \(1979\)](#).

Of course, if the plaintiffs did not need anything beyond the contents of the Academy's membership files to prove their case, there would be no other essential discovery they could be asked to do before getting access to the Academy's files. But it does not appear that the plaintiffs are attempting to prove a per se antitrust offense that

would be complete if the Academy's [**14] files showed that the Academy had an anticompetitive motive in denying their applications for membership. The denial was a collective refusal by the Academy's members to deal with the plaintiffs on the identical terms on which they deal with each other, and hence a boycott. Although it used often to be said that boycotts were illegal per se, that was never entirely true. The best known statement of the Rule of Reason is found in a boycott case, *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242 (1918), which involved the legality of an internal rule of a commodities exchange designed to limit competition from some of its members, a rule whose violation would have been punishable by expulsion. In any event, it is clear today that [HN7](#) [↑] boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se -- for example, price-fixing agreements. See *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781, 787-90 (7th Cir. 1981) (en banc), for the general principle, and *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1234-36 (7th Cir. 1982), cert. granted, 460 U.S. 1010, 103 S. Ct. 1249, [**15] 75 L. Ed. 2d 479 (1983), for the price-fixing exception. At least that is the rule for organized associations having some lawful purposes; we need not decide whether a conspiracy or other ad hoc "association," if anticompetitive in intent, would be treated under a harsher standard.

True, some cases such as *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912), hold or imply that a boycott that totally excludes a competitor from a market is, for that reason alone, illegal; and that could be viewed as a species of per se illegality. Since there has been, at least as yet, no suggestion that the American Academy of Orthopaedic Surgeons has the power to prevent anyone from practicing orthopaedic surgery, these cases are of doubtful relevance. And there is a question to what extent, with their emphasis on the welfare of competitors rather than consumers (the excluded railroad in the *Terminal Ass'n* case appears to have been complaining about its exclusion from a cartel!), they can survive the consumer-oriented view of antitrust that prevails today. See, e.g., *Reiter [*1496] v. Sonotone Corp.*, 442 U.S. 330, 343, 60 L. [**16] Ed. 2d 931, 99 S. Ct. 2326 (1979). Reviewing them recently, this court held that boycotts cannot be deemed illegal per se on the basis of their impact on competitors rather than on the consuming public, if there is no "direct effort to influence the supply of, or demand for, a competitor's product." *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, Inc.*, 672 F.2d 1280, 1286 (7th Cir. 1982). None is alleged in this case. The plaintiffs are competitors of Academy members, and membership may be valuable in competing with both member and nonmember orthopaedists, but there is no contention that the Academy is interfering directly with the plaintiffs' access to suppliers or customers, as by trying to get their hospital staff privileges revoked. The alleged effect of denial of membership on the plaintiffs' ability to practice orthopaedic medicine is indirect, just as denying a trial lawyer membership in the American College of Trial Lawyers would have only an indirect effect on his ability to obtain clients. We are speaking of matters of degree of course, but an "indirect" effect, by which we mean one falling far short of complete exclusion from the market, [**17] will not support a per se attack on a boycott.

Nor do the plaintiffs allege a price-fixing conspiracy among orthopaedic surgeons, a conspiracy to which the exclusion of the plaintiffs from membership in the Academy might be ancillary. Even if, as we very much doubt, a price-fixing allegation could be teased out of the statement in the complaint that Dr. Treister is willing "to consult surgical out-patients on a high-volume basis" -- "high volume" perhaps implying low price -- the plaintiffs have given no indication of wanting to rest their entire case on this tenuous link to the per se doctrine. They want to go further and prove a boycott that is illegal if at all only under the Rule of Reason, and to do that they will have to prove at trial some "anticompetitive market effect" from the boycott. *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981); *Dos Santos v. Columbus-Cuneo-Cabriini Medical Center*, 684 F.2d 1346, 1352 (7th Cir. 1982); *Havco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 558 (7th Cir. 1980). As in *Phil Tolkan Datsun, supra*, 672 F.2d at 1287, "we decline to accept plaintiff's apparent contention that any denial of membership by [**18] an ongoing trade association constitutes a per se violation [HN8](#) [↑] Membership restrictions by trade organizations not possessed of significant economic or operational leverage are more appropriately evaluated according to the standards of the rule of reason." And, of course, what is "significant economic or operational leverage" is a matter of proof too.

Thus, to get over the hurdle of a defense motion for summary judgment at the completion of pretrial discovery the plaintiffs will have to have other evidence besides whatever delicious morsels they may find in the Academy's files on denials of membership applications. They do not have the other evidence yet, though they may get it through

additional discovery. According to their counsel the vast majority of the nation's orthopaedic surgeons who have been practicing orthopaedic medicine for at least three years (one of the plaintiffs' counsel said 99 percent) are members of the Academy, and it has 10,000 members in all. The plaintiffs do not suggest that the Academy places any restrictions on its members. Even the Academy's meetings are open to nonmembers, though the plaintiffs object, frivolously as it seems to us, to having [**19] to wear nonmember badges. This does not appear to be a case where an association is making a "direct effort to influence the supply of, or demand for, a competitor's product." [Phil Tolkan Datsun, supra, 672 F.2d at 1286.](#)

In these circumstances, if all of the Academy's members were in the same market the consumer interest in effective competition could not be seriously harmed by the exclusion of the plaintiffs and others like them -- not that such exclusion is in the cards: the plaintiffs do not argue that the Academy controls entry into the practice of orthopaedic surgery. Ten thousand is a vast number of competitors. Unless they explicitly agreed not to compete and backed [*1497] up the agreement with enforcement machinery to prevent individual members from cheating, the consumer would be assured the benefits of buying in a competitive market. And though there is a sense in which the exclusion of any competitor reduces competition, it is not the sense of competition that is relevant to antitrust law. [Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 663-64 \(7th Cir. 1982\); University Life Ins. Co. of America v. Unimarc Ltd., 699 F.2d 846, 853 \(7th Cir. 1983\).](#) HN9[] The policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors, and a consumer has no interest in the preservation of a fixed number of competitors greater than the number required to assure his being able to buy at the competitive price. Maybe the older, competitor-protection view would survive in a case of naked aggression resulting in the total exclusion of a competitor from the market, but that would be a per se case (if anything) and this is not.

The 10,000 members of the Academy do not, however, all compete in the same market. Assume that the market for orthopaedic surgery is local -- that Dr. Marrese competes with other orthopaedists in Evansville, Dr. Treister with other orthopaedists in Chicago. The plaintiffs will still have the burden at trial of showing that in these local markets the number of orthopaedic surgeons who belong to the Academy is so few that competition among them -- competition that the Academy apparently does not attempt to limit or regulate -- cannot be relied on to give the consuming public the benefits of competition. Unless they can show this they will be unable to [**21] ask the trier of fact to draw an inference that either the exclusion of an individual orthopaedist from a local market or the possible effect of that exclusion on the competitive behavior of other aspirants to membership could result in a higher price or lower quality of orthopaedic surgery in these communities.

The plaintiffs have made no effort yet in discovery to show a probable anticompetitive effect along the foregoing lines or any others, nor have they yet laid an adequate predicate for a per se theory of liability. We emphatically do not decide that they will not be able to make the required showing; since discovery is not yet complete, all statements of fact in this opinion are tentative. But at this early stage of the case, where virtually the only facts of record bearing on competitive effect are that the Academy has thousands of members, does not regulate their behavior, and does not control entry, the plaintiffs cannot be said to have made the required showing. The district court should not in these circumstances have ordered discovery of the Academy's membership files before there was any discovery on the issue of competitive effect. It was not enough for the court [**22] to observe that "nothing in the Federal Rules of Civil Procedure or the case law requires the imposition of such a bifurcation [of discovery] on plaintiffs." As we have pointed out, HN10[] a district court has the power under *Rules 26(c) and (d) of the Federal Rules of Civil Procedure*, and in a clear case the duty, to defer a burdensome discovery request pending completion of discovery on an issue that may dispose of the entire case and thereby make the request moot. We are speaking here only of postponement, and not of denial, of discovery. There would have been no hardship to the plaintiffs in requiring them to conduct their discovery on competitive effect before getting into the Academy's membership files. The sequence of discovery may well have been intended to coerce the Academy to settle but in any event the balance of hardships is clear enough to make us conclude that in refusing to postpone discovery of the membership files the able district judge committed clear error.

The judgment of criminal contempt is therefore reversed. Although the Academy also asks us to order the complaint dismissed on grounds of res judicata, the district judge's denial of the Academy's motion to [**23]

dismiss was an interlocutory order appealable only under [28 U.S.C. § 1292\(b\)](#), which requires the district judge to certify in writing that he is "of the opinion that [the order] involves a controlling question of law as to which there is substantial ground for difference of opinion and that [*1498] an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ." Rightly or wrongly, [HN11](#)[ the judge refused to make the certification, and we therefore have no jurisdiction to review his interlocutory order. [In re Watkins, 271 F.2d 771 \(5th Cir. 1959\)](#).

REVERSED.

Dissent by: STEWART

Dissent

STEWART, Justice (Retired), dissenting.

Much that is said in the opinion of the Court strikes me as correct. Specifically, I agree that a district court has the power, and sometimes the duty, under *Rules 26(c) and (d) of the Federal Rules of Civil Procedure*, to defer a burdensome discovery request pending completion of discovery on an issue that may dispose of the entire case. But for reasons stated in my dissent from the Court's original opinion, see [692 F.2d, at 1097-1098](#), I cannot agree with the Court's ultimate conclusion that the District Court's [\[*24\]](#) refusal to postpone discovery of the Academy's application files in this case was "clear error."

At the heart of the controversy before us is the conflict between the Academy's legitimate concern for preserving the confidentiality of its records, and the appellants' need for evidence with which to prove their antitrust claim. The Academy's interest, however characterized, in preserving the secrecy of its deliberations is substantial. If those charged with determining the qualifications of applicants to membership in a professional organization cannot be assured that their evaluations will remain confidential, they may be less than candid in their assessments, and the organization's legitimate interest in limiting its membership to qualified persons may be impaired.

The District Court was fully cognizant of these concerns. In its order denying the Academy's request to delay discovery of its files, the District Court explicitly acknowledged that public disclosure of the contents of the application files would have a "chilling effect" on the Academy's future deliberations. But the District Court also determined that the sought-after materials were critically important to appellees' [\[*25\]](#) case and therefore declined to "bifurcate" the proceedings. Instead, the District Court imposed a protective order strictly limiting appellees' access to the application materials, finding that "under those restrictive conditions, the confidentiality of the Academy's admission process is largely preserved."

As the Court acknowledges, a district judge must have substantial discretion in controlling how cases proceed in the district court. That discretion is particularly broad with respect to discovery. See e.g., [Voegeli v. Lewis, 568 F.2d 89, 96 \(8th Cir. 1977\)](#). If the authority of the district courts to dispose of discovery matters is to be preserved, an appellate court may not interpose its judgment on such matters unless the lower court's decision leaves it with the firm conviction that a mistake has been made.

In this case, the District Court carefully considered the competing interests and reasonably determined that they could best be accommodated through discovery pursuant to a restrictive protective order. Other judges could reasonably reach other conclusions, but I cannot say that the decision before us was an abuse of discretion. Accordingly, I respectfully [\[*26\]](#) dissent.



Board of Regents v. National Collegiate Athletic Asso.

United States Court of Appeals for the Tenth Circuit

May 12, 1983

No. 82-2148

Reporter

707 F.2d 1147 *; 1983 U.S. App. LEXIS 28061 **; 1983-1 Trade Cas. (CCH) P65,366

The Board of Regents of the University of Oklahoma and The University of Georgia Athletic Association, Plaintiffs-Appellees v. National Collegiate Athletic Association, Defendant-Appellant

Prior History: [\[**1\]](#) Appeal from U.S. District Court, Western District of Oklahoma.

Core Terms

television, football, broadcast, contracts, athletics, intercollegiate, rights, district court, games, programming, network, rule of reason, schools, integration, anticompetitive, institutions, antitrust, Music, amateur, prices, anti trust law, regulations, price fixing, sports, output, market power, cartelization, vertical, boycott, college football

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

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

HN1 Remedies, Injunctions

Section 16 of the Clayton Act states that any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws. [15 U.S.C.S. § 26](#).

707 F.2d 1147, *1147* 1983 U.S. App. LEXIS 28061, **1

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN2 Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Price restraints accompanying a partial integration escape per se invalidation only when the integration renders markets more, rather than less, competitive and when the restraints are properly ancillary to the integration. In other words, the parties must be cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN3 Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Noneconomic considerations, however worthy, cannot be used to justify restraints that adversely affect competition.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4 Regulated Industries, Higher Education & Professional Associations

The Sherman Act, [15 U.S.C.S. § 1 et seq.](#), will not countenance an argument that the nature of a product or an industry structure is such that something other than competition is desirable.

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

HN5 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Determining under a rule of reason whether arrangements are by their nature or character unreasonable requires assessment of the restraints in the context of the market in which they operate. 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.

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

HN6 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Market power is the power to control prices or exclude competition. Whether market power exists or can be exercised in the relevant geographic market depends upon the existence of competing products to which a purchaser can turn when faced with relative price increases. Whether product competition exists is determined by

two factors: (a) The reasonable interchangeability of use to which two or more products can be put. This factor, in turn, is satisfied when two or more products (i) have essentially similar physical characteristics, or (ii) can be put to use for the same purpose. (b) The cross-elasticity of demand, i.e., the extent to which consumer preference shifts freely between two or more products.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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

HN7 Practices Governed by Per Se Rule, Boycotts

In the context of associational activities, the existence of an expulsion sanction does not by itself constitute a boycott. Unless resort to the expulsion sanction constitutes a naked attempt to exclude competition, the antitrust implications of an expulsion sanction turn on the competitive reasonableness of the rule being enforced.

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

HN8 Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

An association's rule or practice can in certain circumstances be considered facially unreasonable, and thus can be summarily invalidated as an illegal boycott. However, when the reasonableness of the practice cannot be assessed summarily, it is improper to affix the label "boycott" and end all inquiry unless the proffered rule-enforcement justification appears to be merely a sham for some anticompetitive purpose.

Judges: Logan, Barrett, and Seymour, Circuit Judges. Barrett, Cir. J., dissenting.

Opinion by: LOGAN

Opinion

[*1149] LOGAN, Cir. J.:

This is an appeal from a district court judgment holding the football television regulations of the National Collegiate Athletic Association to be in violation of [sections 1](#) and [2](#) of the Sherman Act and invalidating contracts entered into between the NCAA and ABC Sports, Inc., CBS Sports, Inc., and Turner Broadcasting System, Inc. The plaintiffs-appellees are The Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association. They want to be free to contract for the sale of broadcast rights to the football games of their universities. After a nonjury trial, the district court held that under [section 1](#) of the Sherman Act the NCAA's television plan and the contracts are invalid per se because they constitute **[*1150]** price fixing and group boycotts, and are also unlawful under rule of reason analysis. The court held that the NCAA violated [section 2](#) by monopolizing the intercollegiate football broadcasting market. [546 F. Supp. 1276 \(W.D. Okla. 1982\)](#). **[**2]**

To resolve this appeal we consider: (1) whether the plaintiffs suffer antitrust injury and have standing to sue; (2) whether the television plan and contracts constitute price fixing unlawful per se; (3) whether the television plan and contracts are unlawful under rule of reason analysis; (4) whether the plan and contracts constitute group boycotts illegal per se; and (5) whether the relief granted below is overly broad.

The challenged NCAA regulations are found in the "1982-1985 NCAA Football Television Plan." Under the network television contracts entered into pursuant to the plan, ABC and CBS share exclusive first rights to negotiate with NCAA member institutions regarding the live broadcast of football games. In return for these negotiation rights ABC and CBS each guarantees to pay a "minimum aggregate compensation" of \$131,750,000 over the four year contract period.¹ **[**4]** The contracts essentially eliminate competition between ABC and CBS for broadcast rights to the same games. See [546 F. Supp. at 1292-93](#). Both ABC and CBS are to broadcast 14 "exposures" per season -- seven or eight exposures are one- or two-game national or semi-national telecasts and the rest are three- **[**3]** to six-game regional exposures. Within the 14 exposures at least 70 teams are to appear on each network. At least 82 different schools must be featured on each network over the course of two seasons; the goal is to feature 115 different teams between the two networks. Although the contracts contemplate that most telecasts will be of "major" university (Division I-A) games, they obligate the networks to telecast a few small-college games and Division I-AA, II, and III championship playoff games. The television plan limits schools to six appearances every two years, with a maximum of four appearances the first year and five the second. These appearances must be divided evenly between ABC and CBS. During 1982 and 1983 Turner Broadcasting System, Inc. is permitted to select and cablecast over its Atlanta station games not selected by ABC or CBS. For 19 games each season Turner pays a minimum aggregate compensation of \$17,696,000 over the two year contract period. Schools may sell the broadcast rights to their games to ABC, CBS, and Turner only.²

I

Relying on [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#), the NCAA asserts that the plaintiffs lack standing to assert antitrust violations because they allege injuries that are not of the type the antitrust laws were designed to redress. The violation claimed by the plaintiffs is that the television plan constitutes a marketwide horizontal price fixing conspiracy. They allege that to facilitate the pricing arrangement individual schools are precluded from exercising independent judgment with regard to output and price. Furthermore, they allege that the NCAA will expel **[**5]** and boycott institutions that violate the television plan.³

In *Brunswick*, the Court stated:

[*1151] [T]hey must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful.

Id. at 489. The television plan at issue here restricts the plaintiffs' revenues, market share, and output; the **[**6]** plan "cripples the freedom of traders and thereby restrains their ability to sell in accordance with their own judgment." [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213, 95 L. Ed. 219, 71 S. Ct. 259 \(1951\)](#). This effect is potentially inconsistent with the Sherman Act's mandate of free competition and is virtually

¹ The "minimum aggregate compensation" fee sets forth the total amount the networks must pay to the individual schools for the rights to particular games. If at the end of the season the minimum has not been paid, the balance is paid to the NCAA.

² A minor deviation from this rule is the "exception telecast." Essentially, games that qualify as exception telecasts are those (1) that are sold out or are being played more than 400 miles from the area in which the game is to be telecast, and (2) that will not be telecast within a certain distance of other football games unless those games are sold out. These telecasts occur infrequently and do not affect our analysis of the television plan and network contracts.

³ Although the boycott claim presents a double contingency -- the plaintiffs must sell broadcast rights in violation of the television plan and the NCAA must boycott the plaintiffs -- the claim is ripe. The plaintiffs have adequately evidenced their desire to be free of the restrictions; indeed, Oklahoma executed a contract for the broadcast of its games. Also, the NCAA has publicly threatened to sanction institutions that violate its television plan. See [546 F. Supp. at 1286, 1302](#).

identical to injuries redressable in the vertical restraint context. Furthermore, compliance with the television plan is coerced by the threat of expulsion and boycott, sanctions which clearly have anticompetitive potential.

Although many of the injuries alleged by the plaintiffs are in the nature of vertical restraint injuries rather than the allocative efficiency/deadweight loss classically attributed to cartelization, we think the plaintiffs have standing to challenge the plan as a horizontal pricing conspiracy. The standing limitation expressed by *Brunswick* does not apply with full rigor to the instant case. *Brunswick* was an action for treble damages; here the plaintiffs seek injunctive relief only.⁴ Section 16 of the Clayton Act [HN1](#) states that "any person, firm, corporation, or association shall be entitled to sue for and have [**7] injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." [15 U.S.C. § 26](#). The plaintiffs allege antitrust injury inextricably intertwined with a horizontal price fixing conspiracy. See [Blue Shield of Virginia v. McCready](#), [457 U.S. 465, 478-85, 102 S. Ct. 2540, 2548-52, 73 L. Ed. 2d 149, 50 U.S.L.W. 4723, 4726-28 \(1982\)](#). Inasmuch as the plaintiffs may challenge the clauses of the television plan that injure the members of the conspiracy, no valid reason appears why they should be foreclosed from challenging clauses that injure the victims of the conspiracy. The statute evinces no such limitation, and we are not inclined to engraft one upon it. To do so would hinder the congressional policy of eliminating artificial restraints from the marketplace. See [Jeffrey v. Southwestern Bell](#), [518 F.2d 1129, 1132 \(5th Cir. 1975\)](#); [In re Multidistrict Vehicle Air Pollution Litigation](#), [481 F.2d 122, 130-31 \(9th Cir.\), cert. denied, 414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336 \(1973\)](#); 2 P. Areeda & D. Turner, [Antitrust Law](#) § 335e (1978). Cf. [Hawaii v. Standard Oil Company of California](#), [405 U.S. 251, 260-61, 31 L. Ed. 2d 184, 92 **81 S. Ct. 885 \(1972\)](#) (State of Hawaii as parens patriae).

We are not persuaded by the NCAA's contention that the plaintiffs are merely seeking a "bigger slice of the [cartel] pie" or are seeking to "promote internal cartel management" by reforming the cartel "so that the cartel members may obtain their benefits while avoiding their burdens." See Appellant's Brief at 53. In [Perma Life Mufflers, Inc. v. International](#) [\[*91 Parts Corp., 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 \(1968\)\]](#), similar arguments were made and rejected. In that case, the plaintiffs were Midas franchisees who alleged that certain clauses in the franchise agreement were illegal. The Court stated:

Although petitioners may be subject to some criticism for having taken any part [*1152] 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 conduct by petitioners defeats their right to sue is completely refuted by the following statement from *Simpson* [v. [Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 \(1964\)](#)]: 'The fact that a retailer can refuse to [**10] deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the anti-trust laws.'

Id. [392 U.S. at 139-40](#). That the plaintiffs recognize the need for and accept the NCAA's regulation of intercollegiate athletics does not preclude their suit to challenge the television plan as violating the antitrust laws. We think that the allegations of the plaintiffs reflect antitrust injury and confer standing to sue under [15 U.S.C. § 26](#).

II

⁴ *Brunswick* does not mandate the result sought by the NCAA for another reason. In *Brunswick* a vertical merger prevented Pueblo Bowl-O-Mat, Inc. from reaping profits that would have accompanied an increase in market concentration. Pueblo sued for those profits, alleging that the merger was unlawful. The Court denied recovery, stating that the lost profits Pueblo would have derived from a decrease in competition were not injury of the type the antitrust laws were intended to prevent. [429 U.S. at 489](#). Here, the plaintiffs seek the right to compete in a market free from artificial restrictions.

At the outset we must determine whether the NCAA's television plan and the network contracts constitute price fixing illegal per se under [section 1](#) or whether they should be scrutinized under the rule of reason. The district court found them illegal per se. [546 F. Supp. at 1311](#). The nearly 600 institutional members of the NCAA, which include all "major" football powers, have agreed to market all of their football games to be offered for television viewing exclusively through the NCAA. By this agreement the teams have restricted the number of games to be telecast per season. The NCAA has negotiated fixed minimum total prices for the packages, which apparently have also always been the maximum. Although [\[**11\]](#) in theory the networks can pay different prices for different games, in practice the compensation paid does not vary from game to game.⁵

To the extent that the provisions of the television plan are naked attempts to restrict output and manipulate price, they are illegal per se under [Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48, 50 U.S.L.W. 4687 \(1982\)](#). The NCAA argues, however, that the restraints are not naked but accompany an integration [\[**12\]](#) of functions, that the restraints should be scrutinized under [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 \(1979\)](#), and therefore that the restraints should be analyzed under the rule of reason. While the NCAA is correct in asserting that *Broadcast Music* applies to restraints accompanying integrations, it incorrectly argues that *Broadcast Music* necessarily precludes application of the per se rule. Rather, the inquiry under *Broadcast Music* is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" [441 U.S. at 19-20](#). "The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason or else we should apply the rule of reason from the start." [Id. at 19 n. 33](#) (citation omitted).⁶

⁵ Because the networks possess exclusive rights to negotiate with the schools, the establishment of the minimum fee ensures that the schools will receive a "reasonable" payment for the broadcast rights. However, the fee also eliminates any incentive on the part of the networks to reward games of greater merit with higher payments. This effect does not necessarily reflect anticompetitive price enhancement (price fixing/allocative inefficiency in the economic sense), but it does reflect a distortion of free market forces.

⁶ The United States' amicus brief suggests that because the trial court scrutinized the procompetitive justifications proffered by the NCAA, it employed a form of rule of reason analysis. The brief argues that it is improper to characterize a case as "per se" after assessing and rejecting proffered justifications. *Broadcast Music* holds otherwise. Permitting facial consideration of attempts to justify restraints accompanying partial integrations does no violence to the concept of per se rules. Essentially, per se rules were developed in the interest of litigation efficiency.

"*Per se* rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases."

[United States v. Container Corp. of America, 393 U.S. 333, 341, 21 L. Ed. 2d 526, 89 S. Ct. 510 \(1969\)](#) (Marshall, J., dissenting). See also [Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 \(1958\)](#); [Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344](#) & n. 14, [102 S. Ct. 2466, 2473](#) & n. 14, [73 L. Ed. 2d 48, 50 U.S.L.W. 4687, 4690](#) & n. 14 (1982). In the context of restraints ancillary to integration, however, it cannot be said that in the aggregate "the gains from imposition of the rule will far outweigh the losses." The integration of productive activities may permit efficiencies of scale regarding research, advertising, and manufacturing; output may be enhanced; new entry into various markets may be facilitated. See Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523, 1527-29 (1982); R. Bork, *The Antitrust Paradox* 263-66 (1978); L. Sullivan, *Handbook of the Law of Antitrust* § 77, at 207 (1977). Cases applying the per se rule to naked price restraints confirm that in some circumstances price restraints ancillary to an integration of functions will escape the per se rule. "If a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price fixing agreement among the doctors would be perfectly proper." [Maricopa County, 50 U.S.L.W. at 4693](#).

[**13] [*1153] Under *Broadcast Music*, [HN2](#) price restraints accompanying a partial integration escape per se invalidation only when the integration "renders markets more, rather than less, competitive" and when the restraints are properly ancillary to the integration. In other words, "the parties must be cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose." R. Bork, *The Antitrust Paradox* 279. See also [United States v. Addyston Pipe & Steel Co.](#), 85 F. 271, 282-83 (6th Cir. 1898), aff'd as modified, [175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 \(1899\)](#); [United States v. Columbia Pictures Corp.](#), 189 F. Supp. 153, 185-92 (S.D.N.Y. 1960); L. Sullivan, *Handbook of the Law of Antitrust* § 131. Our analysis of the television plan and contracts, including a comparison of these agreements to the arrangements in *Broadcast Music*, leads us to affirm the district court's conclusion that the plan and contracts constitute per se illegal price fixing. The NCAA television arrangement is so fraught with anticompetitive potential [**14] that it "appears to be one that would always or almost always tend to restrict competition."

A

The NCAA is essentially an integration of the rulemaking and rule-enforcing activities of its member institutions. It performs many functions for its members, many of them noncommercial. It is the guardian of amateurism in the athletic programs of its members in essentially all intercollegiate sports. The NCAA determines playing rules, sets eligibility requirements, regulates recruiting, and establishes the requirements for and the number of scholarships that may be offered. It establishes when the seasons may start and must end, determines the number of games that may be played, and fixes the number of coaches a team may have. One sanction often levied for violation of these rules is the restriction of television appearances. The NCAA argues that the television plan is ancillary to this cooperative activity because the restraints promote the effectiveness of the cooperation by protecting live attendance at games and by promoting competitive balance, thereby improving the excitement of and the interest in both televised and live games.

The first argument, that the restraints promote [**15] rather than restrict output by protecting [*1154] live attendance, does not qualify the restraints as ancillary. The NCAA argues that in the process of "manufacturing" football, two products are produced that are marketed to different consumers: the right to attend a game, which is sold to spectators, and the right to televise a game, which is sold to broadcasters. The NCAA contends that by restricting the sale of broadcast rights, consumption by spectators is increased.⁷ We doubt on its face the argument that the output may be properly characterized as viewership. Even if we assume that consumption or viewership may be considered to be output, we think that total viewership -- both live and televised -- must be considered. An argument that total viewership is enhanced by restricting the sale of broadcast rights is speculative. The record contains some evidence that supports the conclusion the plan enhances live viewership, but no evidence was adduced to permit the court to gauge total viewership.⁸ Finally, even if the television plan has the effect of promoting spectator consumption, this effect is not unambiguously procompetitive. It is at best competitively neutral. [**16] The plan promotes live attendance by restricting the availability of other options. It potentially creates inefficiencies, such as the reduced output of desired products and the increased consumption of less desirable products. Therefore, the restraints do not increase the efficiencies of the integration.

[**17] The second argument, that the restraints promote athletically balanced competition, also fails to meet the ancillary test. First, this appears on its face to be a noneconomic justification. [HN3](#) Noneconomic

⁷ Another twist on this argument is that promoting spectator consumption ensures that gate receipts will be large enough to enable institutions to fund football and other athletic programs. It is argued that in this manner the plan ensures an adequate number of teams to permit intercollegiate competition. To a certain extent, this argument is not unlike the contention that something other than competition is needed in the industry. Such an argument is not permitted under the Sherman Act. [National Society of Professional Engineers v. United States](#), 435 U.S. 679, 689, 696, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978). If a market structure other than competition is necessary to engage in a line of commerce, Congress must be petitioned for an exemption from the antitrust laws.

⁸ The district court ultimately rejected the argument that the plan enhances live viewership. [546 F. Supp. at 1295-96](#).

considerations, however worthy, cannot be used to justify restraints that adversely affect competition. [National Society of Professional Engineers v. United States, 435 U.S. 679, 687-96, 55 L. Ed. 2d 637, 98 S. Ct. 1355 \(1978\)](#). Furthermore, as the district court noted, the argument that the restraints are necessary to promote athletic balance shades into the argument that competition will destroy the market. See [546 F. Supp. at 1310. HN4](#)⁹ The Sherman Act will not countenance an argument that the nature of a product or an industry structure is such that something other than competition is desirable. [National Society of Professional Engineers, 435 U.S. at 689, 696](#). And, even if we assume the justification to be legitimate, the district court found on adequate evidence that any contribution the plan made to athletic balance could be achieved by less restrictive means.

The restraints contained in the television plan do not increase the efficiency of the rulemaking integration [**18](#) and are broader than necessary to achieve asserted procompetitive goals. Therefore, they are not ancillary to the rulemaking integration and do not escape per se invalidation under *Broadcast Music* on the basis of that integration.
9

B

The NCAA also asserts that the television plan is ancillary to an integrated marketing arrangement. It argues that the restraints enable NCAA football to be marketed as a [\[*1155\]](#) television series and improve its competitive position against other television programming. Essentially, the television plan contains two groups of restraints, those that create an exclusive franchise arrangement [**19](#) with the networks and those that distort the prices paid for the individual games.¹⁰ Under the plan, ABC, CBS, and Turner share the exclusive right to broadcast NCAA football. The grant of exclusivity restricts the buyers to whom schools may sell and prevents other broadcasters from purchasing broadcast rights. In connection with the exclusive rights the NCAA established a price -- the minimum aggregate compensation fee. Both the grant of exclusivity and the setting of the minimum aggregate compensation price appear anticompetitive: exclusivity creates the risk of foreclosure of competition and price setting implicates monopoly power.¹¹

[**20](#) The NCAA attempted to prove that the exclusive franchise restraints were necessary to penetrate the network programming market.¹² [**21](#) The NCAA asserts that the restraints permit college football to be promoted as a series, like "Dallas" or "M*A*S*H," in competition with other television programming. In essence, the NCAA is arguing that the plan restrains intrabrand competition (competition among football games) in order to stimulate interbrand competition (competition between NCAA football and other entertainment programming).¹³ Stimulating interbrand competition at the expense of intrabrand competition is potentially procompetitive. [Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-57, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). It can result in a more vigorous marketing of the product, facilitating market penetration and increasing market share. Because the marketing

⁹ The trial court's findings suggest that it placed the burden of proving the effectiveness and necessity of these restraints upon the NCAA. We believe that is the proper placement of the burden when considering whether to apply per se or rule of reason analysis to admitted price restraints that the defendant attempts to justify as properly ancillary to a legitimate integration.

¹⁰ The price-distorting restraints, articles 10 and 13 of the television plan, relate to fostering athletic balance and enhancing live viewership -- arguments rejected above.

¹¹ The establishment of a minimum aggregate compensation is a necessary incident to the conferral of exclusive rights: it prevents the networks from abusing their position vis-a-vis the individual schools. Therefore, in cases in which the granting of an exclusive right is appropriate, the setting of a price for that exclusive right may also be appropriate.

¹² The evidence consists largely of the testimony of Paul Klein. Klein testified that football would constitute viable network programming only if the network and advertising sponsors were granted exclusivity. That is, the networks would be unable to attract advertising sponsors if football programming competed head-to-head with other football programming. According to Klein, the plan's effect of permitting schools to sell only to ABC, CBS, and Turner is essential to the joint marketing arrangement.

¹³ This argument assumes that NCAA football may be viewed as a single brand, a product of the joint venture rather than of the individual schools, and that football is in the same product market as other television programming. Upon the facial examination appropriate in the per se context these assumptions appear unlikely to be true.

integration could increase interbrand competition, the NCAA argues that the integration and its accompanying restraints should be assessed under the rule of reason.

Whether stimulating interbrand competition by restraining intrabrand competition is procompetitive depends in part on the nature of the interbrand product market. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. at 52 n. 19; ABA Section of **Antitrust Law**, *Vertical Restrictions Limiting Intrabrand Competition* 60-71 (Monograph No. 2, 1977). Therefore, it is difficult to assess the validity of the NCAA's argument without getting into the "enormous complexities of market definition that the per se rule seeks to avoid." R. Bork, *The Antitrust Paradox* 269. *Broadcast Music* makes clear that in assessing the facial validity of an integration, courts are not to engage in rule of reason analysis. *441 U.S. at 19 n. 33*. Yet we need not fully explore [**22] the plan's effect on the interbrand market because we conclude that the marketing integration itself is so fraught with anticompetitive potential that it must be considered invalid per se.¹⁴ A comparison [*1156] of the integration in *Broadcast Music* with the integrated marketing scheme in the instant case highlights the anticompetitive risks that inhere in the television plan and network contracts.

As did the performing rights societies in *Broadcast Music*, the NCAA offers a product -- exclusive broadcast rights to all NCAA games -- that is different from that which the individual schools could offer. However, unlike the blanket license at issue in *Broadcast Music*, the new [**23] and different product in this case comes at the expense of the product that would otherwise be offered by the schools. In *Broadcast Music*, the copyright holders retained the right to negotiate individual contracts: they could sell outside the blanket licensing arrangement. Under the television plan at issue here schools are not permitted to sell outside the network contracts. Not only does this restraint inhibit the freedom of the individual schools, it also poses a greater risk of cartelization than was present in *Broadcast Music*. There, the right of the copyright holders to sell outside the blanket licensing arrangement ensured the presence of potential competition to inhibit the exercise of market power by the performing rights societies. Here, every producer of commercially salable intercollegiate football is bound to sell through the television plan only. There is no potential competition from producers of intercollegiate football. Furthermore, the contracts restrict the total number of games to be broadcast; the district court found that more games would be shown in the absence of the controls. The television plan also poses vertical anticompetitive risks that [**24] were not present in *Broadcast Music*. The rights to NCAA football are sold on an exclusive basis whereas an unlimited number of blanket licenses were offered for sale in *Broadcast Music*. Unless there exist readily available substitutes for NCAA football, then, the television plan creates substantial vertical foreclosure. Moreover, because the football rights are sold only as a package, those broadcasters that are unable to bid for the entire package are permanently foreclosed from the market. The television plan and network contracts pose substantially greater anticompetitive risks than were present in *Broadcast Music*.

C

In summary, the plan on its face suppresses product diversity and restricts output. It poses substantially greater risks of cartelization and vertical foreclosure than were present in *Broadcast Music*. The price distorting restraints are broader than necessary to promote the efficiencies of the integration. And while the ancillarity of the exclusive franchise restraints cannot be fully assessed without a rule of reason inquiry, the plan contemplates an impermissible integration: a combination of virtually all the producers, actual or potential, [**25] of a differentiated product -- commercially salable intercollegiate football. In these circumstances we conclude that the television plan is one "that would always or almost always tend to restrict competition and decrease output." *441 U.S. at 19-20*. We affirm the district court's ruling that the television plan constitutes per se illegal price fixing.¹⁵

¹⁴ This conclusion, of course, obviates the necessity of examining whether the plan's restraints enhance the effectiveness of the marketing integration or are no broader than necessary for that purpose. When an integration is itself impermissible, the restraints justified as accompanying it are likewise impermissible.

¹⁵ To the extent that the procompetitive justifications offered by the NCAA do not relate to an integration, but are offered to show the generally procompetitive nature of the television plan, they are foreclosed by *Maricopa County*.

[**26] [*1157] III

Although we have upheld the trial court's judgment that the NCAA's television plan and the network contracts are illegal per se, we consider them under rule of reason analysis. We do so because given the state of the record and the prospect of review by the Supreme Court, scrutinizing the plan and contracts under the rule of reason promotes litigation efficiency. The trial court held that the plan failed under rule of reason analysis, and we affirm that conclusion.

In assessing the television plan under the rule of reason, the district court applied the test formulated in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911), which prohibits contracts that are "unreasonably restrictive of competitive conditions." *Id. at 58*. "Unreasonableness under [the Standard Oil] test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 690, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978) [**27] (footnote omitted). **HN5**[↑] Determining whether arrangements are by their nature or character unreasonable requires assessment of the restraints in the context of the market in which they operate.

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.

[Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 \(1918\).](#)

The television plan has a substantial impact on the structural characteristics of competition for the sale and purchase of intercollegiate football television rights. First, NCAA members are permitted to sell the broadcast rights to their games in accordance with the television plan only. There is only one vendor of intercollegiate football broadcast rights in the market; therefore, there exists no price competition among the schools for the sale of broadcast rights. Second, the [**28] broadcast rights are sold to three buyers: ABC, CBS, and Turner share the rights to broadcast NCAA football games. The rules set out in article 10 of the television plan restrict price competition among these buyers with regard to the rights to individual games. The plan therefore increases concentration in the marketplace in which broadcast rights to intercollegiate football are bought and sold: the market is composed of one seller and three buyers. There is no price competition among schools or among the buyers once contracts have been awarded. Furthermore, because the broadcast rights are sold only as a package, if a broadcaster does not have the financial ability to bid for the entire package or does not want the entire package, it cannot purchase football rights except within the narrow constraints of the exception telecast. Therefore, the number of broadcasters that can seek to become buyers of NCAA football broadcast rights is limited. This creates a potential for vertical foreclosure because only certain broadcasters have the resources necessary to become buyers of NCAA football rights.

The television plan has broader market implications than merely limiting the number [**29] of buyers and sellers of televised NCAA football. The plan presents market-wise anticompetitive risks of both a horizontal and a vertical nature. The horizontal risk is cartelization, with its accompanying supracompetitive pricing. Because the injuries

"The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application."

[457 U.S. at 351, 102 S. Ct. at 2477, 50 U.S.L.W. at 4692](#) (footnote omitted).

that inhere in cartelization are incurred only if the NCAA possesses market power, whereas the asserted marketing efficiencies of the television plan are achievable in the absence of such power, scrutiny of the cartelization risk requires assessment of market power. The vertical anticompetitive risk is that potential buyers are foreclosed from purchasing a product for which no satisfactory substitute exists. Assessing [*1158] this risk requires an analysis of readily interchangeable substitutes, an inquiry subsumed by an analysis of market power. Therefore, gauging the television plan's net effect on competition requires an assessment of market power.

HN6 [↑] Market power is the power to control prices or exclude competition. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). Whether market power exists or can be exercised in the relevant geographic market depends upon [**30] the existence of competing products to which a purchaser can turn when faced with relative price increases. Whether product competition exists is determined by two factors:

- (a) The reasonable interchangeability of use to which two or more products can be put. This factor, in turn, is satisfied when two or more products (i) have essentially similar physical characteristics, or (ii) can be put to use for the same purpose.
- (b) The cross-elasticity of demand, i.e., the extent to which consumer preference shifts freely between two or more products.

2 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 6G.04[1] (1982) (emphasis omitted). The "market is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. at 404. Accord *United States v. Grinnell Corp.*, 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). We look, then, to the ready availability of substitutable products.

The district court concluded that NCAA football constitutes a unique type of Saturday afternoon programming. This conclusion [**31] has adequate evidentiary support in the record. In terms of audience share NCAA football dominates Saturday afternoon programming. Furthermore, the cost per viewer for advertising time during NCAA football telecasts is more than 2 1/2 times greater than the average per viewer cost for other programming. This presumably is caused by the unique demographic makeup of the viewers of NCAA football -- persons in middle to upper income brackets and college graduates. The characteristics of the programming most often scheduled opposite NCAA football -- comedies, cartoons, and old movies -- support the inference that NCAA football is unique in its time slot. Testimony at trial indicated that such programming does not appeal to the same audience; it does not seem to be readily interchangeable for NCAA football. Even professional baseball, which is broadcast opposite NCAA football during September, apparently is not readily interchangeable. The evidence showed that the cost per 1000 households for baseball advertising was \$3.04, compared with \$5.35 for NCAA football. In 1980, a 30-second advertising spot on NCAA football cost \$47,900, compared with \$17,100 for baseball. The demographics [**32] also vary significantly: the NCAA's share of households having income greater than \$15,000 was twice baseball's share of these households. Professional football, which is perhaps the most logical substitute for NCAA football, is effectively precluded by the terms of its limited antitrust exemption from being broadcast on Saturday afternoon during the NCAA football season. See *15 U.S.C. §§ 1291, 1293, 1294*. Another indication that NCAA football is a unique form of Saturday programming is that when ABC had the exclusive right to televise, CBS "went dark" rather than compete against NCAA football -- CBS offered no network programming but instead left its affiliated stations to fend for themselves. The record supports the trial court's conclusion that, considering price, use, and quality, NCAA football is a product for which there are no readily available substitutes.

It is true, as the NCAA argues, that the networks' willingness to pay supracompetitive prices is limited by their ability to recover the payments from advertisers. This does not arrest the inference that the NCAA has market power, however. Even if advertisers are willing, in the face of [*1159] relative price [**33] increases, to substitute across different days of the week or across different programming, the networks cannot freely do so; they need programming to offer on Saturday afternoon. Furthermore, even if at current price levels both the networks and the

advertisers consider other programming to be readily substitutable for NCAA football, the conclusion that the NCAA has market power is not foreclosed. The NCAA may already be pricing at supracompetitive levels and extracting supracompetitive profits, thereby making otherwise nonsubstitutable products attractive because prices are artificially high. See *L. Sullivan, Handbook of the Law of Antitrust* § 16, at 56-57.

To inquire into market power in rule of reason cases is not to invoke a [section 2](#) monopolization inquiry. In monopolization cases the court searches for the degree of market power possessed by a firm with an extremely large market share. See 2 E. Kintner, *Federal Antitrust Law* § 12.6, at 352, 356-57 (1980) (collecting cases and noting that market share must approach 80% of the relevant market). Under the rule of reason, a more modest degree of power is sufficient. Therefore, any concern that the market definition [\[**34\]](#) may overstate power may be assuaged by attributing less significance to the market share possessed. *L. Sullivan, Handbook of the Law of Antitrust* § 17, at 61. The district court found that the NCAA controlled virtually 100% of the relevant market, televised college football. See [546 F. Supp. at 1319-23](#). Even assuming that the market definition is too narrow, the NCAA's total control over televised intercollegiate football, when combined with NCAA football's apparent uniqueness from the perspective of broadcasters, supports the inference that the NCAA possesses some degree of market power.¹⁶ Because the NCAA possesses market power the risks of cartelization and price enhancement are imminent. Also, because there exist no readily available substitutes for NCAA football the television plan creates substantial vertical foreclosure. Both these results are anticompetitive.

[\[**35\]](#) Non-economic Justifications

The NCAA seeks to justify the restraints contained in the plan by asserting that they promote athletically balanced competition among the schools and that they are necessary to penetrate the network programming market. As noted above, these assertions do not overcome the anticompetitive effects of the restraints. The trial court found that the disparity in revenues between schools can be reduced by means that do not threaten to cartelize the market or to restrict the number of buyers and sellers of NCAA football. A properly drawn system of pass-over payments to ensure adequate athletic funding for schools that do not earn substantial television revenues is one possibility. See [White Motor Co. v. United States, 372 U.S. 253, 270-71, 9 L. Ed. 2d 738, 83 S. Ct. 696 \(1963\)](#) (Brennan, J., concurring); [Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc., 585 F.2d 821, 828-29 \(7th Cir. 1978\)](#), cert. denied, 440 U.S. 930, 59 L. Ed. 2d 486, 99 S. Ct. 1267 (1979); [United States v. Topco Associates, Inc., 1973-1 TRADE CASES \(CCH\) P74,391](#), modified, [1973-1 TRADE CASES \(CCH\) P74,485](#) (N.D. Ill.), aff'd mem., 414 U.S. 801, 94 S. Ct. 116, [\[**36\]](#) 38 L. Ed. 2d 39 (1973); ABA Section of *Antitrust Law*, *Vertical Restrictions Limiting Intrabrand Competition* 20-25 & n. 63 (Monograph No. 2, 1977). Furthermore, the district court found that without the restraints imposed by the television plan more games would be shown at the local level. [546 F. Supp. at 1307](#). This would have the effect of equalizing revenues. To whatever extent the television plan reduces the disparity of revenues devoted to football and [\[*1160\]](#) other athletic programs, the same result can be accomplished by means that do not violate the antitrust laws.

The television plan's contribution to penetrating the network programming market does not save the plan under the rule of reason. The district court concluded that there exist no readily available substitutes for NCAA football. This being the case, there is no interbrand competition in the network programming market to prevent the NCAA from extracting supracompetitive prices. Consequently, the removal of intrabrand competition among the schools totally eliminates price competition from the market. Finally, we note that the plan's restrictions affect NCAA Division I-A universities almost exclusively [\[**37\]](#) since they are the ones whose games might be commercially salable. Fewer than 100 schools fall within Division I-A; of these, 61 are members of the College Football Association, which has strongly manifested its displeasure with the television plan. See [546 F. Supp. at 1324-25](#). The district court

¹⁶ The NCAA makes no separate argument urging reversal of the trial court's monopolization holding under [section 2](#) of the Sherman Act. It notes the court's conclusion that the relevant market was the sale of rights to televise live college football games, in which the NCAA "obviously has the dominant share." Appellant's Brief at 10. The NCAA refers to its market definition argument, contending only that it does not possess market power and not that such power if possessed was lawfully obtained. Because of this and our disposition of the [section 1](#) issues, we do not consider the monopolization claim. A reversal of the court's [section 2](#) ruling would not affect the scope of relief granted.

concluded on adequate evidence that the 61 schools' ultimate decision to submit to the restraints in the television plan was the product of fear of NCAA sanctions, in football and other sports. *Id.* It is apparent that the schools whose games are used to penetrate the network programming market are not pleased with the cost at which this penetration is achieved. Rather, the district court concluded that the NCAA used its dominance in the regulation of intercollegiate athletics to obtain control of broadcast rights to intercollegiate football. In these circumstances we are not particularly disposed to consider the plan's impact on competition within the larger network programming market to be redeeming procompetitive.

We affirm the district court's conclusion that the television plan is unreasonably restrictive of competitive conditions and therefore unlawful. It increases concentration **[**38]** in the marketplace; it prevents producers from exercising independent pricing and output decisions; it precludes broadcasters from purchasing a product for which there are no readily available substitutes; it facilitates cartelization. Against this array of antitrust injuries the NCAA's justifications are insufficient.

IV

We agree with the NCAA that the trial court erred in holding that the television plan and network contracts constitute a group boycott illegal per se under [section 1](#) of the Sherman Act. The court reasoned:

NCAA members have agreed not to sell their product -- football games -- to certain buyers. Every broadcast and cable network in the country, other than ABC, CBS and TBS, are being boycotted. Further, those local broadcasters which are not affiliated with ABC or CBS are allowed to buy football games only in very limited circumstances.

[546 F. Supp. at 1312](#). However, the NCAA television plan and contracts lack a necessary predicate to the existence of an illegal boycott. "The crucial element is an effort [by one competitor] to exclude or cause disadvantage to one or more [of its] competitors by cutting them off from trade relationships **[**39]** which are necessary to any firm trying to compete." L. Sullivan, *Handbook of the Law of Antitrust* § 91, at 260. See also *id.* § 83. The television plan and contracts do not constitute an attempt by NCAA members to shield themselves from competition offered by broadcasters: broadcasters are not in competition with NCAA members. The market relationship between the NCAA and the television industry is vertical. There is no contention here that the successful broadcasters have conspired with the NCAA to seek the exclusive arrangements in order to freeze out their competitors. The exclusivity features were used by the NCAA to extract the highest possible prices from the networks. The opportunity to purchase the rights to the NCAA football package was offered to all broadcasters. That certain networks were unsuccessful bidders, or did not bid at all, does not turn the contracts into boycotts.¹⁷ **[*1161]** Given the vertical market relationship between the NCAA and the broadcasters and the open opportunity to bid for the package, on its face the television plan does not constitute an attempt by competitors at one level to foreclose competition by traders at the same level. **[**40]**

The cases cited by the district court do not compel a different conclusion. In [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 \(1959\)](#), a retailer induced wholesalers and manufacturers to refuse to supply its competitor. In [Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 \(1941\)](#), clothing manufacturers organized a boycott of retailers who dealt in the clothing of competing manufacturers. In [Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 \(1961\)](#), manufacturers of gas heaters coerced an adverse "seal of approval" decision with **[**41]** regard to the product of a competitor. Each of these cases reflects conduct by one firm inducing concerted action to deprive competing firms of necessary trade relationships, a characteristic absent here. We conclude that the NCAA's practices do not constitute a boycott of the networks not awarded broadcast rights.

¹⁷ Because the rights were sold as a package only, broadcasters who lacked the financial resources necessary to purchase the package were foreclosed from bidding. We need not decide whether this constitutes an unlawful restraint under other antitrust theories; it does not implicate the per se rule against boycotts.

The district court also held that by threatening to sanction schools that violated the television plan, the NCAA threatened a per se illegal boycott of those schools. [546 F. Supp. at 1295](#). Again we disagree. [HN7](#)[¹] In the context of associational activities, the existence of an expulsion sanction does not by itself constitute a boycott. Unless resort to the expulsion sanction constitutes a naked attempt to exclude competition, the antitrust implications of an expulsion sanction turn on the competitive reasonableness of the rule being enforced. 2 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 61.02; L. Sullivan, *Handbook of the Law of Antitrust* § 88, at 247-48. Cf. [United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1374-85 \(5th Cir. 1980\)](#) (multiple listing service membership rules assessed for competitive reasonableness even though the rules effectively [**42] excluded certain realtors from membership); *Florists' Nationwide Telephone Delivery Network -- America's Phone-Order Florists, Inc. v. Florist's Telegraph Delivery Association*, [371 F.2d 263, 267-69 \(7th Cir. 1967\)](#) (membership rules that caused members of defendant association to cease dealing with plaintiff scrutinized for competitive reasonableness). [HN8](#)[¹] An association's rule or practice can in certain circumstances be considered facially unreasonable, see *Fashion Originators' Guild; Radiant Burners; Associated Press v. United States*, [326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 \(1945\)](#), and thus can be summarily invalidated as an illegal boycott. However, when, as here, the reasonableness of the practice cannot be assessed summarily, it is improper to affix the label "boycott" and end all inquiry unless the proffered rule-enforcement justification appears to be merely a sham for some anticompetitive purpose. See [North American Soccer League v. National Football League, \[670 F.2d 1249, 1258-59 \\(2d Cir.\\), cert. denied, 459 U.S. 1074, 103 S. Ct. 499, 74 L. Ed. 2d 639, 51 U.S.L.W. 3442 \\(1982\\)\]\(#\); \[United States Trotting Association v. Chicago Downs Association, Inc.\]\(#\), \[665 F.2d 1**431 781, 787-90 \\(7th Cir. 1981\\)\]\(#\) \(en banc\); \[Smith v. Pro Football, Inc.\]\(#\), \[593 F.2d 1173, 1177-82 \\(D.C. Cir. 1978\\)\]\(#\); 2 J. Von Kalinowski, *Antitrust Law and Trade Regulation* §§ 60.03\(4\), 61.02, 61.07\[2\]. The NCAA's expulsion sanction appears to be an enforcement mechanism and not a sham for an anticompetitive purpose. We have affirmed the trial court's ruling that the NCAA's television plan is illegal; hence, we need not assess the competitive reasonableness of the expulsion sanction in the context of the plan.](#)

V

The NCAA contends that the injunction granted by the trial court should be modified [*1162] because it is too vague and too broad. The plaintiffs agree that standing alone the injunction is lacking in specificity and is overly broad, but argue that read in light of the violations found by the district court the injunction is proper. The NCAA specifically challenges paragraphs one, three, and four:

(1) The right to telecast college football games is the property of the institutions participating in the games, and that right may be sold or assigned by those institutions to any entity at their discretion;
; * * *

(3) National Collegiate Athletic Association, [**44] its officers, agents and employees, shall be and hereby are enjoined from enforcing or attempting to enforce the provisions of the contracts above described and from making any other contract of similar kind or nature in the future;

(4) National Collegiate Athletic Association, its officers, agents or employees, shall be and hereby are enjoined from prohibiting member institutions from selling or assigning their rights to telecast the college football games in which they participate, and from requiring as a condition of membership that those institutions grant to National Collegiate Athletic Association the power to control those institutions' rights to telecast college football games.

The NCAA argues that the phrase in paragraph three, "other contract of similar kind or nature in the future," is vague and could be read to prohibit the NCAA from arranging for the broadcast of championship tournaments in Divisions I-AA, II, and III. It also argues that paragraph three can be construed to bar arrangements that it contends are lawful, such as a membership-wide contract with opt-out and pass-over payment provisions, or blackout rules. Finally, the NCAA contends that paragraph [**45] four could be read to prevent the NCAA from imposing sanctions for violations of non-television regulations and to prevent it from reserving Friday night for high school football only.

We hold that the NCAA should present its concerns regarding these paragraphs to the district court. Nevertheless, we comment on some of the arguments as an aid to the district court on remand. Paragraph four might be construed to prevent the NCAA from imposing television sanctions on schools that violate regulations unrelated to

the television plan.¹⁸ Paragraph four might also be read to preclude the NCAA from prohibiting games on Friday night. Neither of these effects is warranted by the violations found. Furthermore, paragraphs one and four appear to vest exclusive control of television rights in the individual schools. While we hold that the NCAA cannot lawfully maintain exclusive control of the rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of the instant case. The NCAA's arguments regarding the specificity and self-sufficiency of the injunction should also be addressed by the district court.

[**46] We remand to permit the district court to consider its injunction in light of the views expressed in this opinion. In all other respects consistent herewith the judgment of the district court is affirmed.

Dissent by: BARRETT

Dissent

BARRETT, Cir. J., dissenting:

I would reverse the judgment of the district court, quash the injunction and hold that the NCAA television regulations and contracts are valid and lawful. It is my view that the district court's findings, affirmed by the majority opinion, that the NCAA television contracts, and its adjunct rules, constitute *per se* price fixing violations under [15 U.S.C. § 1 \(1976\)](#) and monopolization violations under [15 U.S.C. § 2 \(1976\)](#) are clearly erroneous. I am convinced that although there is evidence to support the trial court findings, my review of the entire evidence leads me to a firm conviction that a mistake has been committed. [United States v. United States Gypsum \[*1163\] Co., 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746 \(1948\)](#).

I.

In concluding that the NCAA television contracts constitute *per se* price fixing violations, the district court found, *inter alia*: (a) that although it is true that membership in [**47] the NCAA is voluntary in the sense that a member institution may withdraw from the NCAA at any time, still, as a practical matter, membership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program; (b) NCAA membership is not voluntary for Oklahoma and Georgia, or for many other member institutions for which athletic excellence is an institutional priority; (c) college football is a business, operated by professionals and, like any business, the schools participate in intercollegiate football to maximize revenue and minimize expense "while at the same time maintaining the level of quality which makes their product attractive to the buying public"; and (D) even though Oklahoma and Georgia properly challenge the NCAA television contracts as violative of the antitrust laws causing them injury, still they "believe that NCAA has an important role in regulating such matters as the rules of play, standards of amateurism and academic eligibility."

In concluding that college football is a business operated by professionals to maximize revenue and minimize expense, the district court specifically found:

Oklahoma's intercollegiate football [**48] program has, over the years, produced many outstanding and highly-ranked teams. Oklahoma is capable of attracting large national television audiences for its televised games. Football is the only sport sponsored by Oklahoma which actually generates revenue beyond the costs of fielding a team. The profits generated by the football team support all of the other sixteen men's and women's sports in which Oklahoma participates. In recent years, these programs have become more and more expensive to maintain due to increasing costs and the expansion of athletic programs for women. As a result, Oklahoma seeks to maximize its revenues from football television. Like Oklahoma, Georgia has compiled a record of outstanding success with its intercollegiate football program, and football is the major revenue

¹⁸ The athletic director of the University of Southern California has stated that paragraph four has this effect. See Sports Illustrated, Sept. 27, 1982, at 9, 12.

producing sport for Georgia. Budgetary pressures have forced cuts in Georgia's athletic program, including the elimination of its intercollegiate wrestling program. Georgia also seeks to maximize the revenues generated from the televising of its football games.

Board of Regents v. NCAA, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982).

These findings do not address the purposes [**49] and objectives of the NCAA, i.e., preserving a competitive balance in intercollegiate athletics, insuring the amateurism of college athletics and avoiding the aura of professional sports. It is my view, as set forth more fully hereinafter, that the NCAA television plan's primary purpose is not anti-competitive. Rather, it is designed to further the purposes and objectives of the NCAA, which are to maintain intercollegiate football as an amateur sport and an adjunct of the academic endeavors of the institutions. One of the key purposes is to insure that the student athlete is fully integrated into academic endeavors. These are the "redeeming virtues" which did not impress the trial court or the majority. They are so compelling, in my opinion, that under the "rule of reason" analysis the public interest and that of the parties is served by sustaining the restraint as reasonable.

II.

The NCAA is an unincorporated, nonprofit, educational association with some 883 active members, consisting of private and public colleges and universities in the United States. The NCAA was formed in 1906 to regulate and supervise college athletics throughout the United States, and is dedicated [**50] to preserving amateurism in athletic activities among its member institutions, with the goal of maintaining those activities on an ethical plane in keeping [*1164] with the dignity and high purpose of education. Thus, its goals are an integral part of the academic scheme. Of the approximate 883 members, participation in intercollegiate athletics involves about 271 members in Division I, 188 members in Division II and 281 members in Division III. Approximately 143 member institutions do not engage in intercollegiate athletics.

All divisions are subject to NCAA rules governing academic standards in intercollegiate athletics in keeping with the fundamental policy of the NCAA to maintain intercollegiate athletics "as an integral part of the educational program and the athlete as an integral part of the student body." Student-athletes must meet various academic standards in order to become and remain eligible for participation in NCAA sanctioned athletic events. These requirements are designed to insure that those who engage in college athletics are genuine students. One of the recent bylaws requires proof that the student-athlete makes proper progress toward a degree within [**51] prescribed terms to remain eligible for competition. Obviously, the success of the NCAA goal is in large measure dependent upon the good-faith approach to compliance by the member institutions.

In addition to a variety of rules designed to insure adequate academic achievement by student athletes, the NCAA has complex and detailed rules and regulations dealing with recruiting, financial aid or benefits (intended to foster participation in intercollegiate sports by genuine amateurs in the sense that the student-athlete is primarily dedicated to academic goals), and limitations on the coaching staffs. These goals are in large measure accomplished by a strong, vigilant investigative area of the NCAA dedicated to insuring that its member institutions abide the various rules, standards and bylaws designed to maintain the competitive amateur status of intercollegiate football within the academic framework. The complexity of the NCAA bylaws, rules and interpretations evidence the association's effort to maintain and protect academic standards applicable to amateur student athletes.

The NCAA's committee on infractions is responsible for enforcement of the NCAA program. It receives complaints, [**52] and in reliance on its investigative staff, determines facts and violations, and fixes penalties. Charles Alan Wright, Chairman of the Infractions Committee, testified that the work of this committee is dedicated to the NCAA policy of maintaining intercollegiate athletics as an integral part of the educational program, with the athlete an integral part of the student body, thus retaining a clear line of demarcation between college athletics and

professional sports. The district court gave no credence or recognition to this testimony or similar testimony of other witnesses.

III.

There are relatively few federal court decisions speaking to the issue of amateur athletics' inclusion under the federal antitrust laws. However, *professional* basketball, golf and hockey have been consistently held to be within the meaning of the Sherman Act. See Annot., 18 A.L.R. Fed. 489 (1974) (citing federal court decisions applying federal antitrust laws exclusively to the "business of professional sports.")

In *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977), the court was presented with a challenge to the NCAA bylaws limiting the number of assistant football coaches that a member [**53] institution could employ. The contention was made that the court was without jurisdiction because there had not been demonstrated sufficient impact on interstate commerce by virtue of the rule to bring the case within § 1 of the Sherman Act. The court held otherwise on this issue but upheld the NCAA bylaws there challenged and pertinently observed:

A goal of the NCAA, one which is endowed with certain benefits to society, is to "retain a clear line of demarcation between college athletics and professional sports." Colleges with more successful programs, both competitively and economically, were seen as taking advantage of their success by expanding their programs, [*1165] to the ultimate detriment of the whole system of intercollegiate athletics. Financial pressures upon many members, not merely to "catch up", but to "keep up", were beginning to threaten both the competitive, and the amateur, nature of the programs, leading quite possibly to abandonment by many. "Minor" and "minority" sports were viewed as imperiled by concentration upon the "money makers", such as varsity football and basketball.

[The NCAA regulation in question] was, with other rules adopted [**54] at the same time, intended to be an "economy measure". In this sense it was both in design and effect one having commercial impact. But the fundamental objective in mind was to preserve and foster competition in intercollegiate athletics -- by curtailing, as it were, potentially monopolistic practices by the more powerful -- and to reorient the programs into their traditional role as amateur sports operating as part of the educational processes.

Id. at 1153.

I believe that the trial court disregarded the purposes and objectives of the NCAA set forth in *Hennessey, supra*. Instead of recognizing the NCAA goal of fostering balanced amateur competition among the respective division colleges and universities, the trial court viewed intercollegiate football competition not only as a business, but as a "pot of gold" business for those colleges and universities which have consistently recruited top athletes in keeping with their institutional priority of attaining athletic excellence. I believe that Oklahoma, Georgia and other college football powers which desire to be free from the provisions of the NCAA television rules and bylaws, and assert their "right" to contract [**55] independently for television dollars, in truth and effect insist on the best of two worlds. While solemnly proclaiming their allegiance to all other NCAA rules and regulations pertaining to intercollegiate football, they insist on invalidating the NCAA television contracts and the provisos relative to distribution of the receipts therefrom, based on the additional monetary rewards that their excellent football programs command in national television. I firmly believe that to the extent that the NCAA's television restraints upon Oklahoma and Georgia and other member institutions with excellent football programs are anticompetitive, these restraints are fully justified under the rule of reason in that they are necessary to maintain intercollegiate football as amateur competition.

IV.

In *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918), the Supreme Court succinctly stated the rule of reason to be: "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." It is my view that the district court [**56] failed to adequately focus on the procompetitive features of the NCAA television plan-contracts when considered in light of the entire NCAA design and purpose, the central objective of which is to maintain intercollegiate athletics on an amateur competitive basis.

In *Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*, the basic question before the Court was whether the issuance of blanket licenses to copyrighted musical compositions at fees negotiated by American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) constituted a *per se* price fixing in violation of the antitrust laws. The district court dismissed the CBS complaint, concluding that the blanket license was not price fixing and a *per se* violation of the Sherman Act. The court of appeals reversed, holding that the blanket license issued to television networks was a form of price fixing illegal *per se* and also copyright misuse. The Supreme Court reversed the court of appeals and remanded for further proceedings under the "rule of reason". Mr. Justice White delivered the opinion for the Court. Mr. Justice Stevens was the sole dissenter. [**57] The majority pertinently observed:

[*1166] In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so "plainly anticompetitive", *National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*; *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*, and so often "lack . . . any redeeming virtue", *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*, that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This *per se* rule is a valid and useful tool of antitrust policy and enforcement. And agreements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category. But easy labels do not always supply ready answers.

To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: [**58] the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. But this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price". . . . The . . . literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming value". . . .

Consequently, as we recognized in *United States v. Topco Associates, Inc., 405 U.S. 596, 607-608, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*, "it is only after considerable experience with certain business relationships that courts classify them as *per se* violations. . . ." See *White Motor Co. v. United States, 372 U.S. 253, 263, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*. We have never examined a practice like this one before. . . .

* * *

More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, see *United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*, the purpose [**59] of the practice are to threaten the proper operation of our predominantly free-market economy -- that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." *Id., at 441 n.16*; see *National Society of Professional Engineers v. United States, 435 U.S., at 688; Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S., at 50 n. 16, Northern Pac. R. Co. v. United States, 356 U.S., at 4*.

Broadcast Music, Inc., supra 441 U.S. at 7-10, 19-20. (Footnotes omitted, emphasis supplied).

I recognize that if the rule of reason does not apply to the instant case, the NCAA television contracts may, by virtue of *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*, constitute *per se* illegal price fixing. This would result because the "maximum" sum is "fixed" by virtue of the contracts which

are binding on the NCAA member schools. *Maricopa* holds that the *per se* rule applies when there exists [**60] "a price restraint that tends to provide the same economic rewards to all practitioners [colleges] regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases." *Id. at 2475*. *Per se* violations of § 1 of the Sherman Act are agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore [*1167] illegal. *White Motor Co. v. United States*, 372 U.S. 253, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958).

My research indicates that all of the reported cases wherein the *per se* rule has been applied have involved true competitive *business enterprises* operating in the interstate market where the goal is exclusively that of seeking a profit from the product or service offered to the public. See *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 55 L. Ed. 2d 637, [**61] 98 S. Ct. 1355 (1978); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972). Restraints on competition or on the course of trade in merchandising products moving in interstate commerce are not violative of the Sherman Act unless the restraint is shown to affect market prices or otherwise deprive purchasers and consumers of the advantages to which they are entitled from free competition in the market place. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 84 L. Ed. 1311, 60 S. Ct. 982 (1940).

Maricopa, supra, *National Society of Professional Engineers, supra*, and *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975), involved prohibitive price restraints, even though those restraints were enmeshed with overall programs designed to accommodate needs of people who would benefit therefrom. At the core, however, was the fact that in each case the professionally skilled participants were seeking profits from their services. Thus, their activities constituted business enterprises in a pure competitive sense. I do not view the NCAA television contracts as falling in that category, because they are not [**62] designed to render the greatest profit for a *business purpose*.

V.

If the narrow focus in this case be placed, as I believe the trial court placed it, on the competition for television proceeds from contracts that are exclusively entered into by the NCAA and binding on its member schools, and contracts which may be entered into individually by the established intercollegiate football powers, I have little doubt that the total monetary benefits derived by the football powers would far exceed those received by them via the NCAA contracts. On that measure, then, the NCAA television contracts do constitute an anticompetitive restraint when compared with the potential dollars which the major football powers may command in the so-called "open market".

Nevertheless, I conclude that the NCAA restraints are completely defensible under the rule of reason. The restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, academic achievement. As thus measured, the restraint is not unreasonable in [**63] its effect on competition; its procompetitive effect clearly outweighs the anticompetitive effect. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). Furthermore, there is no showing that the NCAA restraints laid upon Oklahoma and Georgia have injured the consumer public, i.e., those who view intercollegiate athletic events on television. Thus, the "fall back" position taken by the district court -- that antitrust regulation applies when, as here, an association wields exclusive control over television contracts involving the conduct of intercollegiate football -- must fail. The district court erroneously focused on the inhibition placed upon Oklahoma and Georgia and those NCAA member institutions similarly situated who likely could command far greater individual (institution-wise) monetary return for television rights to their football games if permitted to contract independent of the NCAA.

In addition to the amateurism goals promoted by the NCAA, the NCAA's television contract restraints do, on balance, promote competition and enhance viewership at intercollegiate [*1168] football contests. The NCAA television [**64] plan and its television contracts enhance overall viewership when one considers "output" -- as entertainment -- in the sense urged by the NCAA: those who view the games in the stadiums and those who view

the games on television. If viewers are the "consumers", as certainly they must be for antitrust purposes, overall viewership for all games between all participating NCAA members engaging in football, whether Division I, II or III, is increased, rather than reduced by virtue of the NCAA television plan. Critically, live viewership at games is protected by virtue of the plan.

I note that there is a sharp dispute whether NCAA sets or dictates the television "package" with the networks. In *Maricopa, supra*, the Supreme Court applied the *per se* rule to the medical society's practice of setting maximum prices doctor members could claim in full payment for health services provided to policyholders of specified insurance plans. There was no dispute in *Maricopa* that the *maximum* price restraint tends to provide the same economic rewards to all medical practitioners, regardless of their dedication, skill or experience. There is no basis for comparing the medical practitioners [**65] in *Maricopa* with the NCAA member institutions. It is significant that the *Maricopa* majority observed that the "rule of reason" exception set forth in *Continental T.V., Inc., v. GTE Sylvania Inc., supra*, is the preferred method of determining whether a particular practice is in violation of the antitrust laws.

VI.

It is my conclusion that the rule of reason militates in favor of the NCAA. Its television contracts allow for near equal per-game payments to member universities. I agree with NCAA's contention that, in the context of the Association's goals and purposes, this is no more "price fixing" than that involved in a law partnership's division of profits. The NCAA provisions on the division of television proceeds simply allocate those revenues among member institutions. This distribution does not affect television output. It does, however, foster competition among its members in keeping with its goal to assure amateurism in intercollegiate athletics and to maintain the primary status of the athlete as a student.

The NCAA distribution is aimed to assure a minimum of competitive balance on the playing fields. The NCAA is, then, a form of joint venture, and [**66] its television plan and contracts are an integral, all-important aspect of its purposes and goals. As such, the television contracts do not have the "pernicious effect on competition and lack of any redeeming virtue" stated in *Northern Pacific Railway Co. v. United States, supra* 356 U.S. at 5.

The "Fundamental Policy" stated in the NCAA constitution, *i.e.*, that of maintaining intercollegiate athletics as an integral part of the educational program, cannot be considered a profit-oriented goal. I conclude that the district court erred by subjugating the NCAA's educational goals (and, incidentally, those which Oklahoma and Georgia insist must be maintained in any event) to the purely competitive commercialism of "every school for itself" approach to television contract bargaining. The statement of "Purposes" for NCAA television contracts for the years 1982-1985, in sum, reveals the district court's error in refusing to recognize that under the rule of reason, the NCAA television contracts under challenge do not violate the federal antitrust laws:

The purposes of this Plan shall be to reduce, insofar as possible, the adverse effects of live television . . . upon football [**67] game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives.

Plaintiff's Exhibit "LT".

I would reverse the judgment of the district court.



Hayden Pub. Co. v. Cox Broadcasting Corp.

United States District Court for the Eastern District of New York

May 20, 1983

No. 79 C 414

Reporter

566 F. Supp. 503 *; 1983 U.S. Dist. LEXIS 16820 **; 1983-1 Trade Cas. (CCH) P65,456

Hayden Publishing Co., Inc., Plaintiff v. Cox Broadcasting Corp. and United Technical Publication, Inc., Defendants

Subsequent History: [**1] Reversed and Remanded March 6, 1984.

Core Terms

advertising, electronic, monopolization, defendants', relevant market, antitrust, interchangeability, submarket, summary judgment, products, monopoly power, customers, summary judgment motion, cause of action, competitors, directories, consumer, argues, prices

LexisNexis® Headnotes

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

HN1 **Summary Judgment, Entitlement as Matter of Law**

This court is ever mindful that summary judgment procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles. In the proper circumstances however, where plaintiffs have been afforded ample opportunity for discovery, it is clear that summary judgment does apply to antitrust suits. While an antitrust case ripe with issues of fact concerning motive, intent and credibility would seemingly be impervious to Fed. R. Civ. P. 56 application, the mere fact that a case is based upon the antitrust laws does not suspend utilization of the rule.

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

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

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

HN2 Summary Judgment, Entitlement as Matter of Law

Summary judgment is appropriate where, as here, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. A party opposing summary judgment must present "significant probative evidence tending to support the complaint, setting forth "concrete particulars.

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

Evidence > Inferences & Presumptions > Inferences

HN3 Summary Judgment, Entitlement as Matter of Law

Wherever reasonable inference can be drawn regarding the evidence, the court has taken that inference most favorable to the plaintiff.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4 Monopolies & Monopolization, Actual Monopolization

In order to state a valid claim of monopolization under [15 U.S.C.S. § 2](#), a plaintiff must allege that the defendant possesses monopoly power in the relevant market and has willfully acquired or maintained this power, as distinguished from enjoying it solely as a consequence of superior product, growth, development or historic accident.

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

Criminal Law & Procedure > Sentencing > Fines

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

Antitrust & Trade Law > Sherman Act > General Overview

HN5 Monopolies & Monopolization, Actual Monopolization

[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 felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

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

566 F. Supp. 503, *503L^A 1983 U.S. Dist. LEXIS 16820, **1

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > General Overview

HN6 **Monopolies & Monopolization, Attempts to Monopolize**

The initial requirement under [15 U.S.C.S. § 2](#), that a defendant possess monopoly power in the relevant market, compels a determination as to the definition and extent of that relevant market. Indeed, an antitrust plaintiff cannot prove a defendant's ability to monopolize trade absent a showing that the defendant is able to do so within the relevant economic market. Thus, illegal monopoly power may only be appraised in terms of the competitive market for the product. Moreover, courts are not free to accept whatever market is suggested by the plaintiff, but must examine commercial realities within the industry in question, so as to determine whether plaintiff has met the burden of proving the relevant market. In so doing, this court recognizes that the antitrust laws were enacted for the protection of competition, not competitors. While determination of the relevant market is essentially a question of fact, there are specific legal guidelines which are applicable to all cases.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7 **Monopolies & Monopolization, Actual Monopolization**

In defining the relevant product market, the Supreme Court determined that the market is composed of products that have reasonable interchangeability for purposes for which they are produced. It is, therefore, the use of the product by consumers rather than the nature of the product itself, which determines the relevant product market.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN8 **Monopolies & Monopolization, Actual Monopolization**

The purchaser readiness to substitute criterion is designed to measure cross-elasticity of demand or reasonable interchangeability by determining the responsiveness within the marketplace of the sales of one product to price changes of another product.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN9 **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.

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN10**](#) Monopolies & Monopolization, Actual Monopolization

Selling price between commodities with similar uses and different characteristics may vary, is merely reflective of commercial reality. To divide product lines strictly by price is simply unrealistic.

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

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Sherman Act > General Overview

[**HN11**](#) Monopolies & Monopolization, Actual Monopolization

While the emphasis on advertising impact contrasts with the general rule within the commercial world where price is often the determining factor, it does not in and of itself create a separate product market or submarket. Quality of service can substitute without difficulty for price as the primary competitive variable, particularly where a sophisticated consumer, as opposed to the general public, has the ability to make the necessary qualitative distinctions.

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN12**](#) Monopolies & Monopolization, Actual Monopolization

A relevant market for a product may not be defined by focusing merely on a single factor such as sensitivity to price change, but must instead include an evaluation of the limits of that product's competition with other products.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN13**](#) Actual Monopolization, Claims

The essential elements of Attempted Monopolization under [15 U.S.C.S. § 2](#) are a dangerous probability of success in monopolizing a given product market, and the specific intent to destroy competition or build monopoly. Like actual monopolization, the attempt to monopolize cannot exist without first establishing the framework within which the specific intent to destroy competition exists. Thus proof of relevant product market is a necessary element of a cause of action for monopolization or attempted monopolization.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN14 [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

[15 U.S.C.S. § 1](#) provides in pertinent part that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is declared to be illegal.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN15 [blue icon] Regulated Practices, Price Fixing & Restraints of Trade

Under the rule of reason analysis, the elements of restraint of trade are an agreement among two or more persons or distinct business entities which is intended to harm or unreasonably restrain competition and which actually causes injury to competition.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN16 [blue icon] Monopolies & Monopolization, Attempts to Monopolize

It is the impact upon competitive conditions in a definable product market which distinguishes the antitrust violation from the ordinary business tort.

Judges: Costantino, D.J.

Opinion by: COSTANTINO

Opinion

[*505] Memorandum of Decision and Order

COSTANTINO, D.J.:

In the above-entitled antitrust action, defendants have moved for summary judgment pursuant to [Rule 56 of the Fed. R. Civ. P.](#) In addition to opposing the motion, plaintiff has cross-moved for partial summary judgment. For the reasons set forth below, defendants' motion for summary judgment on all causes of action is hereby granted in its entirety.¹

Plaintiff Hayden Publishing Company ("Hayden") commenced this antitrust action charging both defendants Cox Broadcasting Corporation ("Cox") and United Technical Publications, Inc. ("UTP"), a wholly-owned subsidiary of Cox, with violating [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), and charging defendant UTP with violating [Section 2](#). [15 U.S.C. § 2](#). The [Section](#) [\[*21\]](#) claim charges that both defendants conspired in an unlawful combination and in unreasonable restraint of trade and commerce in advertising in electronic catalog directories. The [Section 2](#) claim alleges that UTP's electronic trade reference publication, "Electronic Engineers Master" ("EEM"), has monopolized or attempted to monopolize the market for product data advertising in electronic catalog directories.

¹ As the court has determined that defendants' motion be granted in its entirety, plaintiff's cross-motion for partial summary judgment is accordingly denied.

Defendants' summary judgment motion is premised upon the allegation that the plaintiff's Sherman Act causes of action are dependent upon a showing that Hayden's publication ("Gold Book") and EEM, comprise the entire "relevant product market" for sales of advertising for the electronics trade. Defendants argue that this narrow product market conflicts with commercial reality by excluding actual competitors of both publications. Accordingly, defendants contend that plaintiffs' causes of action must fail as a matter of law.

Summary Judgment

HN1[] This court is ever mindful that "summary [judgment] procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles . . ." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, [*3] 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962); see *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1110 (5th Cir. 1979). In the "proper circumstances" however, where plaintiffs have been afforded ample opportunity for discovery, it is clear that summary judgment does apply to antitrust suits. See *McDaniel v. General Motors Corp.*, 480 F. Supp. 666, 669-670 (E.D.N.Y. 1979), aff'd, 628 F.2d 1345 (2d Cir. 1980). While an antitrust case ripe with issues of fact concerning motive, intent and credibility would seemingly be impervious to *Rule 56* application, see generally Moore's Federal Practice and Procedure §§ 56.17[1],.17[5], the mere fact that a case is based upon the antitrust laws does not suspend utilization of the rule. *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d at 1111; *McDaniel v. General Motors Corp.*, 480 F. Supp. at 670.

HN2[] Summary judgment is appropriate where, as here, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See *Northrop Corp. v. McDonnell Douglas Corp.*, 700 F.2d 506, 525 (9th Cir. 1983). A party opposing summary judgment must present "significant probative evidence tending to support the [*4] complaint," *First National Bank v. Cities Service*, 391 U.S. 253, 290, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968); *General Business Systems v. North Am. Philips Corp.*, 699 F.2d 965, 971 (9th Cir. 1983) setting forth "concrete particulars." *Dressler v. The MV Sandpiper*, 331 F.2d 130, 133 (2d Cir. 1964).

In the instant action, the court has drawn the facts of the case from the voluminous discovery record, including extensive affidavits submitted by the parties. **HN3**[] Wherever reasonable inference can be drawn regarding the evidence, the court has taken that inference most favorable to the plaintiff. See *Reisner v. General Motors Corp.*, 671 F.2d 91, 93 (2d Cir.), cert. denied, 459 U.S. 858, 103 S. Ct. 56, 74 L. Ed. 2d 112 (1982). [*506] With these principles in mind, the court has determined that summary judgment is appropriate. The matter has been sufficiently developed with extensive discovery proceedings. As the movants have carried their burden of demonstrating that there are no genuine issues of material fact concerning resolution of these claims, they are ripe for decision in defendants' favor.

Section 2 Monopolization Claim

HN4[] In order to state a valid [*5] claim of monopolization under S.2,² a plaintiff must allege that the defendant possesses monopoly power in the relevant market and has willfully acquired or maintained this power, as distinguished from enjoying it solely as a consequence of superior product, growth, development or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); *Schaben v. Samuel Moore & Co.*, 462 F. Supp. 1321 (S.D. Iowa 1978), aff'd, 606 F.2d 831 (8th Cir. 1979). Monopoly power is the power to control prices or to exclude competition within the relevant market. *United States v. Grinnell Corp.*, 384 U.S. at 570-71; *ALW, Inc. v. United Air Lines*, 510 F.2d 52, 55 (9th Cir. 1975).

² **HN5**[] 15 U.S.C. § 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[**6] **HN6** The initial requirement, that a defendant possess monopoly power in the relevant market, compels a determination as to the definition and extent of that relevant market. Indeed, an antitrust plaintiff cannot prove a defendant's ability to monopolize trade absent a showing that the defendant is able to do so within the relevant economic market. See *Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980) ("Nifty Foods"); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), cert. denied, 429 U.S. 1097, 51 L. Ed. 2d 545, 97 S. Ct. 1116 (1977). Thus, illegal monopoly power may only be appraised in terms of the competitive market for the product. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 393, 100 L. Ed. 1264, 76 S. Ct. 994 (1956) ("duPont"); see *Nifty Foods*, at 840; *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2d Cir. 1979), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980). Moreover, courts are not free to accept whatever market is suggested by the plaintiff, but must examine commercial realities within the industry in question, *JBL Enterprises*, [**7] *Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011, 1016 (9th Cir. 1983) so as to determine whether plaintiff has met the burden of proving the relevant market. *Acme Precision Products, Inc. v. American Alloys Corp.*, 484 F.2d 1237 (8th Cir. 1973); see *duPont*, 351 U.S. at 381. In so doing, this court recognizes that "the antitrust laws . . . were enacted for the protection of competition, not competitors." *Gianna Enterprises v. Miss World (Jersey) Ltd.*, 551 F. Supp. 1348, 1353 (S.D.N.Y. 1982) (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962) ("Brown Shoe").

While determination of the relevant market is essentially a question of fact, see, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); *International Boxing Club v. United States*, 358 U.S. 242, 3 L. Ed. 2d 270, 79 S. Ct. 245 (1959), there are specific legal guidelines which are applicable to all cases.

HN7 In defining the "relevant product market," the Supreme Court in *duPont*, determined that the market is composed of products that have "reasonable interchangeability" for purposes for [**8] which they are produced. 351 U.S. at 395. It is, therefore, the use of the product by consumers rather than the nature of the product itself, which determines the [*507] relevant product market. *Warner Amex Cable v. American Broadcasting*, 499 F. Supp. 537, 546 (S.D. Ohio 1980); *United States v. Chas. Pfizer & Co.*, 245 F. Supp. 737 (E.D.N.Y. 1965).

The Relevant Product Market

In support of its summary judgment motion, defendants argue that in addition to EEM and Gold Book, there are a number of other publications which compete within the relevant product market. Both EEM and Gold Book are published annually and derive revenue through the sale of advertising space to suppliers of electronic products. The advertisements are then published within each publication and distributed without charge to the electronics trade. The product market, which Hayden's Section 2 claim alleges has been monopolized, consists of that market which competes for the sale of advertising.

Defendants have published EEM since 1958 while Gold Book entered the market in 1974. Defendants have asserted that the following publications compete with EEM and Gold Book within the relevant market: [**9]

- (1) Micro Waves Product Data Directory ("MPDD") *
- (2) Electronic Buyers' Guide ("EBG")
- (3) Electronic Distributors Master Catalog ("EDMC") **
- (4) I C Master **
- (5) Electronic Industry Telephone Directory ("EITD")
- (6) Who's Who In Electronics
- (7) Thomas Register
- (8) Control Equipment Master ("CEM")
- (9) Interference Technology Engineers Master ("ITEM")

* Published by Hayden

** Published by UTP

Hayden argues that the various competitors denominated by the defendants are not "functionally interchangeable" with EEM and further, that the defendants have failed to establish that there is a "purchaser readiness to substitute" between EEM and defendants' nominees.

HN8 [↑] The "purchaser readiness to substitute" criterion is designed to measure "cross-elasticity of demand" or "reasonable interchangeability" by determining the responsiveness within the marketplace of the sales of one product to price changes of another product. See [Borden, Inc. v. F.T.C., 674 F.2d 498, 507 \(6th Cir. 1982\)](#), *petition for cert. filed*, 51 U.S.L.W. 3150 (U.S. Aug. 25, 1982) (No. 82-328). In support of its argument, Hayden cites a study purporting to [**10] show minimal switching away from EEM to other publications when EEM raised its advertising prices.

Hayden also insists that no other publication other than EEM responded to Gold Book's entry into the market by lowering its advertising rates.³

[**11] Finally, Hayden argues that even if the court were to accept all the defendants' arguments, defendants' motion should not be granted in that there has been no showing of the defendants' product market share.

The defendants cite *Brown Shoe*, for the proposition that **HN9** [↑] "the outer boundaries of a product market are determined by the reasonable interchangeability of use [*508] or the cross-elasticity of demand between the product itself and substitutes for it. [370 U.S. at 325](#). Once the outer boundaries of the product market are thus delineated, *Brown Shoe* enumerates further criteria for ascertainment of "submarkets." Included therein are "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

In the case at bar, ample evidence has been proffered (including surveys, studies, questionnaires, internal memoranda and letters) which persuades the court that reasonable interchangeability exists between EEM and the other publications cited by the defendants. [**12] In so holding, this court is guided primarily by the "reality of the marketplace." See [United States v. Empire Gas Corp., 537 F.2d 296, 303 \(8th Cir. 1976\)](#), *cert. denied*, 429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977), Case- [Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 456 \(9th Cir. 1966\)](#), *rev'd on other grounds*, [389 U.S. 384, 19 L. Ed. 2d 621, 88 S. Ct. 528 \(1967\)](#).

It is clear that those publications cited by defendants are utilized to obtain product information concerning electronic products throughout the electronics industry. Suppliers of these products utilize all the publications cited (as well as EEM and Gold Book) for the purpose of advertising their products. In addition, Hayden's own studies indicate its marketing observation that publications other than EEM were in fact in competition with both Gold Book and EEM. For example, the *Fairchild Study*, prepared by Hayden, polled prospective industry customers as to their choice between EEM, Gold Book and EBG, as "the best publication" to reach the market. Further, defendants have cited numerous readership surveys conducted by electronic manufacturers (the potential customers of both Gold [**13] Book and EEM) which indicate clearly that the manufacturers considered a wide range of publications as interchangeable with EEM and Gold Book. Despite minor differences between these publications as to format, it is the interchangeability in end use of the product rather than the product itself which determines the relevant market.

³ Hayden argues that the failure of other publications to lower their prices in response to Gold Book's entry onto the market is evidence that none considered Gold Book a competitor. Thus, concludes Hayden, none should be included within the relevant product market. The court cannot accept plaintiff's argument.

Any test, solely designed to measure the reaction of other publications to Gold Book's entry onto the market, would seem to focus on the wrong side of issue. By ignoring consumers and concentrating instead upon the reaction of other sellers, plaintiff's argument is of extremely limited value. See [L.G. Balfour Company v. F.T.C., 442 F.2d 1, 11 \(7th Cir. 1971\)](#); [United States v. Bethlehem Steel Corp., 168 F. Supp. 576 \(S.D.N.Y. 1958\)](#). The court notes further, that while failing to reduce prices, most of the publications cited by defendants did not raise their prices either. More importantly, the particular gauge of competitor response urged by Hayden cannot be deemed as dispositive as to this issue. The record is replete with examples of identical or equivalent advertising in editions of Gold Book and a number of the other publications, including EEM.

United States v. Chas. Pfizer & Co., 246 F. Supp. 464 (E.D.N.Y. 1965); see Acme Precision Products, Inc. v. American Alloys Corp., 484 F.2d at 1242.

Thus, while the reasonable interchangeability of a product is not the sole test for determining the relevant market, United States v. CBS, Inc., 459 F. Supp. 832, 837 (C.D. Cal. 1978), a determination that product interchangeability does exist, enables this court to ascertain that the "outer boundaries" of the relevant product market are not limited to EEM and Gold Book.

As to whether a valid "submarket" exists consisting solely of EEM and Gold Book, here too plaintiff is unable to substantiate its market definition.

Submarket Analysis

In making its submarket determination, this court is guided by the analysis of such markets by the Supreme Court in *Brown Shoe*.⁴ The parties to [**14] this lawsuit have saturated the court with exhibits, attempting to document the relevant submarket criteria as enunciated in Brown Shoe, 370 U.S. at 325. The court has waded through the entirety of this material and concludes that no submarket exists which would limit the relevant product market for antitrust purposes to EEM and Gold Book.

In examining the first submarket criterion advanced in *Brown Shoe*, this court finds no showing by plaintiff regarding industry or public recognition of a separate economic entity consisting solely of EEM and Gold Book. *Id.* at 325. To the contrary, the evidence before this court indicates [*509] [**15] that the electronics industry recognizes a number of other publications as legitimate competitors of both.

As for the "particular characteristics and uses" of the directories, *id.*, plaintiff has demonstrated a degree of dissimilarity between defendants' nominees and Gold Book and EEM. Some are published on a weekly or monthly basis while EEM and Gold Book are issued annually. Plaintiff alleges further that due to their digest form, EEM and Gold Book are more likely to be retained for use in the purchase of the products advertised therein, than are the magazine-format publications cited by defendants. This court does not concur. While noting that certain distinctions between the publications do exist, this court finds nonetheless that all are within the mainstream of the electronics advertiser market such that a fluid interchange exists between advertisers of these products. See Buffalo Courier-Exp. v. Buffalo Evening News, Inc., 441 F. Supp. 628, 634 (W.D.N.Y. 1977) vacated on other grounds, 601 F.2d 48 (2d Cir. 1979). Hayden's own 1977 Annual Report states that Gold Book and EEM compete for advertising pages with EBG. The fact remains that notwithstanding cosmetic [**16] differences, all of these publications share essentially similar functions in that they are used as advertising vehicles throughout the electronics industry.

Concerning the *Brown Shoe* criteria of "distinct customers" and "unique production facilities," 370 U.S. at 325, plaintiff has failed to demonstrate that any distinction or uniqueness exists.

As for any "distinct[ion] [in] prices," *id.*, the court notes that the fact that HN10 [**17] "selling price between commodities with similar uses and different characteristics may vary," is merely reflective of commercial reality. duPont, 351 U.S. at 396. To divide product lines strictly by price is simply unrealistic. Brown Shoe, 370 U.S. at 326; see Liggett & Myers, Inc. v. F.T.C., 567 F.2d 1273, 1274 (4th Cir. 1977); Acme Precision Products, Inc. v. American Alloys Corp., 484 F.2d 1237. The particular commodity here in question (advertising space) can hardly be distinguished strictly on a price-per-page basis. Hayden's own internal memoranda indicate that customer interest in the effectiveness of the publication in which they advertise outweighs any interest solely in cost-per-page.

⁴ While *Brown Shoe* concerned violation of Section 7 of Clayton Act, the rule of the case has been applied to cases arising under Section 2 of the Sherman Act. United States v. Grinnell Corp., [1966 TRADE CASES P 71,789], 384 U.S. 563, 572-73, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); Borden Inc. v. F.T.C., [1982 TRADE CASES P 64,558], 674 F.2d at 509-10.

Consumer interest in factors other [**17] than price, negates Hayden's emphasis on the next *Brown Shoe* criterion, "sensitivity to price change." [370 U.S. at 325](#). In attempting to portray a dualistic product market and therefore defeat defendants' motion, Hayden argues that customers (i.e. advertisers) do not substitute or switch when there is a change in price of one of the publications. Hayden's studies indicate that where, for example, EEM increased its price by 22% and MPDD stood firm, no significant switching of advertisers, to MPDD took place. Similar results for other of the competitors nominated by defendants were noted as well.

Plaintiffs' reliance on this issue is not well founded. As previously noted, consumer interest in the quality of advertising impact (including such variables as EEM's past performance, art direction and writing support and industry-wide credibility) rather than low prices, is of primary importance to consumers. [HN11](#)[] While the emphasis on advertising impact contrasts with the general rule within the commercial world where price is often the determining factor, it does not in and of itself create a separate product market or submarket. Quality of service can substitute without difficulty [**18] for price as the primary competitive variable, [Robinson v. Magovern, 521 F. Supp. 842, 877 \(W.D. Pa. 1981\)](#) particularly where, as here, a sophisticated consumer, as opposed to the general public, has the ability to make the necessary qualitative distinctions. Cf. [Pontius v. Children's Hosp., 552 F. Supp. 1352, 1365-66 \(W.D. Pa. 1982\)](#); [Williams v. Kleaveland, 534 F. Supp. 912, 919 \(W.D. Mich. 1981\)](#) citing 7 Am. J. of Law and Medicine, Vol. 1, 1981 at iii.

Further, the court notes that [HN12](#)[] a relevant market for a product may not be defined by focusing merely on a single factor such as [*510] sensitivity to price change, but must instead include an evaluation of the limits of that product's competition with other products. See [George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., 508 F.2d 547 \(1st Cir. 1974\)](#) cert. denied, 421 U.S. 1004, 44 L. Ed. 2d 673, 95 S. Ct. 2407 (1975).

Accordingly, this court has determined that Hayden has failed to meet its threshold burden of substantiating its market definition limiting the relevant product market or submarket to one consisting solely of EEM and Gold Book. Meeting this burden is a necessary predicate for establishing [**19] a claim under [Section 2](#). See, e.g., [Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1301 \(9th Cir. 1978\)](#); [City of Cleveland v. Cleveland Elec., Etc., 538 F. Supp. 1306 \(N.D. Ohio 1980\)](#); [United States v. Chas. Pfizer & Co., 246 F. Supp. at 470](#). Plaintiff endeavors to ignore the marketplace realities in its insistence upon an artificial two-publication market theory. This court has concluded that plaintiff has failed to demonstrate that such a limited product market exists. Accordingly, the court need not compute defendants' "monopoly power" within the relevant product market. See [Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d at 1302 n. 3](#); [United States v. Chas. Pfizer & Co., 246 F. Supp. at 470](#).

[Section 2](#) Attempted Monopolization Claim

[HN13](#)[] The essential elements of Attempted Monopolization under [Section 2](#) are (1) a "dangerous probability of success" in monopolizing a given product market, and (2) the specific intent to "destroy competition or build monopoly." [Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 \(1953\)](#); [Nifty Foods, 614 F.2d at 841](#); [Levitch v. Columbia Broadcasting System, Inc., 495 F.2d 649, 668 \(S.D.N.Y. 1980\)](#), aff'd, [697 F.2d 495 \(2d Cir. 1983\)](#). Like actual monopolization, the attempt to monopolize cannot exist without first establishing the framework within which the specific intent to "destroy competition" exists. [M.A.P. Oil Co., Inc. v. Texaco, Inc., 691 F.2d 1303, 1309 \(9th Cir. 1982\)](#). Thus "proof of relevant product market is a necessary element of a cause of action for monopolization or attempted monopolization." [Nifty Foods, 614 F.2d at 840](#); [Jennings Oil Company, Inc. v. Mobil Oil Corp., 539 F. Supp. 1349, 1351 \(S.D.N.Y. 1982\)](#). This court has previously determined that Hayden's relevant product market theory is fatally flawed. Accordingly, defendant's motion for summary judgment dismissing the [Section 2](#) claims of monopolization and attempted monopolization, is granted. See [McDaniel v. General Motors, 480 F. Supp. at 675](#).

[Section 1](#) Restraint of Trade Claim

In its motion for summary judgment, defendants contend that since plaintiff has alleged *unreasonable restraints of trade* rather than any *per se* violation of [Section 1](#),⁵ the legality of the activity alleged must be measured in terms of its effect upon the [**21] relevant product market. Thus, defendant argues, plaintiff's [Section 1](#) claim stands or falls with its [Section 2](#) claims, and must therefore fail upon this court's rejection of plaintiff's dual market theory. For its part, Hayden insists that different legal criteria govern determination of market power in a "rule of reason" [Section 1](#) case than in a [Section 2](#) monopolization case.

Hayden concedes that this case is not governed by any of the *per se* standards of [antitrust law](#) violation. See, e.g., [United States v. Topco Associates, 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 \(1972\)](#) (horizontal territorial divisions); [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 \(1940\)](#) (price fixing); [Bogosian v. Gulf Oil Corp., 561 F.2d 434](#) (3rd Cir.), cert. [**22] denied, 434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978) (tie-in claim). Therefore, the defendants' alleged restraint must be analyzed under the "rule of reason" standard in the context of relevant product market. [United States v. Columbia Steel Co., 334 U.S. 495, 92 L. Ed. 1533, 68 S. Ct. \[*511\] 1107 \(1948\)](#); [North American Soccer v. National Football League, 670 F.2d 1249 \(2d Cir. 1982\)](#), cert. denied, 459 U.S. 1074, 103 S. Ct. 499, 74 L. Ed. 2d 639 (1982); [White and White, Inc. v. American Hospital Supply, 540 F. Supp. 951, 979 \(W.D. Mich. 1982\)](#).

[HN15](#) [↑] Under the rule of reason analysis, the elements of restraint of trade are:

- (1) An agreement among two or more persons or distinct business entities;
- (2) which is intended to harm or unreasonably restrain competition;
- (3) and which actually causes injury to competition.

[Kaplan v. Burroughs Corp., 611 F.2d 286, 290 \(9th Cir. 1979\)](#), cert. denied, 447 U.S. 924, 65 L. Ed. 2d 1116, 100 S. Ct. 3016 (1980). A crucial determination therefore, is whether or not the alleged conduct of the defendant has impact upon competition in general, [DeVoto v. Pacific Fidelity Life Ins. Co., 618 F.2d 1340, 1344](#) (9th Cir.), cert. denied, 449 U.S. 869, 66 L. Ed. 2d 89, 101 S. Ct. 206 (1980); [Kaplan v. Burroughs Corp., 611 F.2d at 291](#), as [HN16](#) [↑] "it is the impact upon competitive conditions in a definable product market which distinguishes the antitrust violation from the ordinary business tort." *Id.*

The foregoing discussion leaves little doubt that a determination as to the boundaries of the relevant product market is essential in order to measure the anti-competitive effect if any, of defendants' activities.⁶ [American Aloe Corp. v. Aloe Cream Laboratories, Inc., 420 F.2d 1248, 1256](#) (7th Cir.), cert. denied, 400 U.S. 820, 27 L. Ed. 2d 47, 91 S. Ct. 37 (1970); see [Kaplan v. Burroughs Corp., 611 F.2d at 291](#). While Hayden concedes that a market determination is required, it argues that a "different (and much less difficult to prove) standard is mandated than that used to determine [Section 2](#) monopoly power." Plaintiffs' Reply Memorandum at 6. Nonetheless, Hayden has not met the burden required under [Section 2](#), of demonstrating any anti-competitive effect upon the relevant market, see [McDaniel v. General Motors Corp., 480 F. Supp. at 674](#), thereby failing [**24] to make out a *prima facie* case under the rule of reason analysis. See [Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 323 \(7th Cir. 1982\)](#) petition for cert. filed, 51 U.S.L.W. 3567 (U.S. Jan. 28, 1983) (No. 82-1260); [Dougherty v. Continental Oil Co., 579 F.2d 954, 962 \(5th Cir. 1978\)](#).

Assuming *arguendo* that this court were to accept Hayden's "much less difficult to prove" standard of product market definition, consideration of the effects of the defendants' alleged conduct upon the relevant market is still

⁵ [HN14](#) [↑] [15 U.S.C. § 1](#) provides in pertinent part that:

every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . .

⁶ Had plaintiff alleged a *per se* violation of [Section 1](#), such a determination would not be required. See [Klor's v. Broadway-Hale Stores, Inc. \[1959 TRADE CASES P 69,316\], 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 \(1959\)](#); [Langston Corp. v. Standard Register Co. \[1982-83 TRADE CASES P 65,118\], 553 F. Supp. 632, 638 \(N.D. Georgia 1982\)](#).

566 F. Supp. 503, *511 (1983 U.S. Dist. LEXIS 16820, **24

required. See George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., 508 F.2d at 560. Hayden's failure to adequately define [**25] the relevant product market or to demonstrate any indication of anti-competitive effect upon that market, is thus fatal to its Section 1 claim. Langston Corp. v. Standard Register Co., 553 F. Supp. 632, 640 (N.D. Georgia 1982).

Accordingly, defendants' motion for summary judgment on plaintiffs' Sherman Act Sections 1 and 2 causes of action is hereby granted and the action is dismissed in its entirety.

So ordered.

End of Document



In re Petroleum Products Antitrust Litigation

United States District Court, Central District of California.

May 25, 1983

No. MDL-150-WPG (State Cases).

Reporter

1983 U.S. Dist. LEXIS 16687 *; 1983-1 Trade Cas. (CCH) P65,426

In re Petroleum Products Antitrust Litigation (This Document Relates to: Retail Clerks Union Local 648, et al. v. Exxon Corp., et al., Civil No. CV-82-2401-WPG).

Core Terms

removal, anti trust law, federal court, state court, anti-trust, purchasers, indirect

Counsel: [*1] Francis O. Scarpulla and Stephen V. Scarpulla, of Scarpulla & Scarpulla, San Francisco, Cal., and Philip Paul Bowe, of Davis, Cowell & Bowe, San Francisco, Cal., for plaintiffs

Richard J. Maclaury and James F. Kirkham, of Pillsbury, Madison & Sutro, San Francisco, Cal., Charles F. Rice, of Mobil Oil Corp., New York, N.Y., Otis Pratt Pearsall, of Hughes, Hubbard & Reed, New York, N.Y., John N. Hauser, and Lynn H. Passahow, of McCutchen, Doyle, Brown & Enerson, San Francisco, Cal., William Simon, of Howrey & Simon, Washington, D.C., Robert D. Wilson, of Texaco, Inc., White Plains, N.Y., Max L. Gillam, Philip F. Belleville, and Frederic J. Zepp, of Latham & Watkins, Los Angeles, Cal., John L. Shoemaker, of Conoco, Inc., Houston, Tex., A. P. Lindemann, Jr., of Exxon Corp., New York, N.Y., John A. Donovan and Ronald C. Redcay, of Hughes, Hubbard & Reed, Los Angeles, Cal., John E. Bailey, Harry Davis, Jr., and Barton D. Whitman, of The Gulf Companies, Houston, Tex., John E. Sparks and William S. Boyd, of Brobeck, Phleger & Harrison, San Francisco, Cal., Edward A. McFadden, of Union Oil Co. of Cal., Los Angeles, Cal., and Donald A. Bright and Howard S. Fredman, of Atlantic Richfield Co., [*2] Los Angeles, Cal., for defendants

Opinion by: GRAY

Opinion

Memorandum of Decision

Gray, Sr. D.J.: In transferring this action to this court, as the transferee Judge in Case No. MDL-150, the Multidistrict Panel authorized this Court to adjudicate the plaintiff's motion that the case be remanded to the state court of California. The issue has been thoroughly briefed, argued, and submitted for decision. The motion now is granted and the case will be ordered remanded.

Such dispositive action is believed to be mandated by the square holding in the case of *In re: Sugar Antitrust Litigation*, MDL-201, [588 F. 2d 1270 \(9th Cir. 1978\)](#). There, the plaintiff filed originally in federal district court, alleging violations of the Sherman and Clayton Acts, and, while that suit was pending, filed an action against the same defendants in state court, this time based solely upon allegations of violations of California antitrust laws. The defendants caused removal to the federal court and the plaintiff appealed the refusal of the district judge to remand. The Court of Appeals held that the California action was not ". . . founded on a claim arising under the . . . laws of the United States . . .," within [*3] the meaning of Title [28 U.S.C. § 1441\(b\)](#) and that the district court there lacked

removal jurisdiction. In arriving at such conclusion, the Court of Appeals discussed and then rejected the defendant's contention that the plaintiffs were seeking improperly to avoid federal jurisdiction through use of what is referred to here as "artful pleading."

This action presents even a stronger case for remand than did Sugar, because unlike the situation there, neither the plaintiffs nor their counsel have sought the aid of the federal court or federal antitrust laws in pursuit of a claim for relief. Their initial and only charge against the defendants has been and is under state **antitrust law**.

Both here and in Sugar, the complaints allege that the respective plaintiffs and the class members that they seek to represent have been exclusively indirect purchasers of products from the defendants and their alleged co-conspirators. As everyone here concerned is thoroughly aware, the Supreme Court has held that, under federal anti-trust laws, such indirect purchasers may not claim and recover damages resulting from price fixing. [Illinois Brick Co. v. Illinois, 431 U.S. 720 \(1977\)](#). In rendering [*4] the decision of the Court of Appeals in Sugar, Judge Merrill adverted to the holding by the Supreme Court and said:

It follows from Illinois Brick that the consumer class action claims of these plaintiffs, if construed by us as arising under federal law, would be dismissed in federal court. While the process of removal of state actions looks to trial of the removed cause in a more appropriate forum, here removal will assure that the cause will never be tried at all. It would be incongruous for us to construe these state law consumer class claims as arising under federal law when, under federal law as announced in Illinois Brick, it would appear that they never arose at all. On the other hand, under California state law they may not be foreclosed. [588 F.2d at 1273.](#)

Likewise, in this case, if the removal to this court were to stand, the first thing that I would do would be to dismiss the action, under the mandate of Illinois Brick. I therefore conclude that I am bound by the decision in Sugar and am obliged to remand.

The defendants contend that in Sugar the Court of Appeals failed to distinguish between the right of this court to accept jurisdiction and the question of what [*5] will happen on the merits once the case is properly removed. My response is that it is my obligation to follow a square holding of the Court of Appeals, rather than to volunteer a re-examination of the correctness of that decision.

The defendants also suggest that Sugar has been overruled sub silentio by the Supreme Court in [Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 \(1981\)](#). The procedural facts in Moitie, which are somewhat complicated, were clearly set out in Justice Rehnquist's opinion, and need not be recited again here. The defendants in this case point out certain similarities between the facts in Moitie and those here concerned, and they rely particularly upon comments in footnote 2 in the Moitie opinion which indicate that both the Ninth Circuit and the Supreme Court were of the view that the cases properly had been removed because of "artful pleading."

However, Justice Rehnquist began the opinion of the Court in Moitie by stating: "The only question presented in this case is whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of res judicata." The "only issue" with which the Supreme Court was concerned has nothing [*6] to do with the present litigation. Certainly, any comments about the propriety of the removals to the federal court were not made in resolution of a litigated issue and were not necessary to the decision, except to the extent that the matter of res judicata would not have been before the Court if there had been no such removals. Thus, this Court declines to assume that the dictum comments in a footnote in Moitie have removed the binding effects of Sugar.

Even if it were to be inferred that the Supreme Court in Moitie somehow did rule on the appropriateness of the removals, I believe that other factors in this case significantly distinguish it from Moitie. There, the only original plaintiff that ultimately was before the Supreme Court (Brown) had filed his initial action in federal court, alleging violation of United States anti-trust laws. The district judge dismissed the action and Brown refiled in state court, using allegations similar to those in his original complaint. It was this action that was removed to federal court and was the subject of the litigation before the Supreme Court. Under those circumstances, application of the "artful pleading" doctrine would have considerable [*7] validity.

To the contrary here, as has been discussed earlier in this memorandum, these plaintiffs and their counsel have relied, from the beginning, upon state antitrust laws and upon the state court as their forum. The defendants seek to persuade the Court to reject this distinction. They point to the complaint filed by the California Attorney General in the MDL-150 litigation, in which the plaintiff class did include the indirect purchasers of petroleum products on behalf of whom the present action by the Retail Clerks Union is brought. Such named class members will be precluded from recovery in the MDL-150 action, in light of Illinois Brick. The defendants thus insist that the class members named in the Retail Clerks Union case have been before this Court and have lost, and that the antitrust action subsequently brought on their behalf in state court therefore must be deemed to involve "artful pleading" and may be removed here for dismissal.

I am not able to accept this rationale. Certainly, if the very complaint brought by the Retail Clerks Union had been filed in state court before the California MDL-150 action was initiated, it could have been prosecuted under California [*8] law. I do not see how the fact that the California Attorney General previously had elected to bring suit under the Sherman Act on behalf of a class that included members of the class named later in the Retail Clerks Union action can preclude subsequent recourse to state court on behalf of the latter. Those potential class members had no part in the decision to file the MDL-150 action, nor have they been given the opportunity to opt out of that litigation. The fact that the Retail Clerks Union has learned from Illinois Brick, in which they had no part, that indirect purchasers cannot recover in federal court for violations of the Sherman Act, cannot forestall their recourse to the antitrust laws of California in the courts of that state.

It is acknowledged here that this conclusion is troublesome to this court. The policy of the courts of the United States, as thoroughly explained in Illinois Brick, is that indirect purchasers may not recover damages for antitrust violations growing out of price fixing. The duty of this Court is to uphold such policy, and the reasons for it are just as applicable to suits under state antitrust laws as they are under federal antitrust laws. I [*9] therefore have a reluctance to sanction the prosecution of the present action in any court. However, the California Legislature has expressly announced a contrary policy, and I am in no position to preclude it from being implemented in the courts of that state. As Judge Merrill said in Sugar, to hold otherwise would mean that ". . . the state would be deprived of any power to legislate other than in accordance with the Clayton Act as construed in Illinois Brick." [588 F. 2d at 1273](#).

Accordingly, pursuant to the motion of the plaintiff, this case will be ordered remanded to the Superior Court of San Francisco County, California.

End of Document



Stearns v. Genrad, Inc.

United States District Court for the Middle District of North Carolina, Winston-Salem Division

May 26, 1983

No. C-79-606-D

Reporter

564 F. Supp. 1309 *; 1983 U.S. Dist. LEXIS 16680 **; 1983-2 Trade Cas. (CCH) P65,495

RICHARD M. STEARNS, Trustee in Bankruptcy for CAROLINA ACOUSTICS CO., INC., Plaintiff, v. GENRAD, INC., Defendant

Core Terms

distributor, products, customer, competitors, termination, Sherman Act, antitrust, commerce, parties, sales, no evidence, entitled to summary judgment, unfair competition, summary judgment, relevant market, restrictions, territorial, inventory, alleges, common law, measurement, contends, Violations, monopolize, documents, consists, consumer, forcing, orders, resale price

LexisNexis® Headnotes

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

HN1 [] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment should be sparingly granted in complex antitrust actions, especially where intent and motive play an important role in the case.

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

HN2 [] **Summary Judgment, Entitlement as Matter of Law**

Fed. R. Civ. P. 56 still applies to antitrust actions and where the action is not so complex and does not necessarily turn upon intent and motive, summary judgment is a proper means of disposing of the litigation.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

See [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

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

HN4 Antitrust & Trade Law, Sherman Act

A cause of action under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), may be sustained by proof of the existence of a contract, combination, or conspiracy which produced adverse, anticompetitive effects within relevant product and geographic markets along with proof that the objects of and the conduct pursuant to the agreement were illegal, and the plaintiff was injured as a proximate result of the agreement.

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

HN5 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Unless the particular restraint falls within a category that has been judicially determined to be illegal per se, the legality of a restraint challenged under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), must be assessed under the rule of reason.

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

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

HN6 Tying Arrangements, Clayton Act

Per se violations of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), presently consist of price fixing, whether horizontal or vertical; concerted refusals to deal or group boycotts; certain tying arrangements; and horizontal allocation of markets by customer or territory. Other activity which is alleged to violate [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), must be judged by the rule of reason, which requires some analysis of the effect of the alleged restraint upon overall competition in the relevant market.

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

[HN7](#) [down] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the rule of reason, the court should focus on the preservation of competition, not individual competitors.

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

[HN8](#) [down] Exclusive & Reciprocal Dealing, Exclusive Dealing

Even though a contract is found to be an exclusive dealing arrangement, it does not violate [§ 1](#) of the Sherman Act, [15 U.S.C.S. §1](#), unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected. In short, the threatened foreclosure of competition must be in relation to the market affected. The competition foreclosed by the contract must be found to constitute a substantial share of the relevant market.

Antitrust & Trade Law > Clayton Act > General Overview

[HN9](#) [down] Antitrust & Trade Law, Clayton Act

Full line forcing is a violation of the antitrust laws only if the effect of such forcing may be to substantially lessen competition in any line of commerce. In order to establish such a transgression, it must be shown that the seller had economic power in the market for the forcing item and that a substantial amount of commerce relating to the forced item was foreclosed. See [15 U.S.C.S. § 14](#).

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

[HN10](#) [down] Monopolies & Monopolization, Conspiracy to Monopolize

An illegal combination to fix prices results 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.

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

[HN11](#) [down] Private Actions, Remedies

One of the essential elements for recovery under the antitrust laws is that the claimant be injured or damaged.

Antitrust & Trade Law > Clayton Act > General Overview

564 F. Supp. 1309, *1309L 1983 U.S. Dist. LEXIS 16680, **16680

[**HN12**](#) [blue icon] Antitrust & Trade Law, Clayton Act

See § 3 of the Clayton Act, [15 U.S.C.S. § 14](#).

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

[**HN13**](#) [blue icon] Exclusive & Reciprocal Dealing, Exclusive Dealing

No liability for exclusive dealing arises under either § 3 of the Clayton Act, [15 U.S.C.S. § 14](#), or [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), absent a showing that there is a probability of foreclosure of competition in a substantial share of the line of commerce affected.

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

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

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

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

[**HN14**](#) [blue icon] Scope, Monopolization Offenses

[Section 2](#) of the Sherman Act makes it unlawful to attempt to monopolize any part of the trade or commerce among the several states. [15 U.S.C.S. § 2](#).

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

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

[**HN15**](#) [blue icon] Monopolies & Monopolization, Actual Monopolization

There is no attempt to monopolize within the prohibition of [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), unless there is both an intent to monopolize and a "dangerous probability" that an actual monopoly will be achieved.

564 F. Supp. 1309, *1309L^A1983 U.S. Dist. LEXIS 16680, **16680

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN16 [blue icon] **Relevant Market, Product Market Definition**

An antitrust plaintiff has the burden to establish a relevant product market. The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they reproduced -- price, use, and qualities considered.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN17 [blue icon] **Jury Trials, Province of Court & Jury**

Whether or not a certain act or practice violates [N.C. Gen. Stat. § 75-1.1](#) is a question of law to be determined by the court.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN18 [blue icon] **Federal & State Interrelationships, Erie Doctrine**

Except in matters governed by the federal constitution or by acts of congress, the law to be applied in any case is the law of the state. There is no federal general common law.

Real Property Law > Torts > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

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

Trademark Law > Special Marks > Trade Names > Infringement Actions

HN19 [blue icon] **Real Property Law, Torts**

The tort of unfair competition consists of acts or practices by a competitor which are likely to deceive the consuming public.

Counsel: [**1] Noel Lee Allen and William D. Harazin, Raleigh, North Carolina, for Plaintiff.

R. M. Stockton, Jr. and George L. Little, Jr., Winston-Salem, North Carolina, for Defendant.

Judges: Erwin, District Judge.

Opinion by: ERWIN

Opinion

[*1311] MEMORANDUM OPINION

ERWIN, District Judge

This matter is before the court on the parties' cross-motions for summary judgment pursuant to [Rule 56 of the Federal Rules of Civil Procedure](#). The court has reviewed the voluminous record compiled in this case and for the reasons stated herein, grants the defendant's motion for summary judgment as to plaintiff's claims under [Section 1](#) of the Sherman Antitrust Act, [15 U.S.C. § 1](#); [Section 2](#) of the Sherman Antitrust Act, [15 U.S.C. § 2](#); Section 3 of the Clayton Act, [15 U.S.C. § 14](#); as well as plaintiff's claims under Chapter 75 of the North Carolina General Statutes, plaintiff's allegation of a breach of the distributorship agreement between the parties, and plaintiff's [*1312] claims of unfair competition under common law. The court denies the plaintiff's motion for summary judgment.

Carolina Acoustics Company, Inc. (CAC), a former distributor of several products manufactured by defendant GenRad, Inc. [**2] (GenRad) commenced this private antitrust suit in September 1979. The original complaint alleged violations of various federal and state antitrust statutes and a breach of the distributorship agreement between the parties. In August 1982, CAC amended its complaint and thereby substituted Richard M. Stearns, Trustee in Bankruptcy for CAC, as the plaintiff in this action and added a claim of common law unfair competition to the complaint.

CAC became a non-exclusive distributor of GenRad portable sound measurement products on or about December 10, 1974.¹ Those sound measurement products included sound level meters, dosimeters, octave band analyzers, and accessories for those measurement devices. In January 1979, GenRad notified CAC that it would be terminated as a distributor effective February 5, 1979 pursuant to the distributorship agreement. The stated reason for the termination was an effort to reduce distribution costs. The plaintiff alleges that during the period it was a distributor of GenRad and upon the unilateral termination of its distributorship agreement with GenRad, a course of conduct followed which was anti-competitive, monopolistic, and resulted in a restraint [**3] of trade.

The court is mindful that [HN1](#) summary judgment should be sparingly granted in complex antitrust actions, especially where intent and motive play an important role in the case. [Poller v. Columbia Broadcasting](#), 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962); [Morrison v. Nissan Motor Co.](#), 601 F.2d 139, 141 (4th Cir. 1979). On the other hand, it is quite clear that [HN2](#) [Rule 56 of the Federal Rules of Civil Procedure](#) [**4] still applies to antitrust actions and that where, as in the instant case, the action is not so complex and does not necessarily turn upon intent and motive, summary judgment is a proper means of disposing of the litigation.

Sherman Act § 1 Violations

Count One of the amended complaint alleges activity by defendant GenRad during the period of December 1974 through February 1979 which the plaintiff contends was violative of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#). That alleged activity includes exclusive dealing, full line forcing, resale price maintenance, imposition of territorial restrictions, imposition of customer restrictions, and preemption of CAC's market by termination of CAC as a

¹CAC was also a *commissioned sales representative* for Grason-Stadler audiometric products during the entire period of time it was a GenRad distributor, having become such a sales representative prior to 1974 and having remained such until sometime after this litigation was commenced. Grason-Stadler was first a subsidiary and later an unincorporated division of GenRad, until it was spun off on January 1, 1978. All of the claims in this litigation relate to CAC's relationship with GenRad as one of its sound product *distributors* and not to its relationship with Grason-Stadler.

GenRad distributor. CAC also alleges that the above activity unreasonably restrained interstate commerce and damaged CAC at least to the extent of \$6,000,000.00.

Section 1 of the Sherman Act, [15 U.S.C. § 1](#), provides: "Every [HN3](#) contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal."

[HN4](#) A cause of action under [§ 1](#) of the Sherman Act may be sustained by proof of the existence of a contract, combination, or conspiracy [\[**5\]](#) which produced adverse, anticompetitive effects within relevant product and geographic markets along with proof that the objects of and the conduct pursuant to the agreement were illegal, and the plaintiff was injured as a proximate result of the agreement. [Martin B. Glauer Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81 \(3rd Cir. 1977\)](#). "Unless [HN5](#) the particular restraint falls within a category that has been judicially determined to be illegal per se, the legality of a restraint challenged under [§ 1](#) of the Sherman Act must be assessed under the rule of reason." [Id. at 82](#).

[*1313] [HN6](#) Per se violations of [§ 1](#) of the Sherman Act presently consist of price fixing, whether horizontal or vertical, [United States v. Trenton Potteries Co., 273 U.S. 392, 397-98, 71 L. Ed. 700, 47 S. Ct. 377 \(1927\)](#); [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26, 84 L. Ed. 1129, 60 S. Ct. 811 & n. 59 \(1940\)](#); [United States v. McKesson & Robbins, Inc., 351 U.S. 305, 100 L. Ed. 1209, 76 S. Ct. 937 \(1956\)](#); [United States v. General Motors Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 \(1966\)](#); concerted refusals to deal (or group boycotts), [Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 \(1945\)](#); [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. General Motors Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 \(1966\)](#); certain tying arrangements, [Northern Pacific Railway v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#); [International Salt Co., Inc. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 \(1947\)](#); and horizontal allocation of markets by customer or territory, [United States v. Topco Associates, Inc., 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 \(1972\)](#); [United States v. Sealy, Inc., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 \(1967\)](#). Other activity which is alleged to violate Section 1 of the Sherman Act must be judged by the rule of reason, which requires some analysis of the effect of the alleged restraint upon overall competition in the relevant market. [Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#); [Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15 \(4th Cir. 1981\)](#). [HN7](#) Under the rule of reason, the court should focus on the [\[**7\]](#) preservation of competition, not individual competitors. [Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#).

Exclusive Dealing

CAC contends that when CAC became a distributor, GenRad required CAC to discontinue handling competing products. CAC's proffered evidence in support of this claim consists of the testimony of CAC's former president and owner, Doyle Chandler, to the effect that: (1) CAC was forced by GenRad, under threat of termination, to drop the Columbia line when it took on GenRad in December 1974; (2) CAC was not thereafter allowed by GenRad to carry any other type of sound level meter; (3) CAC did in fact eliminate its Columbia inventory about sixty days after it became a GenRad distributor; and (4) CAC sold no competing sound level meters or dosimeters from that time until CAC was terminated by GenRad in January 1979. CAC also offered the affidavit of Robert Guinta, another former GenRad distributor, to the effect that an unnamed GenRad representative announced at a meeting attended generally by GenRad distributors that GenRad did not want its distributors handling competing lines. The court notes that CAC's proffered [\[**8\]](#) evidence of an exclusive dealing arrangement would appear to strain the credibility of any reasonable jury, since CAC's own documents demonstrate, contrary to the testimony proffered, that CAC did not eliminate its Columbia inventory after it became a GenRad distributor. Those documents indicate that CAC carried Columbia inventory throughout the time it was a GenRad distributor and continued to make sales of competing sound level meters and dosimeters during most of the period it was a GenRad distributor. CAC's own documents also demonstrate that it was Columbia which elected to terminate its relationship with CAC because CAC failed to pay the company for Columbia products that CAC had ordered and received. Consequently, this court questions whether, in the face of such documentary evidence generated by the complaining party, there is any genuine issue of material fact on the basis of which any jury could reasonably determine that GenRad imposed

an exclusive dealing arrangement upon CAC. Assuming that a factual issue does exist regarding the imposition of an exclusive dealing arrangement, summary judgment for GenRad is nevertheless appropriate on this issue because CAC has failed [**9] to undertake to meet its burden of demonstrating the requisite effect upon competition. In *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, [*1314] 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961), which still appears to be the leading case on exclusive dealing arrangements, the Supreme Court stated as follows:

In practical application, [HN8](#)[↑] even though a contract is found to be an exclusive dealing arrangement, it does not violate the Section unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected. . . . In short, the threatened foreclosure of competition must be in relation to the market affected. . . .

. . . The competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited as was pointed out in *Standard Oil Company v. United States, supra*.

365 U.S. at 327.

The only effort undertaken by CAC to demonstrate the effect of the alleged exclusive dealing arrangement on competition consists of "guesstimates" [**10] by its former president and its expert witness of gross sales allegedly lost by CAC as a result of not having been able to continue to carry the Columbia and possibly other lines competitive with GenRad products. That type of showing, even if made, falls far short of demonstrating the requisite effect upon competition. That type of evidence does not demonstrate the ability of GenRad's competitors to reach the ultimate consumer with their competing products, nor does it demonstrate the ability of the consuming public to make a purchasing decision from among the various competitors in the field. CAC has made no attempt to determine who the other competitors were in the market, whether other distributors were available to those competitors, whether those competitors in fact needed distributors to get their competing products to the consumer, and what, if any, effect the alleged exclusive dealing arrangement may have had upon the ultimate consumer of and competition in the products in question. Nor has CAC made any attempt to show whether other GenRad distributors sold competing lines of products while they were GenRad distributors. In short, CAC has not shown, nor has it attempted [**11] to show, any adverse effect on overall competition in any line of commerce or relevant market resulting from the alleged exclusive dealing arrangement. For that reason, GenRad is entitled to summary judgment on this issue. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978); *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.*, 459 F.2d 138 (6th Cir. 1972); *Smith v. Scrivner-Boogaart, Inc.*, 447 F.2d 1014, 1017 (10th Cir. 1971), cert. denied, 404 U.S. 1059, 30 L. Ed. 2d 747, 92 S. Ct. 740 (1972).

Full Line Forcing

CAC also contends that GenRad forced its full line of measurement instruments upon CAC in quantities exceeding CAC's reasonable requirements or demands. The evidence proffered by CAC on this issue indicates that CAC's complaint is that GenRad forced an excessive amount of inventory in certain products upon CAC. Mr. Doyle Chandler testified in his deposition that CAC's inventory of GenRad equipment was as high as \$140,000 and that a reasonable level of inventory would have been between \$80,000 and \$100,000; however, Mr. Chandler [**12] also testified that there was no specific requirement that CAC carry the \$140,000 inventory and that much of the \$140,000 inventory consisted of Grason-Stadler products which are not at issue in this litigation.

Documents produced by the plaintiff in discovery refute any claim of excessive inventory. Those documents demonstrate that the highest level of CAC's inventory of GenRad products was \$25,963 on January 31, 1976. In addition, the plaintiff has made no attempt to analyze or demonstrate any adverse effect upon overall competition in any relevant market as a result of the alleged conduct by GenRad.

HN9[] Full line forcing is a violation of the antitrust laws only if the effect of such [*1315] forcing "may be to substantially lessen competition . . . in any line of commerce." In order to establish such a transgression, it must be shown that the seller had economic power in the market for the forcing item and that a substantial amount of commerce relating to the forced item was foreclosed.

Pitchford v. Pepi, Inc., 531 F.2d 92, 100 (3rd Cir. 1976) (footnotes omitted) (quoting [15 U.S.C. § 14](#)). CAC has made no showing of any anti-competitive effect in any relevant [**13] market. Therefore, the defendant is entitled to summary judgment on the issue of full line forcing.

Resale Price Maintenance

The plaintiff alleges that GenRad attempted to restrict the price at which CAC could sell GenRad products to its customers by limiting CAC discount sales to state agencies. The only evidence in the record to support such claim is the deposition testimony of Mr. Doyle Chandler, who testified that GenRad did not like discounting and told him that CAC should try to keep its prices at a high level and discount GenRad products no more than five percent.

HN10[] An illegal combination to fix prices results "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. 29, 43, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*. There is no evidence that GenRad used any coercive measures to induce CAC to charge any particular resale price for GenRad products. CAC's own documents reveal that CAC sold GenRad products to the State of North Carolina at various levels of discount above five percent. The court is of the opinion [**14] that no genuine issue as to any material fact exists regarding the claim of resale price maintenance. In addition, the plaintiff has failed to show any antitrust injury. The deposition testimony of Mr. Chandler reveals only one instance of sales loss by CAC as a result of its alleged adherence to GenRad's suggestion and that loss was recaptured by CAC. "One **HN11**[] of the essential elements for recovery under the antitrust laws is that the claimant be injured or damaged." *Gray v. Shell Oil Co., 469 F.2d 742, 748 (9th Cir. 1972)*. GenRad is entitled to summary judgment on the issue of resale price maintenance.

Territorial and Customer Restrictions

CAC's allegations relating to territorial and customer restrictions include claims that (1) CAC was restricted to sales in a geographical territory that included North Carolina, South Carolina, Georgia, Alabama, and Eastern Tennessee, (2) CAC was prohibited from selling or attempting to sell GenRad products to the General Services Administration (GSA), and (3) CAC was prohibited from selling GenRad products to other Grason-Stadler division sales representatives who were not GenRad distributors.

Once again CAC has made no attempt to [**15] show any adverse effect upon competition in any relevant market as a result of the alleged territorial and customer restrictions. CAC has made no study or other analysis of the other competitors in the market, or to what extent, if any, overall competition has been impaired as a result of the alleged restrictions. CAC has limited its analysis to its own very rough estimates of its gross sales allegedly lost as a result of the alleged imposition of territorial and customer restrictions. Consequently, the defendant GenRad is entitled to summary judgment on this issue. *Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*; *Sherman v. British Leyland Motors Limited, 601 F.2d 429, 450 (9th Cir. 1979)*; *The Sports Center, Inc. v. Riddell, Inc., 673 F.2d 786, 791 (5th Cir. 1982)*.

Although it is undisputed that GenRad (and not CAC) was the manufacturer of the products in question and that CAC acted solely as a distributor of some of these products, CAC argues that because GenRad elected to make direct sales through its own sales force in addition to indirect sales through distributors such as CAC, GenRad and CAC were therefore competitors [**16] operating at the same level of [*1316] the market; and that the alleged imposition of territorial and customer restrictions by GenRad were therefore "horizontal" rather than "vertical," thereby mandating *per se* antitrust treatment pursuant to the teaching of *United States v. Topco Associates, 405*

U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972). That argument must be rejected by the court due to the absence of evidence that the alleged restrictions emanate from and work to the benefit of other distributors who are competitors of the injured distributor, which is not even alleged here. Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15 (4th Cir. 1981), cert. denied, 454 U.S. 864, 70 L. Ed. 2d 164, 102 S. Ct. 324 (1981); Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001 (5th Cir. 1981), cert. denied, 454 U.S. 827, 102 S. Ct. 119, 70 L. Ed. 2d 102 (1981); The Sports Center, Inc. v. Riddell, Inc., 673 F.2d 786 (5th Cir. 1982); Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982). CAC has offered no evidence nor has it even contended that the alleged territorial and customer restrictions originated anywhere other than [**17] with GenRad. Consequently, the court considers rule-of-reason analysis to be appropriate to this issue, which mandates summary judgment for defendant GenRad.

Termination of CAC

Even though the amended complaint at Paragraph 9 specifically alleges the "period involved" in Count One to be December 1974 until February 1979, read in the light most favorable to the plaintiff CAC and considered in conjunction with the entire record, it appears to include a complaint of unlawful termination by GenRad of CAC's distribution rights to GenRad products. Furthermore, in its answer to Interrogatory No. 2, CAC affirmatively states its contention that GenRad conspired with its former Grason-Stadler division and its president, Rufus Grason, in terminating CAC as a distributor. Consequently, for the purpose of these cross-motions for summary judgment, the court will consider CAC's claims to include one claim to the effect that GenRad unlawfully conspired with Grason-Stadler and Rufus Grason to terminate CAC's distributorship. A careful and close review of the entire record indicates no evidence of a conspiracy between Grason-Stadler and GenRad. CAC's own witnesses have testified to the [**18] contrary. Mr. Doyle Chandler testified that "a decision had been made at a corporate level [at GenRad] to sell direct and bypass distributors" and that he had no information regarding the termination other than the information contained in the letter he received from GenRad (GenRad Exhibit 62). Other former CAC employees confirmed GenRad's position that it made an internal, unilateral decision to terminate CAC and its other distributors. The documentary evidence before the court, as well as deposition testimony from GenRad personnel, is uniform to the effect that GenRad's decision was internal and unilaterally made. The voluminous documentary evidence in the record is also uniform to the effect that GenRad was motivated by a desire to reduce distribution costs in terminating all of its remaining distributors. There is no evidence in the record which indicates that GenRad in any way singled out CAC or that GenRad's decision to terminate its distributors was anything other than a unilateral decision to terminate all distributors in an effort to reduce distribution costs.

Since there is no evidence in the voluminous record that GenRad's action in terminating CAC and its other [**19] remaining distributors was other than unilaterally made, GenRad is entitled to summary judgment on this issue. United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919); Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476, 483 (4th Cir. 1980); Hester v. Martindale-Hubbell, Inc., 659 F.2d 433, 436 (4th Cir. 1981); Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623 (4th Cir. 1977), cert. denied, 434 U.S. 923, 54 L. Ed. 2d 280, 98 S. Ct. 400 (1977).

Clayton Act, § 3 Violations

Count Two of CAC's amended complaint alleges that GenRad imposed an exclusive dealing requirement upon CAC, thereby violating § 3 of the Clayton Act, 15 U.S.C. [*1317] § 14, in addition to Section 1 of the Sherman Act, 15 U.S.C. § 1, as discussed above.

Section 3 of the Clayton Act, 15 U.S.C. § 14, provides in pertinent part: HN12 [↑]

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or other commodities . . . for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee [**20] or purchaser thereof shall not use or deal in the goods . . . or other commodities of a competitor or competitors of the lessor or seller, where

the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Exclusive dealing arrangements normally take the form of an agreement whereby a purchaser agrees to purchase exclusively for a significant period of time from one supplier. The perceived evil in such an agreement is that it may foreclose the supplier's competitors from the market represented by the purchaser for the period of time involved. Exclusive dealing arrangements have traditionally been treated somewhat more leniently than tying arrangements because of the recognition that exclusive dealing arrangements may have pro-competitive effects and may be motivated by other than anti-competitive desires on the part of the seller. Consequently, exclusive dealing arrangements have not been considered *per se* illegal, and before reaching a decision, the courts have made at least some analysis of the competitive effects of the exclusive dealing [**21] arrangement. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 329, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961). In *Tampa Electric*, the Court made it clear that [HN13](#) [↑] no liability for exclusive dealing arises under either § 3 of the Clayton Act or [§ 1](#) of the Sherman Act absent a showing that there is a probability of foreclosure of competition in a substantial share of the line of commerce affected. *Tampa Electric*, 365 U.S. at 335.

The record in the instant case lacks any evidence of an exclusive dealing arrangement.² Assuming, however, the existence of an exclusive dealing arrangement, summary judgment is nevertheless appropriate in this case because the plaintiff has failed to present the relevant economic analysis. There is no evidence that GenRad's competitors or the ultimate consumers of portable sound measurement products were affected in any way. CAC has not attempted to show any adverse impact on overall competition resulting from the alleged exclusive dealing arrangement. In addition, the plaintiff has failed to show any injury to it due to the alleged conduct. Consequently, the defendant is entitled to summary judgment on this issue.

[**22] Attempt to Monopolize

[HN14](#) [↑] [Section 2](#) of the Sherman Act makes it unlawful to "attempt to monopolize . . . any part of the trade or commerce among the several states." [15 U.S.C. § 2](#).

The basic principles governing application of [§ 2](#) of the Sherman Act have been concisely stated by the Fourth Circuit. "There [HN15](#) [↑] is no attempt to monopolize within the prohibition of [§ 2](#) of the Sherman Act, unless there is both an intent to monopolize and a "dangerous probability" that an actual monopoly will be achieved." *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974) (citations omitted). Consequently, the first task that must be undertaken by any antitrust plaintiff alleging attempted monopolization under [§ 2](#) of the Sherman Act is to define and establish a relevant market, consisting both of a relevant product market and a relevant geographic market. While the parties agree that the relevant geographic market is the United States, the parties do not agree on the relevant product market. More importantly, the record is void of any attempt by CAC to ascertain the facts from which the relevant product market contended by it [*1318] might be inferred. CAC contends [**23] that the relevant product market consists of portable sound measuring devices of the type sold by GenRad to its distributors. However, there is no basis in the record from which a reasonable jury could infer that the relevant product market in this action should be limited to only those portable sound measuring devices which GenRad sold to CAC while it was a distributor. CAC has provided the court with absolutely no analysis relating to functional interchangeability of products or the cross-elasticity of demand for products, which is its [HN16](#) [↑] burden in order to establish a relevant product market. *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). In *DuPont*, the Supreme Court summarized the rule as follows:

The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they reproduced -- price, use, and qualities considered.

² See Sherman Act, [§ 1](#) Violations, *supra*.

DuPont, 351 U.S. at 404. Here, CAC has assumed a product market limited to products it [**24] purchased from GenRad. That assumption does not meet CAC's burden of providing some analysis of functional interchangeability and cross-elasticity of demand and supply from which a jury could reasonably find a product market. Consequently, CAC's § 2 claim fails initially because of plaintiff's failure to establish a relevant product market. United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976), cert. denied, 429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977).

The voluminous record established by the parties in this litigation also fails to demonstrate a dangerous probability of GenRad's achieving monopoly power in any relevant market. There is no evidence that GenRad achieved the dominance of the market necessary to create a monopoly assuming GenRad did possess the requisite intent. CAC does not contend that GenRad ever achieved more than a fifty percent market share, which negates the element of a dangerous probability of success. CAC accepts GenRad's estimate of forty-nine percent as GenRad's market share. That alone is insufficient to show a dangerous probability of success. Empire Gas, supra; Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 974 [***25] (8th Cir. 1968), cert. denied, 395 U.S. 961, 23 L. Ed. 2d 748, 89 S. Ct. 2096. CAC has also failed to show any impact on any relevant market attributable to any activity of GenRad. That failure negates the element of dangerous probability of success. Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir. 1977), cert. denied, 434 U.S. 879, 98 S. Ct. 234, 54 L. Ed. 2d 160 (1977). Summary judgment is appropriate as to the issue of attempted monopolization.

North Carolina Antitrust Claims

Count Four of CAC's amended complaint alleges that the same acts and conduct on the part of GenRad which CAC contends violate § 1 of the Sherman Act also violate §§ 75-1, 75-5(b)(2), 75-5(b)(3), and 75-1.1 of the North Carolina General Statutes. For the reasons stated above as to why GenRad is entitled to summary judgment on CAC's claims under § 1 of the Sherman Act, GenRad is also entitled to summary judgment under these sections of the North Carolina "antitrust" statutes. Rose v. Vulcan Materials Co., 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973). In addition, the court notes that HN17 [**26] whether or not a certain act or practice violates N.C. Gen. Stat. § 75-1.1 [**26] is a question of law to be determined by the court. In this regard, taking the evidence in the light most favorable to the plaintiff CAC, the court sees no act or practice demonstrated in the record on the part of GenRad which would be violative of N.C. Gen. Stat. § 75-1.1. Finally, as was noted above, CAC has made absolutely no effort to demonstrate any effect upon overall competition in any relevant market. Johnson v. Phoenix Mutual Life Insurance Co., 300 N.C. 247, 266 S.E.2d 610 (1980); Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

[*1319] Breach of Contract

CAC contends that GenRad breached the terms and provisions of the distributor agreement as follows:

1. By failing to refer customer orders as required;
2. By withholding measurement instruments from CAC and pre-empting CAC's territory by making direct sales to CAC's customers;
3. By conducting a telephone sales campaign in which GenRad allegedly secretly contacted and misled CAC's customers for the purpose of making direct sales to them; and
4. By engaging in conduct and activities which impaired and eventually nullified CAC's rights under the distributor agreement.

[**27] Although the written agreement between the parties is silent on the subject of referral of customer orders, GenRad's "Statement of General Radio Company Distributor Policy" contains the following provision regarding referral of customer orders:

Customer orders received at GenRad district offices for small quantities of standard catalog items are to be referred to the nearest distributor subject to the following. All referrals will be based on the known availability of the required items in the distributor's stock. The distributor is expected to refer to GenRad all orders falling

below the quantity limits normally handled by the distributor in the usual course of business and orders for items requiring modification or special design.

CAC offers no testimony or documentary evidence which tends to show that GenRad breached the foregoing provision of its distributor policy, assuming that such policy was a part of the agreement between the parties.

The only evidence in the record that GenRad withheld products from CAC is to the effect that GenRad did so when CAC was on "credit hold" and was not paying for products which CAC had ordered and which GenRad had already shipped [**28] to CAC. The court finds no evidence of GenRad's withholding any products from CAC in violation of the agreement between the parties.

With regard to GenRad's direct telephone selling campaign, the court again finds no evidence that GenRad secretly contacted or misled any of CAC's customers for any purpose. There is evidence in the record that GenRad conducted a direct telephone selling campaign beginning in the spring of 1978. However, there is no evidence that any calls were made which were not authorized by the agreement between the parties; nor is there any evidence that GenRad said or did anything improper in the course of any such calls. The agreement between the parties allowed GenRad to compete directly with CAC in the sale of GenRad products. Consequently, the fact of the direct telephone selling campaign and the fact of GenRad's making sales calls on customers or potential customers which CAC either was soliciting or wanted to solicit is specifically authorized under the agreement.

Finally, the record is clear that GenRad complied with the agreement between the parties in terminating CAC as a distributor. GenRad gave CAC the notice in writing to which it was entitled [**29] before terminating the distributor agreement between the parties.

For the foregoing reasons, GenRad is entitled to summary judgment with regard to CAC's claim for breach of contract.

Common Law Unfair Competition

The final contention is that GenRad, by engaging in the acts and conduct which CAC contends violate § 1 of the Sherman Act, also violated the common law of unfair competition, both in the United States and in North Carolina.

At the outset, the court questions whether there is any separate federal law of unfair competition. In Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938), Justice Brandeis, writing for the Supreme Court, said: "Except HN18[[↑]] in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State . . . [*1320] There is no Federal general common law."

Traditionally at common law, including that of North Carolina, HN19[[↑]] the tort of unfair competition consisted of acts or practices by a competitor which are likely to deceive the consuming public. Charcoal Steak House of Charlotte, Inc. v. Staley, 263 N.C. 199, 139 S.E.2d 185 (1964). The tort has traditionally [**30] been applied to practices such as trademark or trade name infringement, imitation of a competitor's product or its appearance, interference with a competitor's contractual relations, disparagement of a competitor's product or business methods, and misappropriation of a competitor's intangible property rights such as advertising devices or business systems. Note, "Unfair Competition -- Law of Unfair Competition in North Carolina," 46 N.C.L.R. 856 (1967-68).

A thorough review of the record before this court discloses no evidence that GenRad has damaged CAC by engaging in any practice heretofore determined to constitute common law unfair competition, nor does it disclose any evidence of any practice by GenRad which, though not yet crystallized as an act of unfair competition, would shock the judicial sensibilities of this court. Consequently, GenRad is entitled to summary judgment on that issue.

In re Mid-Atlantic Toyota Antitrust Litigation

United States District Court for the District of Maryland

May 27, 1983

Nos. MDL-456, Civil Action Y-80-3238, Y-81-650, Y-81-726, Y-81-805, Y-81-1880, Y-82-479, Y-81-806, Y-81-2954

Reporter

564 F. Supp. 1379 *; 1983 U.S. Dist. LEXIS 16640 **; 1983-1 Trade Cas. (CCH) P65,409

IN RE: MID-ATLANTIC TOYOTA ANTITRUST LITIGATION This Opinion Relates to all consolidated actions: STATE OF MARYLAND ex rel. SACHS v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; STATE OF DELAWARE ex rel. GEBELEIN v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; STATE OF WEST VIRGINIA ex rel. BROWNING v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; DISTRICT OF COLUMBIA ex rel. ROGERS v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; COMMONWEALTH OF PENNSYLVANIA ON ITS OWN BEHALF AND AS PARENTS PATRIAE v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; COMMONWEALTH OF VIRGINIA v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; DANIEL E. GOLUB, et al. v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.; WALLACE H. JOHNSTON, JR., et al. v. MID-ATLANTIC TOYOTA DISTRIBUTORS, INC., et al.

Core Terms

Settlement, Dealer, temporary settlement, certificates, proposed settlement, Distributor, join, parties, notice, negotiations, purchasers, adequacy, class action, class member, damages, factors, opt, identification, non-settling, antitrust, approving, preliminary approval, parens patriae, legal right, preliminarily, benefits, stresses, trade-in, merits, rights

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN1[] Public Enforcement, State Civil Actions

Similar standards should govern judicial review of proposed settlements in both parens patriae actions and private class actions. The essential inquiry is whether the proposed settlement is fair, adequate, and reasonable. The relevant analysis is bifurcated into inquiries on the fairness and the adequacy of the proposed settlement.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN2[] Settlements, Settlement Agreements

The factors tending to reveal the fairness of a settlement are those which indicate the presence or absence of collusion among the parties. Because of the danger of counsel's compromising a suit for an inadequate amount for the sake of insuring a fee, the court is obligated to ascertain that the settlement was reached as a result of good-faith bargaining at arm's length. The good faith of the parties is reflected in such factors as the posture of the case at the time settlement is proposed, the extent of discovery that has been conducted, the circumstances surrounding the negotiations and the experience of counsel.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN3 Settlements, Settlement Agreements

In evaluating the adequacy of a proposed settlement, the court must weigh the likelihood of the plaintiff's recovery on the merits against the amount offered in settlement. This necessarily requires the court to make a careful assessment of all the facts and a thorough analysis of the applicable law. It is not, of course, necessary or desirable to try the case to determine whether a settlement is adequate since the very purpose of settlement is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN4 Settlements, Settlement Agreements

In assessing the adequacy of the proposed settlement, courts should weigh the amount tendered to the plaintiffs against such factors as: (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Criminal Law & Procedure > Preliminary Proceedings > General Overview

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN5 Class Actions, Compromise & Settlement

In a class action, the determination of whether a proposed settlement is fair and reasonable is normally at least a two-step procedure. The first step involves a preliminary determination of whether to give notice of the proposed settlement to members of the class and whether to schedule a hearing at which to receive evidence in support of and in opposition to the proposed settlement. Unless the judge is preliminarily satisfied that the proposed settlement is within the range of possible approval, there is no point in proceeding with notice and a hearing. Accordingly, rather than automatically accepting the assurances of counsel that the proposed settlement is a good one and should be submitted to the class members, it is usually desirable to have a preliminary hearing.

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN6 Judicial Officers, Judges

A preliminary hearing on whether a proposed settlement is fair and reasonable is not a definitive proceeding, and the judge must be careful to make clear that the determination permitting notice to members of the class is not a finding that the settlement is fair, reasonable, and adequate. In appraising the possibilities and probabilities of recovery and the possible range of damages for the purposes of submitting or approving the settlement proposal, the judge should carefully avoid expression of any opinion that constitutes a prejudgment of the outcome of the litigation or a final judgment on the merits. On the contrary, he should make clear that it is simply a determination that there is, in effect, probable cause to submit the proposal to members of the class and to hold a full-scale hearing on its fairness, at which all interested parties will have an opportunity to be heard and after which a formal finding on the fairness of the proposal will be made.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN7 Settlements, Settlement Agreements

While a court might insist on certain different provisions if it had participated in the settlement negotiations, the court should not substitute its business judgment for the business judgment of the parties whose business is involved.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN8 Settlements, Settlement Agreements

Whether the commitment the settling defendants make to cooperate with plaintiffs will certainly benefit the classes, is an appropriate factor for a court to consider in approving a settlement.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN9 Settlements, Settlement Agreements

The presence of public law enforcement officers in the settlement process is an appropriate element for the court to consider in approving that settlement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

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

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN10 Prerequisites for Class Action, Adequacy of Representation

The primary purpose of *Fed. R. Civ. P. 23(e)* is to protect the absentee class member from the entry of a binding judgment when his interests have not been adequately represented. Consequently, while the contexts, results and formulations have varied somewhat, the general rule is that a non-settling defendant has no standing to object to a proposed settlement unless his formal, legal rights are prejudiced by the settlement. Non-settling defendants have standing to object to proposed court approval only when the settlement would alter their formal, legal rights. In particular, non-settling defendants do have standing to object to proposed court approval of a settlement which would bar their rights of contribution and indemnity from settling defendants.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN11[**Class Actions, Compromise & Settlement**

The unique res judicata aspects of a class action judgment mandate judicial solicitude on behalf of the absentee class members at the time of a proposed class action settlement, but this does not compel the court to assume the unaccustomed role of general arbiter of the substantive fairness of a settlement vis-a-vis all parties to the action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN12[**Class Actions, Certification of Classes**

The conditional determination of a temporary settlement class does not constitute an all purposes certification, and in particular does not certify a litigation class should the supervising court subsequently disapprove the proposed settlement.

Counsel: [**1] Charles O. Monk, III, Esq., Baltimore, Maryland, Michael F. Brockmeyer, Esq., Baltimore, Maryland, (Liaison Counsel for Plaintiffs).

Raymond W. Bergan, Esq., Washington, District of Columbia, (Liaison Counsel for Defendants), Benjamin R. Civiletti, Esq., Baltimore, Maryland, (Counsel for defns. Mid-Atlantic Toyota Distributors, Inc., Carecraft Industries, Ltd., and Frederick R. Weisman).

Judges: Young, United States District Judge.

Opinion by: YOUNG

Opinion

[*1380] MEMORANDUM OPINION AND ORDER

YOUNG, United States District Judge

The above numbered action is a multidistrict antitrust litigation involving six *parens patriae* actions, [15 U.S.C. § 15c](#), and two private treble damage actions, [15 U.S.C. § 15](#). See generally *In Re Mid-Atlantic Toyota Antitrust Litigation*, [560 F. Supp. 760 \(D. Md. 1983\)](#). All plaintiffs and several defendants have submitted a proposed settlement ("the Settlement") to the Court for approval pursuant to [15 U.S.C. \[*1381\] § 15c\(c\)](#) and [Fed.R.Civ.P. 23\(e\)](#). The Court has heard the parties' comments on the terms of the Settlement at open hearings on April 29, 1983 and May 26, 1983. In addition, all parties have submitted lengthy memoranda outlining [**2] their views on the merits of the Settlement. After careful consideration of the parties' contentions and the relevant authorities, the Court enters an

order preliminarily approving the Settlement in its entirety and conditionally determining a temporary settlement class ancillary to the main *parens patriae* classes. The Court stresses the preliminary and conditional nature of these two rulings; they will be followed by another hearing and ruling on 1) the final approval of the Settlement and 2) the possible certification of a permanent settlement class. The principal legal effect of the present order is to allow notice to issue to the potential beneficiaries of the Settlement. The Court will make a final adjudication of the rights of these potential beneficiaries only after they have had a full opportunity to be heard and to exercise any "opt-out" rights they may possess. A fuller explanation of the details of and legal basis for these rulings follows.¹

[**3] All plaintiffs have sued two classes of defendants: Toyota dealers in Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia ("Dealer defendants"); and several entities essentially comprising the single Toyota distributor for the six jurisdictions ("Distributor defendants").² The plaintiffs allege that both sets of defendants have conspired together in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, to force purchasers of certain new 1980 Toyotas to pay more for their cars than they would have paid in the absence of a conspiracy. After extensive briefing by the parties, the Court, at some length, denied the bulk of defendants' motions for summary judgment and held that the case could proceed to trial under a *per se* theory of liability. *In Re Mid-Atlantic Toyota Antitrust Litigation, 560 F. Supp. 760 (D. Md. 1983)*.

[**4] While the summary judgment motions were *sub curia*, counsel for the plaintiffs and Distributor defendants commenced serious settlement negotiations in December, 1982. The negotiating parties did not permit Dealer defendants to participate in these discussions, although they informed Dealer defendants of the basic form of the Settlement by the middle of March, 1983. After four months of intensive negotiations, plaintiffs and Distributor defendants signed the Settlement on April 14, 1983. The Settlement does not purport to seek an order of the Court unilaterally altering any of the formal, legal rights of the non-signatory Dealer defendants. However, the Settlement does give each Dealer defendant the option of joining in the Settlement on or before May 29, 1983. An attempt at a "global" resolution of this litigation, the Settlement explicitly informs the Dealer defendants of the rights and liabilities they would assume if they choose to join. In addition, the Settlement warns them, in advance, that plaintiffs have reserved the option to rescind their agreement with any individual Dealer defendant if the number of Dealer defendants joining the Settlement does not reach a certain [**5] "critical mass."³ The Settlement is intended to be [*1382] final as between the plaintiffs and Distributor defendants regardless of the number of Dealer defendants who elect to join.

The Settlement is lengthy and complex and the Court will summarize only its most salient features, focusing primarily on the results contemplated if all Dealer defendants join the Settlement. In such a situation, the Settlement mandates the issuance of "certificates" or "scrips" to eligible class members. With one small exception, each of the certificates may be redeemed for (1) \$250.00 worth of retail value goods, services or trade-in allowance from a participating Dealer defendant, (2) \$135.00 in cash, or (3) some proportionate mixture of the two. While [**6] the certificates are freely negotiable for redemption in cash, only the initial recipient of the certificate may exercise the goods, services or trade-in allowance option. These certificates will be distributed to all those who purchased a

¹ While the United States Court of Appeals for the Fifth Circuit has detailed at length why an interlocutory order preliminarily approving a proposed settlement and conditionally determining a temporary settlement class is not appealable, *In Re Beef Industry Antitrust Litigation, 607 F.2d 167, 180-83 (5th Cir. 1979)* (Wisdom, J.), the Court has attempted to provide counsel with a written opinion on relatively "short order" should any party choose to seek immediate appellate relief. Consequently, this opinion cannot be quite as comprehensive as might otherwise be appropriate. The Court refers the reader interested in the nature and background of this litigation to its recent summary judgment opinion. *In Re Mid-Atlantic Toyota Antitrust Litigation, 560 F. Supp. 760 (D. Md. 1983)*.

² The Court has on occasion referred to the "Distributor defendants" as the "Weisman defendants" to stress the role played within them by defendant Frederick R. Weisman. The terms "Distributor defendants" and "Weisman defendants" should be considered to be synonyms.

³ Section 26 of the Settlement mandates that the plaintiffs retain a right of rescission against participating Dealer defendants unless Dealer defendants settling in at least two thirds of the relevant sales of 1980 Toyotas join the Settlement on or before May 29, 1983.

new 1980 Toyota from one of the Dealer defendants, provided that the vehicle purchased had an accessory which (1) had a list or "sticker" price of at least \$425.00 and (2) had at least two of the five components of the so-called "Protective Package" which has formed the basis of this litigation: rust-proofing, exterior paint sealant, undercoating, fabric or vinyl interior protection, and a motor club membership.

The Settlement provides an elaborate procedural mechanism, complete with an adjudicative "Settlement Committee," for determining the identities and number of the actual beneficiaries of the Settlement. While its intricacies need not be outlined here, the Court stresses that all who purchased a new 1980 Toyota from one of the Dealer defendants will be provided with notice and an opportunity to be heard on the issue of whether they qualify as beneficiaries of the Settlement.

The cost of redeeming the certificates will be borne by a Settlement **[**7]** Fund. The Fund shall consist of a contribution of up to \$2,900,000.00 from the Distributor defendants, a contribution of up to \$1,925,000.00 from the Dealer defendants, and accrued interest. The defendants will be permitted to make less than their maximum contributions only if the total number of identified beneficiaries falls below the 35,000 currently estimated by the parties. The anticipated accrual of interest will allow the issuance of certificates for their full value for up to 36,500 beneficiaries. If the number of beneficiaries exceeds 36,500, then the value of an individual certificate may be reduced.

A Settlement beneficiary may either (1) cash the certificate directly, (2) obtain goods, services or trade-in value from a Dealer defendant, or (3) obtain a proportionate combination of cash, goods, services or trade-in allowance from a Dealer defendant.⁴ If the beneficiary exercises any of these options with a Dealer defendant, the Distributor defendants will reimburse the Dealer defendant \$135.00, and will in turn be reimbursed by the Settlement Fund \$135.00. Thus, as the certificate entitles the beneficiary to \$250.00 worth of retail value goods, services or trade-in **[**8]** allowance, but the Dealer is only reimbursed \$135.00 in cash, the Dealer defendant absorbs the \$115.00 differential of lost retail profit, overhead, or direct costs.

Plaintiffs waive all rights to attorney's fees, except that they reserve the right to receive, in an amount approved by the Court, a segment of any excess Settlement Fund interest remaining after all claims and certain costs have been satisfied. Plaintiffs' counsel currently estimate that they will receive only a small fraction of the fees they have incurred in this case.⁵

The above **[**9]** scenario will only occur if all of the Dealer defendants join in the Settlement. The result occurring if less than all of the Dealer defendants join depends upon the number who join. If Dealer defendants accounting for at least two-thirds of the relevant 1980 transactions opt in, then plaintiffs will either (1) reduce the value of **[*1383]** the certificates or (2) delay their disbursement to allow accrued interest and possible executed judgments to make up the shortfall. If less than two-thirds opt in, then plaintiffs will elect either to (1) accept payments from the joining Dealer defendants or (2) rescind the Settlement with all joining Dealer defendants and continue the litigation with the Dealer defendants as a group. In any of these scenarios, the Distributor defendants will be dismissed from the case upon their payment of the amounts agreed upon and their cooperation in any continuing litigation against Dealer defendants.

The Settlement sets out the following schedule:

May 29, 1983 Deadline for Dealer defendants to join Settlement;

June 1, 1983 Distributor defendants pay 58.6% and Dealer defendants pay 30% of their total contributions;

*July **[**10]** 1, 1983 Parties complete preliminary identification of beneficiaries;*

⁴The only restriction upon the last option is that the beneficiary must use the certificate for at least \$100.00 worth of goods, services or trade-in allowance.

⁵While the Settlement is not clear, it appears that plaintiffs' counsel in the private actions will share in this award of fees.

August 1, 1983 Settlement Committee completes resolution of disputes over preliminary identification of beneficiaries;

September 1, 1983 Notice mailed to purchasers of new 1980 Toyotas from Dealer defendants informing them of the preliminary identification of their status to participate/not participate in Settlement;

September 1, 1983 Distributor defendants pay approximately 38.4% and Dealer defendants pay 30% of their contributions;

October 1, 1983 Deadline for recipients of notice who were not preliminarily identified as beneficiaries to submit contrary evidence;

November 1, 1983 Settlement Committee makes final determination of eligible beneficiaries;

November 15, 1983 Relevant purchasers informed of Settlement Committee's decisions of November 1, 1983;

December 1, 1983 Deadline for requesting reconsideration by Settlement Committee;

January 1, 1984 Settlement Committee files final list of beneficiaries with Court;

February 1, 1984 To extent necessary, Distributor defendants pay \$100,000.00 and Dealer defendants pay 40% of remaining [**11] contributions; and

March 1, 1984 Earliest possible date of disbursement to beneficiaries.

Obviously, the above schedule will be delayed if an insufficient number of Dealer defendants choose to opt in. Payments from the Distributor defendants and any eligible Dealer defendants will accumulate interest in the Settlement Fund, but disbursement will await the outcome of the continuing litigation with the remaining Dealer defendants.

STANDARDS FOR PRELIMINARY APPROVAL

HN1[] Similar standards should govern judicial review of proposed settlements in both *parens patriae* actions and private class actions. In *Re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305, 315 n.9 (D. Md. 1979). The essential inquiry is whether the proposed settlement is fair, adequate, and reasonable. See, e.g., In *Re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 207 (5th Cir. 1981); In *Re Beef Industry Antitrust Litigation*, 607 F.2d 167, 179-80 (5th Cir. 1979); *Montgomery County*, 83 F.R.D. at 305; *Manual for Complex Litigation* § 1.46 at 56-57 (5th Ed. 1982). The late Judge Blair of this District bifurcated the relevant analysis into inquiries on [**12] the "fairness" and the "adequacy" of the proposed settlement. On the element of "fairness," Judge Blair indicated:

HN2[] The factors tending to reveal the fairness of a settlement are those which indicate the presence or absence of collusion among the parties. Because of the danger of counsel's compromising a suit for an inadequate amount for the sake of insuring a fee, the court is obligated to ascertain that the settlement was reached as a result of good-faith bargaining at arm's length. The good faith of the parties is reflected in such factors as the posture of the case at the time settlement is proposed, the extent of discovery that has been conducted, the circumstances [*1384] surrounding the negotiations and the experience of counsel.

Montgomery County, 83 F.R.D. at 315 (citations omitted). Judge Blair then addressed the second element of "adequacy":

HN3[] In evaluating the 'adequacy' of a proposed settlement, the court must weigh the likelihood of the plaintiff's recovery on the merits against the amount offered in settlement. This necessarily requires the court to make a careful assessment of all the facts and a thorough analysis of the applicable law. [**13] It is not, of course, necessary or desirable to 'try' the case to determine whether a settlement is adequate since the very purpose of settlement is 'to avoid the trial of sharply disputed issues and to dispense with wasteful litigation.'

HN4 In assessing the adequacy of the proposed settlement, courts should weigh the amount tendered to the plaintiffs against such factors as (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement.

Id. at 315-16 (citations omitted).

The Court must apply these two general standards within the unique context of a preliminary approval determination. While neither *Fed.R.Civ.P. 23(e)* nor *15 U.S.C. § 15c(c)* specify that a court must follow any particular procedure, the Court has chosen to utilize § 1.46 of the *Manual on Complex Litigation* as a rough procedural framework for reviewing the Settlement. **[**14]** The *Manual* is not mandatory authority, and itself stresses that its "suggestions" need not be strictly adhered to in every application. *Manual on Complex Litigation, supra*, at xx. However, the Court will give the *Manual's* recommendations every consideration when appropriate in the particular instance. The *Manual* specifically recommends a preliminary approval procedure:

HN5 In a class action, the determination of whether a proposed settlement is fair and reasonable is normally at least a two-step procedure. The first step involves a preliminary determination of whether to give notice of the proposed settlement to members of the class and whether to schedule a hearing at which to receive evidence in support of and in opposition to the proposed settlement. Unless the judge is preliminarily satisfied that the proposed settlement is within the range of possible approval, there is no point in proceeding with notice and a hearing.

Accordingly, rather than automatically accepting the assurances of counsel that the proposed settlement is a good one and should be submitted to the class members, it is usually desirable to have a preliminary hearing.

Such **HN6** a preliminary **[**15]** hearing is not, of course, a definitive proceeding on the fairness of the proposed settlement, and the judge must be careful to make clear that the determination permitting notice to members of the class is not a finding that the settlement is fair, reasonable, and adequate. In appraising the possibilities and probabilities of recovery and the possible range of damages for the purposes of submitting or approving the settlement proposal, the judge should carefully avoid expression of any opinion that constitutes a prejudgment of the outcome of the litigation or a final judgment on the merits. On the contrary, he should make clear that it is simply a determination that there is, in effect, "probable cause" to submit the proposal to members of the class and to hold a full-scale hearing on its fairness, at which all interested parties will have an opportunity to be heard and after which a formal finding on the fairness of the proposal will be made.

Id., § 1.46 at 62, 64-65. See *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980); *Montgomery County*, 83 F.R.D. at 313. The Court adopts this general procedure for the present case.

[*1385] **[16]** "FAIRNESS" OF THE SETTLEMENT**

Probable cause exists that the Settlement was reached as a result of good faith bargaining at arms length. The four primary participants in the negotiations were two of the chief law enforcement officers of the State of Maryland, a senior partner in one of the most prominent litigation firms in the country, and a former Attorney General of the United States. The Settlement emerged only after several years of hard but honestly fought litigation which has produced one interlocutory appellate decision and four lengthy rulings by the Court. The very intricacy and comprehensiveness of the Settlement suggests the professionalism of its origins. While the Court in no way prejudges the issue of "fairness," and stands ready to entertain any evidence which may subsequently be submitted on the issue, the Court has no problem in finding at the present that probable cause exists that the Settlement was arrived at in an appropriate manner.

"ADEQUACY" OF THE SETTLEMENT

Similarly, the "adequacy" of the Settlement is well within the range of "possible approval." **HN7** While the Court might have insisted on certain different provisions had it been a participant in the **[**17]** negotiations, the Court

should not substitute its business judgment for the business judgment of the parties whose "business" is involved. *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 426-27 (7th Cir. 1977). Focusing instead on the factors Judge Blair suggested, the Court notes that its recent summary judgment ruling implies that the case would probably go to the jury on a *per se* theory of antitrust liability.⁶ On the other hand, the summary judgment ruling only resolves the issue of antitrust "injury" on the level of facial allegations, and does not foreclose a subsequent directed verdict for defendants on that basis should it appear appropriate. In *Re Mid-Atlantic Toyota Antitrust Litigation*, 560 F. Supp. 760, slip op. at 63-67. If the case does go to the jury, the Court's experience with antitrust trials suggests that a finding of liability is a significant possibility.

[**18] The precise extent of damages, closely related to the existence of antitrust "injury" in the present case, is not altogether clear. *Id.* Indeed, the governing legal measure of damages was only recently specified by the Court. *Id.* slip op. at 66-67. However, as the summary judgment ruling indicates, each individual purchaser of a new 1980 Toyota with a Protective Package suffered damages (assuming liability) within the *specific range* of \$0 to \$535.00. If a sufficient number of Dealer defendants join the Settlement, then the previously described certificates will be issued to all such injured purchasers. The value of these certificates falls within the middle of the range of individualized damages, and may well be an appropriate balancing of the possibly fatal indeterminacy of damages⁷ [**19] on the one hand, *id.* slip op. at 63-66, and the potential trebling of damages on the other, see [15 U.S.C. §§ 15\(a\), 15c\(a\)\(2\)](#).⁸

If, alternatively, a sufficient number of Dealer defendants do not join the Settlement, then the "adequacy" of the Settlement would merit perhaps less scrutiny. [*1386] As federal **antitrust law** currently provides no right of contribution, *Texas Industries, Inc. v. Radcliff* [*20] *Materials, Inc.*, 451 U.S. 630, 68 L. Ed. 2d 500, 101 S. Ct. 2061 (1981), the classes would still be entitled to all of their potential recoveries. The Distributor defendants do appear to be the "deeper" and perhaps more uniformly solvent "pocket," but the \$80.00 per purchaser contribution they would make is certainly within the range of possible approval as "adequate."⁹ In addition, [HN8](#)[↑]] the commitment Distributor defendants have made to cooperate with plaintiffs will certainly benefit the classes, and is an appropriate factor for a court to consider in approving a settlement. In *Re Ampicillin Antitrust Litigation*, 82 F.R.D. 652, 654 (D. D.C. 1979); cf. *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 12 (N.D. Ga. 1973) (fact that settling defendant will open files to plaintiff is a factor in concluding that class will not be prejudiced by partial settlement). Similar comments would apply to any Dealer defendant who joins a partial settlement.

[**21] Turning to some of the other factors Judge Blair enumerated, the Court agrees with the parties that continuation of this massive litigation will certainly entail significant costs for all involved. As some doubt exists about the solvency of certain Dealer defendants, approval of a settlement in which all of them participate might be prudent, although the Court places little weight upon this factor. Finally, [HN9](#)[↑]] the presence of public law enforcement officers in the settlement process is an appropriate element for the Court to consider in approving that settlement. *Mendoza v. United States*, 623 F.2d 1338, 1353 (9th Cir. 1980); *Marshall v. Holiday Magic, Inc.*, 550

⁶The Court again refers the reader interested in a more detailed assessment of the potential evidence to the April 4, 1983 summary judgment ruling.

⁷The Court stresses that the issue of "damages", like the issue of "injury," has only been resolved at the level of facial allegations. The Court in no way prejudgets the resolution of either of these issues when the matters are more fully developed.

⁸Dealer defendants assert that the Court would irrevocably err by preliminarily approving the Settlement before examining the States' economic evidence. While the *Manual on Complex Litigation* does suggest that a court examine the economic evidence before issuing a preliminary approval, *Manual on Complex Litigation*, *supra*, § 1.46 at 64, the Court believes that rigid application of this recommendation would not be appropriate in the present context. Production of economic evidence would necessitate several months delay, and would disrupt the Settlement's carefully negotiated timetable and equilibrium. In addition, the Court's thorough familiarity with the possible range of recoverable damages in this action leaves it fully satisfied that the Settlement falls within the possible range of adequate settlements.

⁹This is particularly true when one considers the interest which would accrue on their contribution pending resolution of the continuing litigation against non-settling Dealer defendants.

F.2d 1173, 1178 (9th Cir. 1977). Considering all of these factors, but once again not prejudging the issue, the Court finds the Settlement to be within the "possible range" of "adequacy."

The Court notes with some concern the contractual provisions providing for (1) a return to the defendants of certain unclaimed principal and (2) an award to the plaintiffs of attorney's fees from certain excess, unclaimed interest. These terms theoretically provide both sides with some financial incentive to minimize the number of **[**22]** beneficiaries. However, the Settlement has elaborate procedural safeguards favoring the identification of beneficiaries. In addition, the vast majority of beneficiaries will have their interests represented not by private counsel but instead by their respective attorneys general. In any event, the actual results of the identification process will come before the Court again. While these terms do give the Court pause, and certainly should be explored at the final approval hearing, they do not remove the Settlement from the range of possible approval. Similarly, some exploration of the competitive effect of the certificates might be merited later, but it should not derail the orderly workings of the settlement process at this point. Finally, the Court notes that the Settlement paints with a broad brush by providing identical awards to consumers who may have suffered disparate injuries and by giving benefits to certain groups who would not be entitled to participate in a judgment at all. However, the Court recognizes the administrative difficulties in "fine tuning" the Settlement to any greater level of precision than the twenty-four page document already contains. At present, **[**23]** the Court finds these disparities to be no grounds for summarily rejecting the carefully crafted proposal. If settling defendants choose to lavish their money on those they could not be legally liable to, that is their prerogative.

DEALER DEFENDANTS' OBJECTIONS

Numerous Dealer defendants have strongly objected to various provisions of the Settlement as unduly unfair to them. As of yet, these Dealer defendants have not become parties to the Settlement. The Court frankly acknowledges that, as it pointed out at the April 29 conference, many terms of the Settlement do impose burdens upon the Dealer defendants which do not appear to be equally shared by the Distributor defendants. Indeed, given the **[*1387]** fact that the States negotiated the Settlement exclusively with the Distributor defendants, one could scarcely expect otherwise. However, HN10¹⁰ the primary purpose of Fed.R.Civ.P. 23(e) is to protect the absentee class member from the entry of a binding judgment when his interests have not been adequately represented. Piambino v. Bailey, 610 F.2d 1306, 1327 (5th Cir. 1980); Shelton v. Pargo, 582 F.2d 1298, 1303 (4th Cir. 1978); Norman v. McKee, 431 F.2d 769, 774 **[**24]** (9th Cir. 1970); 7A C. Wright & A. Miller, Federal Practice and Procedure § 1797 at 226 (1972). Consequently, while the contexts, results and formulations have varied somewhat, the general rule is that a non-settling defendant has no standing to object to a proposed settlement unless his formal, legal rights are prejudiced by the settlement. Beef Industry, 607 F.2d at 172-73; 172-73 (5th Cir. 1979); *In Re Nissan Motor Co. Antitrust Litigation*, 552 F.2d 1088, 1103 n.17 (5th Cir. 1977) (blanket statement of no standing); *In Re Ampicillan Antitrust Litigation*, 82 F.R.D. at 654 (blanket statement of no standing); Seiffer v. Topsy's International, Inc., 70 F.R.D. 622, 631 n.11 (D. Kan. 1976) (blanket statement of no standing); Wainwright v. Kraftco Corp., 53 F.R.D. 78, 81 (N.D. Ga. 1971) (stating rule but refusing to issue ruling which would alter legal rights of non-settling defendants); Philadelphia Electric Co. v. Anaconda American Brass Co., 42 F.R.D. 324, 326 n.1 (E.D. Pa. 1967) (blanket statement of no standing); 3 Newberg on Class Actions, *supra*, § 5660b, at 564-65; cf. *In Re Viatron Computer Systems Corp. Litigation*, 614 F.2d 11, 14 (1st **[**25]** Cir. 1980) ("non-settling defendant does not ordinarily have standing to object to a court order approving a partial settlement"). Although some of these cases on occasion speak rather broadly of "prejudice" to the "rights" of the non-settling defendants, a careful analysis of the actual results reached in these decisions reveals that non-settling defendants have standing only when the settlement would alter their formal, legal rights. In particular, non-settling defendants do have standing to object to proposed court approval of a settlement which would bar their rights of contribution and indemnity from settling defendants. See Altman v. Liberty Equities Corp., 54 F.R.D. 620 (S.D. N.Y. 1972); Wainright v. Kraftco Corp., 53 F.R.D. at 81; 3 Newberg on Class Actions, *supra*, § 5660b, at 565. ¹⁰ In the present case, Dealer

¹⁰ Florida Power Corp. v. Granlund, 82 F.R.D. 690 (M.D. Fla. 1979), is the only case which has gone beyond protecting the non-settling defendants rights to indemnity and contribution. In *Granlund*, the court refused to approve a settlement which would create a previously non-existent right of indemnification in the settling defendant, expose the non-settling defendants to the risk

defendants have presented no arguments demonstrating that approval of the Settlement would produce a judicial order unilaterally altering their formal, legal rights.¹¹ **[**28]** While the Settlement does purport to outline various rights and responsibilities for the Dealer defendants, these rights and duties become obligatory upon an individual Dealer defendant **[**26]** only if that Dealer defendant chooses to assume them. In effect, the Dealer defendants request the Court to relieve them of the burden of making a tactical litigation decision which they regard as a Hobson's Choice. The Dealer defendants complain that they must choose between joining a burdensome settlement or proceeding through a protracted and expensive litigation with the Distributor defendants realigned against them. However, litigation is not an activity for the kind of heart or the gentle of **[*1388]** spirit. Fear of prosecution for a capital offense may impel a criminal defendant to plead guilty to a lesser charge, but this in no way implies that the plea is not voluntary, knowing, and intelligent. *Brady v. United States*, 397 U.S. 742, 755, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970). Similarly, plaintiffs in ordinary civil actions routinely engage in a "divide and conquer" settlement strategy among multiple defendants. **HN11**[↑] The unique *res judicata* aspects of a class action judgment mandate judicial solicitude on behalf of the absentee class members at the time of a proposed class action settlement, but this does not compel the Court to assume the unaccustomed role **[**27]** of general arbiter of the substantive fairness of a settlement vis-a-vis all parties to the action.¹² The Court holds that the arguments made by Dealer defendants are not relevant to the preliminary determination of whether the Settlement is fair, adequate and reasonable.

[29] FORMATION OF A TEMPORARY SETTLEMENT CLASS**

The present *parens patriae* actions are pursued on behalf of natural persons currently residing within the respective plaintiff States who have not previously "opted out" of these actions. By negative implication, purchasers of new 1980 Toyotas in the Mid-Atlantic region who are "non-natural" commercial entities, who have since moved from the Mid-Atlantic region, or who have previously "opted out" of the *parens* actions are not currently participants in this litigation. Nevertheless, in keeping with its "global" scope, the Settlement purports to provide benefits to all who purchased a new 1980 Toyota from one of the Dealer defendants with an accessory which had a suggested retail price of at least \$425.00 and which included two or more items of the "Protective Package." To remedy this disparity between the compositions of the (1) current plaintiffs and (2) the proposed beneficiaries, the Court enters

of multiple litigation, and prohibit the non-settling defendants from exercising an otherwise valid *in pari delicto* defense. The Court notes that all of the rights vindicated in *Granlund* were once again formal, legal rights.

¹¹ Dealer defendants make no arguments relative to the potential impairment of their contribution rights. No right to contribution exists under the federal antitrust laws. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 68 L. Ed. 2d 500, 101 S. Ct. 2061 (1981). While the complaint also asserts violations of various state statutes, Section 28 of the Settlement expressly provides for a *pro rata* reduction of damages recovered by the plaintiffs against the non-settling defendants should a court subsequently determine that a right of contribution exists. Such a reduction would remove the right to contribution, since the non-settling defendants would not be liable for more than their proportionate share. See *Altman v. Liberty Equities Corp.*, 54 F.R.D. at 624.

¹² Dealer defendants attempt to distinguish the overwhelming mass of authority reviewed above on the grounds that none of the settlements under scrutiny in those cases purported to establish the terms upon which a non-signatory could join the agreement. While the Settlement does appear to be unique in that respect, the argument provides Dealer defendants with no relief. Under the above authorities, Dealer defendants would have had no standing to object to a pure partial settlement between plaintiffs and Distributor defendants which did not curtail their formal, legal rights. The fact that Distributor defendants would subsequently cooperate with the plaintiffs would be a "well established" ground for *approving* such a partial settlement. In *Re Ampicillin Antitrust Litigation*, 82 F.R.D. at 654. Given the Dealer defendants' clear lack of standing in a pure partial settlement, the fact that the signatory parties have attempted to give the Dealer defendants an alternative option to proceeding alone in this protracted litigation does not suddenly create standing. The "opt in" provisions of the Settlement do not lie at the root of the Dealer defendants' objections; the prospect of continuing this expensive litigation alone does. In purely practical terms, the existence of the global settlement with its "opt in" provision leaves the Dealer defendants better off than if Distributor defendants and plaintiffs had struck the standard "separate deal." As the signatory parties had the unquestioned right to leave the Dealer defendants as the sole defendants in this case, they certainly are free to provide the Dealer defendants with a potentially more palatable alternative to that situation. Simply put, "standing" cannot be conferred on Dealer defendants because of provisions in the Settlement which can only help the Dealer defendants.

an order conditionally determining a Temporary Settlement Class ¹³ [**32] in the "umbrella" multi-district action MDL-456. Counsel for the plaintiffs in Civ. Action Nos. Y-81-806 and Y-81-2954 shall be joint counsel for the Temporary Settlement [**30] Class. Current plaintiffs in Nos. Y-81-806 and Y-81-2954 [*1389] shall be the representative parties of the Temporary Settlement Class. The Temporary Settlement Class shall automatically expire when the Court issues a joint ruling on the issues of (1) the final approval or disapproval of the Settlement and (2) the certification or non-certification of a permanent settlement class.¹⁴ The Temporary Settlement Class shall consist of all purchasers of a new 1980 Toyota from a Dealer defendant who are not natural persons, who no longer reside in the Mid-Atlantic states (Delaware, Maryland, Pennsylvania, Virginia, West Virginia or the District of Columbia), or who have opted out of one of the six pending *parens patriae* actions. The Court has specifically expanded the Temporary Settlement Class to include some purchasers ostensibly not entitled to benefits under the Settlement. The reason for this expansion is to provide all purchasers of a new 1980 Toyota from a Dealer defendant with the procedural safeguards which the Settlement establishes for the accurate identification of its beneficiaries. Consequently, membership in the Temporary Settlement Class does not necessarily [**31] indicate membership in any later permanent settlement class. Members of the Temporary Settlement Class shall receive appropriate notice of their inclusion in the Temporary Settlement Class at the same time they receive notice of the Court's preliminary approval of the Settlement shall be mailed September 1, 1983, counsel should provide the Court with a Proposed Notice for Temporary Settlement Class members by August 1, 1983. This Proposed Notice should be fully supported by legal authority. See, e.g., *Beef Industry*, 607 F.2d at 178-79 (discussing legal sufficiency of notice).

Judge Minor Wisdom of the United States Court of Appeals for the Fifth Circuit has provided a comprehensive review of the authorities and policies supporting the creation of a temporary settlement class. *Beef Industry*, 607 F.2d at 173-78.¹⁵ The Court will not repeat those arguments here, except to note that the principal practical benefit of a joint order preliminarily approving a proposed settlement and conditionally determining a temporary settlement class is that it clearly establishes the financial benefits of participating in a class settlement and hence provides the putative class members with a more informed choice for opting in or out of the class. As Judge Wisdom summarized:

It is fair to state that as the law now stands, tentative or temporary settlement classes are favored when there [**33] is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge.

¹³ A temporary settlement class is a class tentatively formed for the purposes of anticipated settlement only. Completely ancillary to the proposed settlement, it lasts only as long as the period between the preliminary approval of the settlement and the court's final determination on the settlement. At the time of the court's final adjudication of the proposed settlement, the court decides whether or not to certify a permanent settlement class. In effect, a temporary settlement class serves only as a procedural vehicle for providing notice to putative members of a proposed class of the terms of the anticipated settlement and of their opportunity to "opt out" and/or object. See generally *Beef Industry*, 607 F.2d at 173-78; 3 Newberg on *Class Actions*, *supra*, at § 5570c.

¹⁴ If a sufficient number of Dealer defendants do not join the Settlement, and notice to consumers does not issue, the Temporary Settlement Class will also automatically expire. The Court would then consider "recreating" a Temporary Settlement Class at any later date that notice might issue.

¹⁵ The Court stresses that the "temporary settlement class" being addressed today was *not* considered by the United States Court of Appeals for the Fourth Circuit in *Shelton v. Pargo, Inc.*, 582 F.2d at 1298. *Shelton* held that potential class members need only be given notice of a proposed *precertification* settlement if the district court determines after a hearing that the precertification settlement has been the product of collusion or that putative class members have detrimentally relied upon the assumed maintenance of the class action. As the Fourth Circuit noted, a precertification settlement "binds solely the individual plaintiff and not absentee class members." *Shelton v. Pargo, Inc.*, 582 F.2d at 1303. In the present case, on the other hand, the signatory parties clearly intend that the Settlement will bind members of the Temporary Settlement Class. To avoid any confusion in this area of occasional terminological looseness, the Court reiterates that it is presiding over the "temporary settlement class" discussed in *Beef Industry* and not the "precertification settlement" considered in *Shelton*.

Beef Industry, 607 F.2d at 174. The primary "abuse" feared by the courts is that defendants will play potential class counsel off against each other to find the "lowest bidder" at the expense of the members of the nascent class. These concerns are simply not present here. The Settlement has been negotiated not by private counsel but by public law enforcement officers.

[**34] If the Settlement receives approval, the eligible members of the Temporary Settlement Class will receive benefits identical to [*1390] those conferred upon the members of the *parens* classes. The unique circumstances of the present case, with the Temporary Settlement Class essentially "parallel" to the main *parens* actions, leaves the Court confident that the abuses extensively discussed in *Beef Industry* are not present here.¹⁶ As the Court has preliminarily determined the Settlement to be "fair" and "reasonable," and as the Settlement is under the continuing scrutiny of the Court, all of the prerequisites identified in *Beef Industry* for the conditional determination of a temporary settlement class exist here.

[**35] HN12 [↑] The conditional determination of a temporary settlement class does not constitute an "all purposes" certification, and in particular does not certify a litigation class should the supervising court subsequently disapprove the proposed settlement. Consequently, it is unclear whether the full findings required for a formal class certification need to be made. See Beef Industry, 607 F.2d at 177-78; 3 Newberg on *Class Actions*, *supra*, § 5570c, at 477-79. To the extent they are required, the Court finds that the Temporary Settlement Class, as a temporary settlement class, fulfills all of the prerequisites of Fed.R.Civ.P. 23(a)¹⁷ and Fed.R.Civ.P. 23(a)(3).¹⁸ In particular, the "adequacy" requirement of Fed.R.Civ.P. 23(a)(4) is met within the limited context of the proposed settlement. The Court of course recognizes that it has previously denied ordinary class certification to two groups of aspiring representative plaintiffs on the grounds that the cost reimbursement arrangements of the representative plaintiffs' counsel violated the disciplinary rules of the relevant jurisdictions and hence rendered suspect their ability to fairly and adequately protect the interests of [**36] their classes. In Re Mid-Atlantic Toyota Antitrust Litigation, 93 F.R.D. 485 (D. Md. 1982). The Court stresses that it does not retreat from this prior holding: if the Court does not give final approval to the Settlement, then the Temporary Settlement Class will automatically dissolve, and attempts at ordinary class certification for full litigation purposes will still be governed by the principles enunciated in the earlier opinion. However, the "representatives" of the members of the present Temporary Settlement [*1391] Class have

¹⁶ These same factors serve to distinguish the present case from the primary appellate discussion of temporary settlement classes since Beef Industry, Plummer v. Chemical Bank, 668 F.2d 654 (2nd Cir. 1982). In *Plummer*, counsel for the putative class had negotiated the proposed settlement prior to the filing of the complaint, and the named plaintiffs appeared to receive more favorable settlement terms than the unnamed members of the prospective class did. The district court disapproved the settlement, and the Circuit Court affirmed stressing the factors noted above. As outlined previously, no such indicia of collusion or overreaching exist in the present case. It should also be noted that *Plummer* involved a final disapproval of a settlement and a denial of certification for a permanent settlement class. The step mandated by the present ruling, notice to prospective members of a permanent settlement class, was in fact undertaken without comment in *Plummer*. Plummer, 668 F.2d at 657.

¹⁷ As the estimated membership in the proposed class exceeds 3000, joinder is impracticable. Fed.R.Civ.P. 23(a)(1). As outlined in detail in the April 4, 1983 opinion, members of the class may have suffered at the hands of a large antitrust conspiracy, so common questions of law and fact obtain. Fed.R.Civ.P. 23(a)(2). Similarly, the antitrust claims of the representatives are typical of the antitrust claims that any purchaser of a new 1980 Toyota from a Dealer defendant would attempt to assert. Fed.R.Civ.P. 23(a)(3). The "adequacy" determination of Fed.R.Civ.P. 23(a)(4) is discussed *infra* in the body of the opinion.

¹⁸ While damages may vary among individual purchasers, common questions of law and fact clearly predominate, and a class action certainly is superior to other methods, if any are available, of fairly and efficiently adjudicating this controversy. As the amount of damages suffered by an individual purchaser is relatively small, the purchaser would have little interest in maintaining a separate action. Fed.R.Civ.P. 23(b)(3)(A). Litigation over factually identical claims is currently before the Court and it makes excellent sense to resolve these matters simultaneously. Fed.R.Civ.P. 23(b)(3)(B). The fact that the Panel on Multi-district Litigation has transferred all actions relating to these matters to the Court indicates the desirability of concentrating the litigation of the class claims in this forum. Fed.R.Civ.P. 23(b)(3)(C). Finally, any "difficulties likely to be encountered in the management of a class action," if they exist in the instant action, are already being encountered by the Court in the parallel *parens* actions. Fed.R.Civ.P. 23(b)(3)(D).

in effect been public law enforcement officers, who, as stressed before, have negotiated identical settlement for their own citizens on the basis of essentially equivalent factual claims. In light of the unique factors of this proposed settlement, and the conditional nature of this determination, the Court cannot say that the class representative will not fairly and adequately protect the interests of the class members during its brief and limited existence. As Judge Wisdom has observed:

it is altogether proper and consistent for a court to certify a class for settlement purposes while it might have had more difficulty reaching this **[**37]** determination in a different context.

Beef Industry, 607 F.2d at 178 (quoting 3 *Newberg on Class Actions, supra*, § 5570c at 479-80).

[38]** For the foregoing reasons, it is this 27th day of May, 1983, by the United States District Court for the District of Maryland, ORDERED:

1. That plaintiffs' and Distributor defendants' motions for the preliminary approval of the proposed Settlement BE, and the same ARE, hereby GRANTED;
2. That a Temporary Settlement Class BE, and the same IS, hereby CONDITIONALLY DETERMINED in accordance with the rulings enunciated above; and
3. That defendants who are not signatories to the Settlement shall have until 5:00 p.m., June 3, 1983 to elect to join the Settlement, pursuant to the agreement of the signatory parties in open court on May 26, 1983.

End of Document



Broad. Music v. T & D Enters.

United States District Court for the Eastern District of Missouri Eastern Division.

June 2, 1983.

Case No. 82-1733-C (4).

Reporter

1983 U.S. Dist. LEXIS 16522 *; Copy. L. Rep. (CCH) P25,536; 1983-1 Trade Cas. (CCH) P65,411

Broadcast Music, Inc. v. T & D Enterprises, Inc., and Terrance L. Taylor.

Core Terms

affirmative defense, copyright infringement, motion to strike, defendants', Memorandum, Antitrust

Opinion by: [*1] CAHILL

Opinion

Memorandum and Order

CAHILL, D.J. This matter is before the Court on a motion to strike the defendants' affirmative defense filed by Broadcast Music, Inc.

Broadcast Music commenced this action seeking injunctive relief against the defendants' alleged copyright infringement. As an affirmative defense, the defendants maintain that Broadcast Music's cause of action is barred because of Broadcast Music's violation of [§ 1](#) of the Sherman Antitrust Act, [15 U.S.C. § 1](#).

Broadcast Music's motion argues that "as a matter of law, an allegation that plaintiff has violated the [antitrust law](#) is not a defense to a claim for copyright infringement." After viewing Broadcast Music's motion, which is unopposed, and the case law cited in the memorandum in support of the motion, the Court agrees that the affirmative defense in question should be stricken. [Orth-o-vision, Inc. v. Home Box Office, 474 F. Supp. 672 \(S.D.N.Y. 1979\)](#); [Broadcast Music, Inc. v. Grant's Cabin, Inc., 204 USPQ 633 \(E.D. Mo. 1979\)](#). Accordingly

It Is Ordered that Broadcast Music's motion to strike is Granted.

End of Document



Frontier Title Co. v. Chi. Title Ins. Co.

United States District Court for the District of Colorado

June 3, 1983, Decided ; June 3, 1983, Filed; June 7, 1983, Entered on the Docket

Civil Action No. 81-JM-1616

Reporter

1983 U.S. Dist. LEXIS 20396 *

FRONTIER TITLE COMPANY OF COLORADO, Plaintiff, vs. CHICAGO TITLE INSURANCE COMPANY, et al, Defendants.

Core Terms

Take-Off, plant, Lawyers, membership, title company, starter, Sherman Act, delivery service, title insurance, defendants', anti-competitive, shareholder, conspiracy, partial summary judgment, anti-trust, statute of limitations, opinion letter, documents, motions, metropolitan area, waive, title insurance company, plaintiff's claim, non-members, accrued, join, motion for a protective order, full membership, communications, indicates

Counsel: [*1] Edward B. Towey, Esq., TOWEY, ZAK & SILVERMAN, Denver, Colorado.

Kenneth R. Bennington, Esq., BROWNSTEIN, HYATT, FARBER & MADDEN, Denver, Colorado.

John C. Christie, Jr., Esq., Patrick J. Roach, Esq., Evelyn M. Suarez, Esq., BELL, BOYD & LLOYD, Washington, D.C.

Patrick M. Westfeldt, Esq., James E. Hartley, Esq., HOLLAND & HART, Denver, Colorado.

Donald B. Gentry, Esq., GRANT, McHENDRIE, HAINES & CROUSE, Denver, Colorado.

Jack Silver, Esq., SILVER, SUTTON AND KELLEY, Denver, Colorado.

David L. White, Esq., JENNINGS, STROUSS AND SALMON, Phoenix, Arizona.

Magistrate Schauer.

Judges: JOHN P. MOORE, Judge, United States District Court.

Opinion by: JOHN P. MOORE

Opinion

MEMORANDUM OPINION AND ORDER

This action presents claims for relief for alleged anti-competitive practices under Sections 1 and 2 of the Sherman Act, [15 U.S.C. § 1](#) and [§ 2](#). The matter arises for consideration of various motions for summary judgment and partial

summary judgment and a motion for a protective order filed by the defendant Lawyer's Title Insurance Company.¹ The plaintiff asserts jurisdiction pursuant to [28 U.S.C. § 1331](#) and [§ 1337](#) [*2] and [15 U.S.C. § 15](#) and [§ 26](#).

The plaintiff was in the title insurance business in the Denver metropolitan area between 1977 and 1981. The metropolitan area constitutes the relevant market for the purposes of this case and includes six Colorado counties: Adams, [*3] Arapahoe, Boulder, Denver, Douglas, and Jefferson.² [*4] Discovery clarified certain factual misstatements contained in the original Complaint, however, the subsequently filed motions and supporting documents clear the factual background.³

The defendants⁴ are members, owners, and in some cases, founders of two organizations which are quite exclusive: S-K-L-D, Inc. and Take-Off, Inc. Take-Off, Inc. was organized by six title insurance companies in December of 1959 for the purpose of making a daily "take-off" or photocopy of all recorded instruments affecting the titles to real property in the City and County of Denver or its environs.⁵ Subsequently, in 1961, four of the Take-Off participants formed S-K-L-D, Inc. (hereinafter SKLD). SKLD's original purpose was the creation of a single abstract or title plant for the City and County of Denver, and Adams, Arapahoe, Boulder, and Jefferson Counties. A title "plant" is, in essence, a sophisticated library containing copies of all instruments, documents, [*5] and maps affecting the titles to real property including copies of plats and various geographical and names indices.⁶

¹ The motions pending include a Motion for Partial Summary Judgment (Statute of Limitations) filed by all of the defendants except defendant Commonwealth which joined in the motion and filed its own Motion for Summary Judgment. The plaintiff filed a partial summary judgment motion raising several bases for partial summary judgment and four of the defendants filed a Motion for Partial Summary Judgment Regarding Take-Off, Inc. The plaintiff had also filed a Motion to Amend Complaint which was withdrawn at the hearing on these motions. I heard argument on the questions presented by the various summary judgment motions. The defendant Lawyers Title Insurance Corporation's Motion for Protective Order was submitted on the briefs.

² The Complaint defines the relevant market as the 6-county area. From the late 1950's until at least 1967, there were four counties considered as part of the metropolitan area for the purposes of this case: Denver, Adams, Arapahoe, and Jefferson. See letter of April 13, 1967, from Colorado Title Company contained in Appendix V to plaintiff's Motion for Partial Summary Judgment, item 49. Subsequently, the reach of the defendants' allegedly concerted activities through SKLD and Take-Off, Inc. (identified and discussed *infra*) expanded to include activity in Boulder and Douglas counties as well as in Larimer, Eagle, Clear Creek and Weld counties. See generally Take-Off, Inc., 1981 Annual Report to Stockholders contained in Appendix V, item 47 and Appendix III, item 31 -- Schedule J, plaintiff's Motion for Partial Summary Judgment. For the purposes of this memorandum, the 6-county area will be considered as the Denver metropolitan area during the relevant time period: 1977 to 1981, as set forth in the Complaint.

³ The plaintiff had filed a Motion to Amend Complaint which would have clarified certain of the factual allegations contained in the Complaint, however, this motion was withdrawn. The proposed amended Complaint deleted the "plaintiff's claims under [§ 2](#) of the Sherman Act and the defendants stipulated to the dismissal of those claims.

⁴ At the time I heard this Motion, the defendants included Ticor Title Insurance Company which was originally named Pioneer National Title Insurance Company. I approved a Stipulation for Dismissal of this action against Ticor on May 18, 1983.

⁵ See Bylaws of Take-Off, Inc. and Memorandum of Working Agreement contained in Appendix IV, items 33 and 34, to plaintiff's Motion for Partial Summary Judgment which indicate that the founding Take-Off members were Record Abstract and Title Insurance Co., The Title Guaranty Co. [now Transamerica Title], Titles, Inc. [now U.S. Life Title], Security Title Guaranty Co, Kansas City Title Insurance Co. [now Chicago Title] and Lawyers Title Insurance Co. Take-Off includes non-SKLD members and one of its founders reportedly was (and is) the oldest and largest title company in Denver. This company is neither a defendant nor an SKLD member.

⁶ See generally SKLD Articles of Incorporation and Agreement in Appendix I, items 1 and 2, plaintiff's Motion for Partial Summary Judgment.

[*6] For the first decade of its existence, the four original members of SKLD eschewed the advances of other title companies who sought access to the SKLD plant.⁷ However, in 1967, they decided that if, anyone was going to be permitted to buy an SKLD membership the price tag should be \$ 1,175,000.00.⁸ This figure reflected one member's assessment of the cost to a new company of assembling a plant covering only a four-county metropolitan area and the difference of operating costs borne solely by a new title company versus the type of cost sharing arrangement available to SKLD members. Even with membership valued at in excess of \$ 1 million, the calculations suggest that access to the SKLD plant could be a worthwhile expenditure for one in the title business. Finally, in the early 1970's two new members were accepted to SKLD: Pioneer National Title and Fidelity National Title.⁹ [*8] The two new members reportedly paid \$ 750,000.00 for their ownership interests in SKLD and Take-Off. Subsequently, in 1974, Land Title and First American Title were afforded an opportunity to participate to a limited extent in SKID under a ten-year service contract.¹⁰ First American apparently participated [*7] in a substitution agreement with Stewart Title in 1978 whereby Stewart gained access to SKLD under the contract. In 1981 Stewart Title learned that the payments it and First American Title had made under the contract since 1974 exceeded \$ 500,000.00 and could be applied toward the purchase of an ownership interest in SKLD.¹¹

A full membership in SKLD includes, among other things, participation in a free "starter" exchange.¹² This particular incident of ownership is allegedly one of the more valuable aspects of participation in SKLD. A "starter" in the title insurance business is a prior title insurance policy or commitment for the same piece of property. Starters are sought after because they provide a jumping off point for research into the title history of a particular piece of real estate. With a prior policy or title commitment in hand, the title company will generally rely on the previous policy issuer's research and merely bring the title history up to date. As one title insurance man averred, "in all cases, it's a tremendous value."¹³ Of course, having access to a complete plant in which to conduct the research is a major convenience to title researchers who need not travel to a particular county recorder's office [*9] in order to search grantor, grantee, or tract indices and other records.

SKLD also offers a delivery or courier service which, for a time, was open to a number of other non-SKLD member title companies. The delivery service would pick up and deliver items from the entities with which title companies normally work including banks, credit unions, savings and loan institutions, mortgage brokerages, realtors, developers, builders, attorneys, government agencies and other title companies.¹⁴ The delivery service was designed to save money and fuel. Title companies could pool their metropolitan area transportation needs and resources by subscribing to the SKLD Courier Service. However, after [*10] two years of permitting non-SKLD members to participate, the service was changed and limited exclusively to SKLD shareholders.¹⁵

⁷ In 1965 the First American Title Insurance Co. of California was turned down for membership and in 1966 the SKLD board rejected the overtures of St. Paul Title Insurance Co. See Appendix I, item 3, plaintiff's Motion for Partial Summary Judgment. Attorneys Title also sought membership in SKLD according to plaintiff's counsel's argument at the motions hearing.

⁸ See Appendix 5, item 49, to plaintiff's Motion for Partial Summary Judgment. Letter of 4/13/67 from Charles Willis re: Sale of an Interest in SKLD, Inc.

⁹ Fidelity's assets, including the SKLD and Take-Off memberships, were sold to Commonwealth in the spring of 1981. See Appendix III, item 31, plaintiff's Motion for Partial Summary Judgment. The basic purchase price was \$ 1,400,000.00 for the business with a possible \$ 400,000.00 in additional consideration based on performance.

¹⁰ See Appendix I, item 4, and Appendix V, item 55, plaintiff's Motion for Partial Summary Judgment.

¹¹ See Appendix V, item 55, plaintiff's Motion for Partial Summary Judgment.

¹² Starter exchange is limited to SKLD members. See SKLD memo of 10/16/75 re: Agreement to Exchange Policies and Commitments at Appendix V, item 53, plaintiff's Motion for Partial Summary Judgment.

¹³ Excerpt of deposition of William Vollbracht, Appendix V, item 50, plaintiff's Motion for Partial Summary Judgment.

¹⁴ See Appendix II, item 23, plaintiff's Motion for Partial Summary Judgment.

¹⁵ See generally Appendices I and II, items 5-30, plaintiff's Motion for Partial Summary Judgment. The record indicates that there were service problems with such a large delivery operation which included misdeliveries and delays. Even though there were

In this case, the plaintiff asserts that the SKLD and Take-Off organizations have operated in contravention of the anti-trust laws to eliminate the plaintiff from the title insurance business in the Denver Metropolitan area market. Specifically, the plaintiff contends that it was rejected by SKLD when it tried to [*11] obtain title services in 1977. *The plaintiff alleges that its participation in Take-Off was permitted, but only at a cost substantially in excess that charged SKLD members.* With regard to the starter exchange among SKLD members, the plaintiff views the *members-only exchange* policy as an anti-competitive practice. The plaintiff also contends that the rebuff of its attempt to receive SKLD information and benefits on a limited "moving forward" basis¹⁶ was motivated by the defendants' continuing conspiracy in restraint of trade. In addition, the plaintiff complains that its exclusion from participation in the joint delivery service maintained by SKLD was but another incident illustrating the anti-competitive consortium operated by the defendants.

Through the pending motions, both sides claim that there are no material facts in dispute with regard to some issues and that partial summary judgment is appropriate. *The [*12] plaintiff moves for judgment in its favor on its allegations that the following three conspiratorial activities resulted in restraints of trade in violation of § 1 of the Sherman Act:* 1. the exclusion from the joint delivery service; 2. the excessive charges for *non-owner/member participation in Take-Off*; and 3. *the defendants' refusal to exchange starters.*

The defendants' motions request that I find the four year statute of limitations under the Clayton Act, 15 U.S.C. § 15b, bars certain aspects of, the plaintiff's Sherman Act § 1 claim. The defendants also contend that the allegations against Take-Off fail to state an anti-trust claim. Defendant Commonwealth moves for dismissal of the entire complaint on the basis that it only became a member of SKLD and Take-Off a month before the plaintiff sold its business and, therefore, it could not have shared in any conspiracy to drive the plaintiff out of the Denver title insurance market. Defendant Lawyers moves for a protective order requiring the plaintiff to return a document inadvertently produced in the course of discovery.

In considering the issues presented by the various motions, I will [*13] address first those associated with the plaintiff's Sherman Act § 1 claim, then the Lawyers' protective order question, and finally, the status of plaintiff's claims under § 2 of the Sherman Act. The summary judgment motions basically are directed to the § 1 claim of anti-competitive practices by the allegedly conspiring defendants. *In seriatim*, this memorandum will consider the following Sherman Act § 1 issues: statute of limitations questions; starters; Take-Off's activities; the SKLD delivery service; and the question presented by defendant Commonwealth.

I. Sherman Act § 1 Claim, 15 U.S.C. § 1.

A. Applicability of Clayton Act § 4b, 15 U.S.C. § 15b.

The defendants assert that the plaintiff's claims for relief are barred by a four year statute of limitations governing anti-trust claims. The motion characterizes the primary thrust of plaintiff Frontier's claim by concluding that the plaintiff believed terms for membership in SKLD were unreasonable. The defendants' motion argues that to the extent the plaintiff sought a limited membership in SKLD, that claim is barred because the determinative act occurred more than four years prior [*14] to the filing of the complaint. During the hearing on this matter, counsel extended the SKLD statute of limitations issue to raise the question of whether an anti-trust claim ever accrued with regard to full membership in SKLD because Frontier never applied to SKLD nor was ever rejected for regular membership.

With regard to Frontier's application for limited membership on a "forward moving" basis, the statute the defendants contend applies to bar this claim is 15 U.S.C. § 15b.¹⁷ [*15] Defendants assert that a request was made by

¹⁶ See Appendix to defendant's Motion for Partial Summary Judgment, item J at 53.

¹⁷ The statute provides in pertinent part, that:

Frontier for a limited participation in SKLD by a letter dated July 11, 1977, and that SKLD rejected this request by letter dated August 17, 1977.¹⁸ This suit was filed on September 11, 1981. The defendants rely upon [Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 \(1971\)](#), and its progeny for the proposition that "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." [Id. at 338.](#)

In opposition, the plaintiff advances three arguments: 1. that the refusal of services was effective in October of 1977 rather than in August; 2. that the plaintiff's damages were not ascertainable in August, and therefore the statute of limitations must be tolled; and 3. that, in any event, all of the defendants' actions are but one grand conspiracy, and thus, the motion should be denied.

Considering first the denial of plaintiff's request for limited participation in SKLD, [*16] I find that the denial of service on a moving forward basis without access to SKLD's historical plant was effective with the August 17 SKLD letter. I cannot find any support for the proposition that limited services were denied in October instead of August of 1977, nor do I feel that there is any rationale for tolling the statute of limitations.¹⁹ Thus, I find no merit to plaintiff's argument that damages were unduly speculative in August of 1977 because of plaintiff's fledgling status in the title insurance business. Plaintiff provided no legal support for its "one grand conspiracy" theory, and I find it requires no further consideration. Moreover, even where a plaintiff has properly plead the elements of a conspiracy, without subsequent evidence of overt acts or clear pleading and proof of fraudulent concealment, there is no basis for tolling the statute or finding a continuing conspiracy. [Charlotte Telecasters v. Jefferson-Pilot Corp., 546 F.2d 570 \(4th Cir. 1976\)](#). In this case, the plaintiff has isolated several overt acts as part of its Sherman Act claim, and I think that the view adopted by the Fifth Circuit makes clear that those overt acts which fall within [*17] the four year period are timely, while those beyond are barred by [§ 15\(b\). Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117 \(5th Cir. 1975\)](#).

There remains, however, a question of whether the statute of limitations should bar the plaintiff's broader claim of denial of access to SKLD. Neither the defendants' motion nor the plaintiff's complaint clearly separated these issues, however Mr. Hautzinger discussed the distinction at the hearing on this matter. In essence, plaintiff's SKLD full membership complaint centers on plaintiff's conclusion that the price for full membership would be too high. If the plaintiff did inquire following receipt of the August 17 letter about the cost of full participation in SKLD,²⁰ the record is clear that plaintiff, of its own volition, never pursued further a full membership in the title plant. [*18] The price tag for SKLD membership was described as something between \$ 1.25 million and \$ 1.75 million, which admittedly is a substantial sum of money. Nevertheless, the plaintiff has shown no indication that there was a refusal to deal, nor that the asking price for full SKLD membership was *per se* unreasonable. In addition, there is no actual showing of any overt action which injured the plaintiff in connection with its efforts to get access to the SKLD plant.

"Any action to enforce any cause of action under [the antitrust laws]...shall be forever barred unless commenced within four years after the cause of action accrued."

¹⁸ The text of the refusal letter states:

This acknowledges receipt of your letter dated July 11, 1977, wherein you requested the S-K-L-D, Inc. Board of Directors to consider providing title plant services to you.

The aforementioned directors met recently, and considered your request. They were very unreceptive to any type of arrangement for title plant services others than a full membership in S-K-L-D, Inc.

If you are interested in such a membership or if you have any question related to the action of the directors, please contact Robert Ludlow of Pioneer Title who is president of S-K-L-D.

¹⁹ Furthermore, as argued by the defendants, the plaintiff's "speculative nature of damages" argument undermines its position on the merits.

²⁰ Frontier claims it did so in October.

Frontier's case differs from the other title companies it contends were previous victims in the defendants' alleged continuing conspiracy. For example, the minutes of the SKLD Board meetings of September 25, 1965 and September 28, 1966,²¹ might well have supported refusal to deal claims²² [*20] under the Sherman Act by First American Title Insurance Company of California and St. Paul Title Insurance Company fifteen or more years ago. However, by the spring of 1967, SKLD members were considering changing [*19] their exclusionary policy, and they set about attempting to value SKLD as an asset for the purposes of setting a sales price.²³ At that time, at least one SKLD member's representative estimated a shareholder's interest in the corporation should be valued at \$ 1,175,000.00. Subsequently, shares sold in 1972 to Fidelity and Pioneer for \$ 1.5 million or \$ 750,000.00 apiece. The prices were high, but apparently both negotiable and (in the minds of the buyers) worthwhile. With the growth of the SKLD plant and the Denver metropolitan area, by 1977 a price in excess of \$ 1 million cannot be considered as unreasonable *per se*.

In evaluating the plaintiff's contention that the restraint in this case is unreasonable, I am mindful that numerous factors must be considered before a determination of reasonableness can be made.²⁴ And, it is well established that reasonableness is but one prong of the inquiry into whether a particular type of activity comes within the proscription of the Sherman Act's Section 1.

For activities to constitute a Section 1 violation, the following five elements must be present: (1) the activities must be in or affect interstate commerce or foreign commerce; (2) the activities must be performed by two or more persons; (3) the activities must be the result of concerted action; (4) the concerted action must constitute a restraint on trade or commerce; and (5) the restraint must be unreasonable.

II Kintner, *Federal Antitrust Law*, § 9.1 at 5 (1980).

In this case the plaintiff has alleged the requisite factors; however, I question seriously whether Frontier has shown or can prove that the million dollar plus cost of SKLD membership was unreasonable, [*21] given the value of as complete a title insurance plant as that assembled by SKLD during its nearly twenty year existence. The antitrust laws do not require that a newcomer to a market be given a valuable asset in order to compete. As the Supreme Court noted in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962), "[t]he

²¹ Note 7, *supra*.

²² Concerted refusal to deal or group boycotts have been determined to be inherently anti-competitive, and therefore the Supreme Court considers them to be *per se* unreasonable. In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1957), Justice Black concluded:

[T]here 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. This principal of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable--an inquiry so often wholly fruitless when undertaken.

²³ Note 8, *supra*.

²⁴ As summarized by antitrust commentator Earl W. Kintner, the former Chairman and general counsel of the Federal Trade Commission:

These factors include the nature of the restraint; the degree of market power exerted by the defendant; and the effect of the restraint, probable or actual, upon competitive market conditions. Often the process of weighing and evaluating these factors involves a complex procedure which consumes a substantial amount of judicial resources.

antitrust laws, ...were enacted for 'the protection of *competition*, not *competitors*.'" (emphasis in original). Further, I do not find evidence in the voluminous material before me²⁵ which proves that the plaintiff suffered an antitrust injury in connection with the proposed sale of an SKLD membership. The plaintiff never attempted to negotiate for itself a deal for an SKLD ownership interest. Frontier never applied for membership at the asking price, nor ever offered to buy a membership at a lesser price. The plaintiff claims, but has not shown, any direct actual injury nor resulting restraint on trade from the fact that it thought SKLD membership would be too expensive. In fact, in 1977, when it first [*22] inquired about limited SKLD participation, Frontier's business scheme was directed exclusively to developers of new residential real estate. Thus, Frontier really was only interested in access to the SKLD title plant on a "moving forward" basis, and access to the SKLD historical plant was not part of its original business plan.

The denial of access [*23] to the plant on a "from this day forward" basis, if it is an antitrust injury,²⁶ [*24] is not part of this case because of the untimeliness of the complaint. Yet, this claim illustrates the point that when the plaintiff wanted to get into the booming real estate title insurance business in Denver in 1977, it sought only to benefit from SKLD, but it was unwilling to pay part of the cost for the plant as a "capital asset." From the beginning, it was obvious that Frontier was only interested in limited SKLD participation, as this letter of inquiry from Commonwealth on Frontier's behalf in April of 1977 illustrates:

We have an Agent who would like to lease the right to use the SKLD Plant. I understand that currently there are two leases in effect. I therefore, would like to know what the terms of your lease arrangements are and I would assume that if leasing rights are now available to a title agency they would also be available to others.

The Agent would not consider, or be in a position to buy an interest in the Plant, therefore, you may limit your proposal to a lease only.

(emphasis added)²⁷

Thus, it is obvious, that the plaintiff either could not afford or did not want to join SKLD in 1977. Accordingly, I find that with regard to plaintiff's claims of denial of SKLD membership, they are either barred as untimely or they never accrued.

B. Starter Exchange

The plaintiff has moved for summary judgment on the limited basis that the exchange of starters among SKLD members and no others in the title insurance business in the Denver metropolitan area was violative of the Sherman Act [§ 1](#). In 1967, participation in the starter exchange program was valued at \$ 50,000.00.²⁸ [*25] The plaintiff points to the defendants' reaffirmation in 1975 of the rule that starters could be exchanged among members only²⁹ as clear evidence of the anti-competitive practices engaged in by the defendants.

I cannot concur with the plaintiff that there are no material facts in dispute on this issue. On the contrary, it is reasonable to assume that the defendants can show and argue that protection of the starter exchange is protection of its *research facility or title plant in which Frontier did not choose to participate*. A jury reasonably could find this to be a legitimate business decision, and thus, would deny recovery to the plaintiff. Hence, with regard to the starter exchange, a question of fact exists, and the plaintiff's motion must be denied.

C. Take-Off, Inc.

²⁵ Plaintiff's Appendix to its Motion for Partial Summary Judgment is 5 volumes and nearly 4 inches thick.

²⁶ Although the point is or will soon be moot for the purposes of this case, I question whether plaintiff could have proved that the denial of limited SKID membership was for other than legitimate reasons.

²⁷ Defendants' Motion for Partial Summary Judgment Appendix item E at 44, Letter of Paul J. Kennedy, Commonwealth Land Title Insurance Co. dated April 6, 1977.

²⁸ Appendix V, item 49 at 2, plaintiff's Motion for Partial Summary Judgment; Note 12, *supra*.

²⁹ Appendix V, item 53, plaintiff's Motion for Partial Summary Judgment.

Parties on both sides have moved for partial summary judgment in their favor on the issues presented by the existence and activities of Take-Off, Inc. The motions and the briefs which accompany them illustrate that significant factual issues are presented with regard to the pricing differential for Take-Off participation between members and non-members. The burden of establishing the absence of any genuine issues of material fact is on the moving [*26] party, [Adickes v. S. H. Kress and Company, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 \(1970\)](#), and, in this instance, neither party has met its burden.

D. The SKLD Delivery Service

The third part of the plaintiff's motion for partial summary judgment concerns the exclusion of non-SKLD members from participation in the courier service after various non-member companies had been invited to join and did participate for several years. A careful reading of the documents presented in the Plaintiff's Appendix at Volumes I and II indicates that the defendants may be able to show that legitimate business considerations prompted SKLD to cut-back to non-members.³⁰ Because inferences drawn from the underlying facts "must be viewed in the light most favorable to the party opposing the motion," [United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 \(1962\)](#), the motion must be denied.

E. Motion [*27] of Commonwealth Land Title Insurance Company for Summary Judgment

Through its motion Commonwealth joins in the motion of the other defendants for partial summary judgment based on the application of the statute of limitations while concurrently moving for dismissal of all claims presented in the Complaint against it individually. The thrust of Commonwealth's argument is that because it did not become affiliated with SKLD until the spring of 1981, it should not be held responsible for the alleged anti-competitive acts of the co-conspirator SKLD members which occurred prior to the time that it joined the organization. Commonwealth reasons that because Frontier was completely out of the title insurance business by October of 1981, Commonwealth is not, and was not, responsible for any of the activities of which Frontier complains.

[Fed. R. Civ. P. 56\(c\)](#) provides that a summary Judgment motion should be granted only if, *as a matter of law*, the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact..." The record before me reveals that Commonwealth acquired the [*28] assets of Fidelity National Title Insurance Company pursuant to an agreement executed on March 27, 1981.³¹ Through the purchase of Fidelity, Commonwealth acquired an SKLD membership and became a Take-Off participant.

At the Take-Off Annual Corporate Stockholders Meeting on May 5, 1981, Commonwealth was represented by Benjamin Kelly who was elected Chairman of the organization for the 1981-82 term.³² The minutes indicate Kelly apparently also voted to raise non-member companies' monthly charges by \$ 250.00 effective June 1, 1981. This price increase came at a time when Frontier was still in business, and the plaintiff claims that this and previous price increases to non-SKLD members were part of the defendants' anti-competitive scheme. Thus on the facts alone, this motion must be denied with regard to Commonwealth's participation in Take-Off. Commonwealth also agreed at P11(f), pages 12-13, of the Fidelity/Commonwealth sales [*29] agreement to be bound by all SKLD rules and regulations.³³ Therefore, if the members-only starter exchange is found to be an anti-competitive practice, Commonwealth may also be liable for damages accruing from its participation therein.

With regard to the delivery service exclusion claim raised by the plaintiff, the decision to eliminate delivery service to non-SKLD members was made December 6, 1979, and the courier service to non-members was cut off January 30, 1980.³⁴ [*30] Frontier and Continental Title Company were among the non-members who had participated in the

³⁰ Appendix II, item 18, plaintiff's Motion for Partial Summary Judgment.

³¹ Appendix III, item 31, plaintiff's Motion for Partial Summary Judgment.

³² Appendix IV, item 39, plaintiff's Motion for Partial Summary Judgment.

³³ See note 30, *supra*.

service beginning in 1978, but who were shut out nearly two years later. By the end of August, 1980, the delivery service included all SKLD members and no others,³⁵ however, by February of 1981, one of the SKLD members withdrew of its own accord.³⁶

While generally the law is clear that one who joins a conspiracy late in the game is equally liable with the other conspirators who were involved at an earlier date, in this instance one must assume that Commonwealth suffered equally with the other title companies who could not participate in the delivery service after January 30, 1980. As a general rule, a plaintiff's anti-trust cause of action accrues on the date that the defendant commits an act which injures the plaintiff's business. *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 337 (10th Cir. 1982); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971). Because the plaintiff's cause of action with regard to exclusion from the delivery service accrued more than a year before Commonwealth became a participant in the alleged conspiracy, and because Commonwealth itself could have been a victim of the same purported [*31] anti-competitive practice, I find that this particular issue should be resolved in the defendant's favor.

Finally, it goes without saying, if 15 U.S.C. § 15(b) operates as a bar to the Sherman Act Section 1 claim against the other defendants with regard to SKLD membership, so too does it bar the plaintiff's claim on this issue against the defendant Commonwealth. It should be noted that it was in fact Commonwealth which was acting as the agent for Frontier during 1977 when Frontier was attempting to gain access to the SKLD plant on a limited basis. Furthermore, from a factual perspective it is difficult to understand why Commonwealth should be liable as a co-conspirator with the defendants when it was acting as the plaintiff's agent at the time in question.

II. Motion for Protective Order

The defendant Lawyers Title Insurance, Corporation has moved for a protective order. Through the motion Lawyers seeks the return of all copies of a document which was produced to the plaintiff in the normal course of discovery in this case. The defendant alleges that the document was and remains privileged and that its production was the result of inadvertence. "People [*32] -- even lawyers -- make mistakes. But a single lapse in document screening will not, under the circumstances of this case, support the conclusion that the privilege has been waived." Memorandum of Lawyers Title at 1.

In response, the plaintiff skirts the waiver issue while asserting that Lawyers cannot claim the privilege. The document in question is an opinion letter³⁷ [*33] written in 1975 by the law firm of Holme, Roberts and Owen to its client, SKLD. Lawyers is represented by Holland and Hart. Because Lawyers was not the client which received the communication, and because SKLD is not a party to this action, the plaintiff contends that Lawyers lacks standing to invoke the privilege. One must read between the lines to reach the plaintiff's response to the waiver issue: only the holder of the privilege can claim or waive it. Therefore, in the plaintiff's view, whether Lawyers intended to waive the privilege is irrelevant if it is not the party which could invoke the privilege in the first place.³⁸

The Supreme Court "has assumed that the (attorney-client) privilege applies when the client is a corporation," which is a creature of law rather than a human individual. *Upjohn Co. v. United States*, 449 U.S. 383, 389-390, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). In drawing this assumption, the Court concedes that complications are inherent in the application of the privilege to an artificial and oftentimes amorphous entity. Moreover, in *Upjohn*, the Court made clear that no "abstractly formulated and unvarying 'test' will necessarily enable courts to decide questions such as

³⁴ Appendix II, item 18, plaintiff's Motion for Partial Summary Judgment.

³⁵ Appendix II, item 24, plaintiff's Motion for Partial Summary Judgment.

³⁶ Appendix II, item 27, plaintiff's Motion for Partial Summary Judgment.

³⁷ The plaintiff indicates that the contents of the letter concern a key issue in this case: the illegality of the denial of SKLD services to non-member competitors.

³⁸ As Lawyers' counsel points out in its .reply, the plaintiff apparently concedes that the privilege was not waived by the mere inadvertent release of the document.

this with mathematical precision." *Id. at 393*. Indeed, such a rigid formula would contravene the intent of Congress in fashioning the privilege rule, *Fed. R. Evid. 501*, that "recognition of a privilege based on a confidential relationship ... should be determined on a case-by-case basis." S. Rep. No. 93-1277.

Neither I nor counsel [*34] have found a reported case which is precisely on point with the privilege question before me. To resolve this issue, I begin by re-examining the nature of SKLD and its relationship to the defendant Lawyers. SKLD is a Colorado corporation which maintains and indexes land title information for the use of six member title insurance companies. Lawyers is a member or shareholder of SKLD. Pursuant to the SKLD articles and by-laws, each member selects one representative to the SKID board of directors. Apparently each member/shareholder has an ownership share equal to the shares of all other members, and each has an equal proportional right to participate in the management of the corporation. See Articles of Incorporation of S-K-L-D, Inc., Fourth section at 2-3, Appendix 1, item 1, Plaintiff's Motion for Partial Summary Judgment; see also defendant Lawyers' memoranda in support of its Motion for Protective Order.

The letter which is the subject of the instant controversy was written and produced for SKID at the request of its board of directors. Each board member received a copy of the letter in July of 1975. Although SKLD would have been billed directly for the cost of producing the letter, [*35] the individual member/shareholders would have been indirectly but proportionately liable for their share of the legal fee. McLaughlin Affidavit at 4. The uncontested affidavit³⁹ of David M. McLaughlin, the current president of SKLD and the Lawyers' representative to the board in 1975, indicates that "by virtue of its (Lawyers') shareholding in SKLD, communications between Lawyers Title and attorneys for S-K-L-D were confidential." McLaughlin Affidavit at P6. McLaughlin sent the opinion letter to the defendant's assistant corporate counsel at Lawyers' home office in August of 1975. McLaughlin Affidavit at P7. The recipient of the opinion letter in the home office affirms that:

While the law firm was formally retained by S-K-L-D, it is my perception, understanding and belief that the law firm was acting both in the interest of the corporation and the member companies as shareholders. Accordingly, I regarded and treated the communications between the law firm and representatives of Lawyers Title Insurance Corporation as confidential and privileged.

Rumsey Affidavit at 5.

[*36] The opinion letter languished in Lawyers' files until this controversy arose. Rumsey Affidavit at P6. Prior to filing, it had been shown only to Lawyers' senior management and attorneys. Mayes Affidavit at P4. Last year it was turned over to Lawyers' outside counsel in connection with the plaintiff's request for production. According to Lawyers' Regional Counsel, G. H. Mayes, Jr., the documents were tendered to Holland and Hart "with the express understanding that the documents would be screened and that documents subject to the attorney client privilege would not be produced to the plaintiff." Mayes Affidavit at P5.

Despite screening by two lawyers and a paralegal which resulted in the document being listed on a "privileged log," somehow the opinion letter was among the documents produced by Lawyers on October 11, 1982. See generally, Hartley Affidavit. Plaintiff's counsel alerted Mr. Hartley to the fact that the opinion letter had been received but refused to return the document. As counsel for the defendant Lawyers, Mr. Hartley swears that he did not intend to produce the opinion letter nor to waive the privilege claim associated with it on behalf of his client.⁴⁰

³⁹ The plaintiff has filed no conflicting affidavits in support of its opposition to this motion; thus, all of the defendant's affidavits are uncontested.

⁴⁰ Mr. Hartley's Affidavit states, in part:

9. Lawyers Title has produced over 4,000 documents in this case. The other defendants and third-party witnesses have produced thousands more. I do not know how our screening process failed to identify and segregate the document in question. I do know that had I realized the document was included in those produced to plaintiff, I would have certainly withheld it. In fact, another copy of the same letter was located and withheld.

10. I have not been authorized by my client to waive the attorney-client privilege in this case with respect to the subject document or its subject matter. On no occasion have I intended to do so, and it was not my intention to produce this letter for plaintiff to inspect and copy.

[*37] It is well settled that the attorney-client privilege, which preserves in confidence the communications between those two parties, belongs to the client. *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S. Ct. 125, 32 L. Ed. 488 (1888). "Only the client can waive this privilege and, to support a finding of waiver, there must be evidence that he intended to waive it." *Connecticut Mutual Life Insurance Co. v. Shields*, 18 F.R.D. 448, 451 (S.D.N.Y. 1955). The privilege applies only if the holder is a client communicating with a lawyer concerning a confidential matter relative to either "(i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding" but not for the purpose of committing a crime or tort. *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 357, 358 (D. Mass. 1950). Further the privilege must have been claimed and not waived by the client. *Id. at 359*.

The question is simply whether Lawyers, as a shareholder and member of the board of directors of SKLD, can assert the privilege on its own behalf and as an SKLD representative. I cannot find any evidence of intentional waiver of the privilege [*38] as required by *Connecticut Mutual, supra*.⁴¹ I clearly find that the privilege was claimed by representatives of each member/owner title company and SKLD, who, in this case, appear to be the same individual. See McLaughlin Affidavit at P2 and P9. Furthermore, all other aspects of the *United Shoe* test are met so that the only real issue to be resolved is the standing to assert the privilege problem.

[*39] According to the McLaughlin affidavit, it appears that when received, the SKLD opinion letter was delivered to each board member of SKLD and at the time, the president of the board was Lawyers' own representative, Mr. McLaughlin. McLaughlin Affidavit at P3 and P5. McLaughlin, like every other board member, wore two hats: SKLD director and representative of one of the title company member/shareholders of SKLD. SKLD was (and is) a very closely held corporation whose sole reason for being was for the purpose of providing title services to the member companies. As is obvious from the way the plaintiff has structured this case, by suing the individual members for their participation in SKLD but not joining SKLD itself, the plaintiff itself sees SKLD as little more than a collective alter-ego for the alleged anti-competitive conspiracy of the individual title company defendants. Thus, in my view, the plaintiff's attempt to differentiate the status of the SKLD directors from the organizations they represent in order to capitalize on a document production error is fatuous and twists Frontier's own theory of the case mercilessly. Moreover, the objective evidence supports the conclusion that [*40] a legal opinion to SKLD was indirectly intended for each individual title company member/shareholder of the SKLD corporate entity.

Accordingly, the motion for a protective order must be granted as it is obvious that the individual title companies themselves through their representatives to the SKLD board form the "control group" of SKLD. Moreover, it is well established that "control" of a corporation is not presumptively found in an individual person. *Dunn Chemical Co. v. Sybron Corp.*, 1975-2 Trade Cas. (CCH) 67,458, 67,460 (S.D.N.Y. 1975). The situation in *Dunn* is somewhat similar in that communications from one corporate figure to the corporation's in-house counsel were found to be covered by the attorney-client privilege. Finally, to the extent that waiver remains an issue, I find absolutely no indication of intentional waiver of the privilege in this matter; thus, the confession of defendant's counsel is heeded, and I find absolution is appropriate in this case.⁴²

[*41] III. Plaintiff's Sherman Act § 2 Claims

The plaintiff's second claim for relief arises under the monopolization section of the Sherman Act, *15 U.S.C. § 2*. Through a motion to amend the complaint, the plaintiff proposed to drop the claims under *§ 2* noting in its motion that "[d]iscovery has also enabled Plaintiff to determine that its claims under *§ 2* of the Sherman Act should be deleted and therefore, the *§ 2* claims have been deleted." The defendants objected to some aspects of the plaintiff's

⁴¹

Indeed, as indicated previously, plaintiff apparently does not assert evidence of intentional waiver through the mere release of the document. *C. F. Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Instead, plaintiff argues that McLaughlin's act of sending the document to the Lawyers' home office demonstrates intent to waive the privilege by breaching confidentiality through the exposure of this document to persons not on the SKLD board. This argument is not persuasive. See *Dunn Chemical Co. v. Sybron Corp.*, 1975 U.S. Dist. LEXIS 15801, 1975-2 Trade Cas. (CCH) at P60,561 (S.D.N.Y. 1975).

⁴² Mr. Hartley's comment "People -- even lawyers -- make mistakes," I can only reply "To err is human, to forgive divine."

proposed amended complaint; however, their memorandum in opposition contained a "Stipulation in Dismissal of Plaintiff's Second Claim for Relief."

At the hearing on these motions, plaintiff withdrew the Motion to Amend. However, in my view, the decision not to proceed with an amended complaint should not have altered the decision to delete the monopolization claim to which the defendants had stipulated. My review of the extensive memoranda submitted and the many pages of deposition testimony and documents in connection with the motions reviewed here indicates that plaintiff's determination to delete the monopolization claim was appropriate in this case. [*42] Accordingly, it is

ORDERED:

1. The defendants' motion for partial summary judgment on the statute of limitations question is granted;
2. The plaintiff's motion for partial summary judgment is denied;
3. The defendants' motion for partial summary judgment on Take-Off is denied;
4. The defendant Commonwealth's motion for summary judgment is granted as to the statute of limitations and the delivery service issues, but denied as to its participation in Take-Off and the starter exchange;
5. The defendant Lawyers' motion for a protective order is granted;
6. The complaint is amended to delete the second claim for relief arising under [§ 2](#) of the Sherman Act.

DATED at Denver, Colorado, this 3rd day of June, 1983.

BY THE COURT:

JOHN P. MOORE, Judge

United States District Court

End of Document

Furlong v. Long Island College Hospital

United States Court of Appeals for the Second Circuit

December 15, 1982, Argued ; June 14, 1983, Decided

Docket No. 82-7565, No. 614

Reporter

710 F.2d 922 *; 1983 U.S. App. LEXIS 26747 **; 1983-1 Trade Cas. (CCH) P65,452

MONICA FURLONG, M.D., Plaintiff-Appellant, v. THE LONG ISLAND COLLEGE HOSPITAL, ET AL., Defendants-Appellees

Prior History: **[**1]** Appeal from a judgment of the District Court for the Eastern District of New York (Charles P. Sifton, Judge), dismissing with leave to amend an antitrust complaint brought by a physician against a physician, a hospital, and an organization of anesthesiologists.

Disposition: Affirmed.

Core Terms

interstate commerce, antitrust, commerce, price-fixing, defendants', staff, out-of-state, privileges, Anesthesiology, unlawful conduct, district court, requisite, infected

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1 Antitrust & Trade Law, Sherman Act

The interstate commerce component of an antitrust cause of action may be established in two ways. First, plaintiff may allege and prove that defendant's conduct is "within" the stream of interstate commerce. Alternatively, plaintiff may allege and prove that defendant's conduct, although entirely local or confined to one state, nonetheless "affects" interstate commerce.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Real Property Law > Brokers > Right to Commissions

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

Antitrust & Trade Law > Sherman Act > General Overview

HN2 Antitrust Actions, Facilities

The Ninth Circuit has extracted from McLain a general rule that the requisite impact on interstate commerce may be established by any of a defendant's business activities independent of the violations. However, the First and Tenth Circuits have read McLain more narrowly to mean that an antitrust plaintiff must show an effect upon interstate commerce resulting from defendant's unlawful conduct, either an effect that has already occurred or is likely to occur.

Antitrust & Trade Law > Sherman Act > General Overview

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

The court agrees with the First and Tenth Circuits that it would not be prudent to extract from McLain a generalized rule that antitrust jurisdiction can be established simply by showing that some aspects of a defendant's business have a relationship to interstate commerce. Rather the inquiry must be whether the defendant's activity that has allegedly been "infected" by unlawful conduct can be shown as a matter of practical economics to have a not insubstantial effect on the interstate commerce involved.

Antitrust & Trade Law > Sherman Act > General Overview

HN4 [] **Antitrust & Trade Law, Sherman Act**

A plaintiff must allege sufficient facts concerning the alleged violation and its likely effect on interstate commerce to support an inference that the defendants' activities infected by illegality either have had or can reasonably be expected to have a not insubstantial effect on commerce.

Counsel: Harold M. Weiner, New York, New York (Sandra M. Goodman, New York, New York, on the brief), for Plaintiff-Appellant.

Robert Lang, New York, New York (Edward N. Meyer, David W. Shapiro, Cole & Deitz, New York, New York, on the brief), for Defendant-Appellee Long Island College Hospital.

Diana L. Nicholson, New York, New York (Corner, Finn, Nicholson & Charles, New York, New York, on the brief), for Defendants-Appellees Owre and Long Island Anesthesiology Associates, P.C.

Judges: Feinberg, Chief Judge, Timbers and Newman, Circuit Judges.

Opinion by: NEWMAN

Opinion

[*923] NEWMAN, Circuit Judge:

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Charles P. Sifton, Judge) entered upon an order dismissing, with leave to amend, a Sherman Act complaint for failure to allege adequately the required connection to interstate commerce. Though [*924] we do not agree with all of the District Court's analysis of the relevant standards for assessing the sufficiency of an allegation of interstate commerce effects, we agree that the complaint, in its present form, was properly dismissed.

I.

The following facts were alleged in the complaint and subsequently filed affidavits. Plaintiff-appellant Monica Furlong is a licensed physician and surgeon and a National Board certified anesthesiologist. Dr. Furlong began

work at the Long Island College Hospital (LICH) in 1968. In 1974, Dr. Stewart Owre, chief of the Department of Anesthesiology at LICH, appointed Dr. Furlong to the position of Assistant Director of Anesthesiology. By 1977, appellant had become a fully privileged staff member of LICH with senior privileges in anesthesiology.

In May 1978, Dr. Owre established a professional corporation, Long Island Anesthesiology Associates (LIAA). Although the other anesthesiologists associated with LICH joined LIAA, Dr. Furlong was not asked to become a member. On May 10, 1978, LIAA executed a contract with LICH, which granted LIAA the exclusive right to provide anesthesiological services to LICH, and which obliged LIAA to **[**3]** provide such services on a 24-hour, seven-days-per-week basis.

Notwithstanding the exclusivity provision of its contract with LIAA, LICH did not dismiss Dr. Furlong from her staff position. Dr. Owre, however, deprived Dr. Furlong of certain economic benefits that she had consistently received prior to the formation of LIAA. In addition, Dr. Owre removed Dr. Furlong from her position as Assistant Director of Anesthesiology and sought to prevent her assignment to surgical cases.

On April 15, 1979, Dr. Furlong requested and received a leave of absence from LICH. Some time during her leave, Dr. Furlong found alternative employment as an anesthesiologist. On August 14, 1981, Dr. Furlong instituted this action, alleging, among other things, that LICH, LIAA, and Dr. Owre acted together to restrain trade and fix prices in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).

To establish that her claim was cognizable under federal antitrust law, Dr. Furlong alleged several connections between the parties' business activities and interstate commerce. The connections specified were Dr. Furlong's receipt of third-party payments from out-of-state, LIAA's **[**4]** receipt of such payments, LIAA's practice of purchasing goods and services in interstate commerce, and LICH's receipt of federal subsidies. It was not alleged that any of these connections to interstate commerce were or would be affected by the claimed antitrust violation.

Defendants filed motions to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to allege adequately the effect on interstate commerce required to permit application of the Sherman Act. In the supporting affidavits, defendants asserted that neither the amount of out-of-state payments received nor the amount of goods and services purchased had been or would be altered by their alleged conduct.

On June 16, 1982, the District Court filed a memorandum opinion and order dismissing the claim.¹ **[**6]** In its opinion, the Court held that "as a matter of logic,' the extent of defendants' activities in interstate commerce, in and of itself, 'is irrelevant in a denial of hospital staff privileges . . . [since] their denial of staff privileges to [plaintiff] has no possible effect on their own activities in interstate commerce; the only potential effect relates to plaintiff['s] practice of medicine, **[**5]**" quoting Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center, 536 F. Supp. 1065 (E.D. Pa. 1982). Focusing solely on plaintiff's professional **[*925]** activities, Judge Sifton concluded that plaintiff's receipt of third-party payments from out of state did not provide a cognizable relation to interstate commerce within the scope of the Sherman Act.² He therefore dismissed the complaint "without prejudice to the filing of an amended complaint that would state a claim within the Court's jurisdiction." Declining the District Court's invitation to amend, plaintiff appealed from the judgment entered upon the order of dismissal.

II.

¹ The District Court assessed only the sufficiency of the complaint and did not render an adverse summary judgment, even though the submission of affidavits might have permitted the defendants' motion to dismiss to be treated as a motion for summary judgment. See Fed. R. Civ. P. 12(c). This testing of the complaint alone, a course that inured to the plaintiff's advantage, since the dismissal was with leave to amend, was proper.

² The District Court also concluded that, if the complaint was endeavoring to allege jurisdiction based on the interstate movement of plaintiff's patients, this basis was legally insufficient. On appeal, plaintiff does not claim that her complaint should be understood as making such an allegation, and we therefore do not consider it.

HN1[] The interstate commerce component of an antitrust cause of action may be established in two ways. First, plaintiff may allege and prove that defendant's conduct is "within" the stream of interstate commerce. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975). Alternatively, plaintiff may allege and prove that defendant's conduct, although entirely local or confined to one state, nonetheless "affects" interstate commerce. *United States v. Employing Plasterers Association*, 347 U.S. 186, 189, 98 L. Ed. 618, 74 S. Ct. 452 (1954). Both sides in this case agree that the complaint seeks to plead antitrust [**7] jurisdiction under the "affecting commerce" approach. What divides the parties on the substantive aspect of the commerce issue is a dispute concerning the scope of business activities relevant in determining the requisite relationship to interstate commerce. This dispute concerns two issues: (1) whether, in any antitrust case, a court may examine all of the business activities of a defendant or only the defendant's activities affected by the conduct alleged to be unlawful; (2) whether, in a case like Dr. Furlong's, involving a doctor's alleged loss of hospital staff privileges, a court may examine the relevant activities of either party or only those of the plaintiff.

The first dispute requires consideration of the Supreme Court's decision in *McLain v. Real Estate Board*, 444 U.S. 232, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980), which sustained the jurisdictional allegations of a complaint by real estate buyers and sellers accusing New Orleans real estate brokers of conspiring to fix commission rates. The Court ruled that the plaintiffs need demonstrate a substantial effect on interstate commerce resulting only from defendants' "brokerage activity," not from the "alleged [**8] conspiracy to fix commission rates." *Id. at 242*. **HN2**[] The Ninth Circuit has extracted from *McLain* a general rule that the requisite impact on interstate commerce may be established by any of a defendant's business activities "independent of the violations." *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.), cert. denied, 449 U.S. 869, 66 L. Ed. 2d 88, 101 S. Ct. 205 (1980).³ However, the First and Tenth Circuits have read *McLain* more narrowly to mean that an antitrust plaintiff must show an effect upon interstate commerce resulting from defendant's unlawful conduct, either an effect that has already occurred or is likely to occur. *Cordova & Simonpietri Insurance Agency v. Chase Manhattan Bank*, 649 F.2d 36, 45 (1st Cir. 1981); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 722 (10th Cir. 1981) (en banc). At first glance, this narrower approach seems inconsistent with the language in *McLain* that explicitly rejected a requirement that the plaintiffs [**9] must show an effect on commerce caused by the alleged price-fixing or other activity alleged to be unlawful. *444 U.S. at 242-43*. However, as Judge Breyer's opinion for the First Circuit in *Cordova* indicates, the narrower view [**9] does not require an explicit showing of a causal link between the unlawful conduct and interstate commerce; instead, it requires only sufficient facts to support an inference that the unlawful conduct has affected or is likely to affect commerce, and in drawing this inference a court will focus upon the link between the defendant's activities "infected" by illegality, *649 F.2d at 45* (quoting *McLain, supra*, *444 U.S. at 246*), and interstate commerce.

[**10] **HN3**[]

We agree with the First and Tenth Circuits that it would not be prudent to extract from *McLain* a generalized rule that antitrust jurisdiction can be established simply by showing that some aspects of a defendant's business have a relationship to interstate commerce. Rather the inquiry must be whether the defendant's activity that has allegedly been "infected" by unlawful conduct can be shown "as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *McLain, supra*, *444 U.S. at 246*, quoting *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 745, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976). The requisite showing will vary with the type of unlawful conduct alleged. With a price-fixing allegation, as in *McLain*, the link between the "infected" activities and an ultimate effect on commerce was easily posited, since price-fixing is generally recognized as tending to restrict output, and the complaint adequately alleged interstate activities -- real estate financing and title insurance -- that [**11] would be adversely affected if the local brokerage activities of the defendants were diminished. In prior cases, the Court has spelled out in more detail the causal chain by which the alleged illegality could be expected to affect the relevant lines of commerce. *Burke v. Ford*, 389 U.S. 320, 19 L. Ed. 2d 554, 88 S. Ct.

³ Though *Western Waste* announced a broad rule focusing on defendant's activities "independent of the violation," *616 F.2d at 1097*, Judge Kennedy's opinion was careful to detail numerous respects in which the alleged illegality could be expected to affect interstate commerce. *Id. at 1097-99*.

[443 \(1967\); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235-44, 92 L. Ed. 1328, 68 S. Ct. 996 \(1948\)](#). We therefore conclude that [HN4](#) [↑] a plaintiff must allege sufficient facts concerning the alleged violation and its likely effect on interstate commerce to support an inference that the defendants' activities infected by illegality either have had or can reasonably be expected to have a not insubstantial effect on commerce.

The second substantive issue is whether in a case like the pending one the requisite relationship with commerce may be based on the activities of both plaintiff and defendants, or only, as the District Court ruled, on those of the plaintiff. On this issue, we think the District Court too readily [**12] put aside any consideration of the defendants' activities.⁴ Judge Sifton adopted the view, expressed in *Cardio-Medical Associates, supra*, that in a case involving a hospital's denial of staff privileges, the alleged violation can never affect the hospital's receipt of goods and services. However, this view ignores the rationale behind the Sherman Act's condemnation of such anti-competitive schemes as price-fixing and group boycotting. Such schemes are prohibited because they permit those who perpetrate them to constrict supply, raise prices, and lower output. If output decreases, a defendant's demand for the goods and services it uses will also decrease. Thus, as a matter of substantive [antitrust law](#), there is no defect in a complaint that alleges that a denial of staff privileges, undertaken in furtherance of a price-fixing or group boycotting scheme, may ultimately affect certain of the activities that connect a hospital to interstate commerce.

[**13] With these substantive principles in mind, we now consider whether the complaint adequately alleged the requisite jurisdictional element of an antitrust claim. We are mindful of McLain's caution that the plaintiffs there were not required to make a "particularized showing" of an effect on interstate commerce in order to [[*927](#)] survive a motion to dismiss, but we also must assume that the Court was willing to accept a somewhat general allegation because the causal connection to identified lines of commerce from activities subject to restriction by reason of price-fixing was so readily inferable. That is not the situation with Dr. Furlong's complaint. Though her complaint mentions "price-fixing" in a caption to her antitrust cause of action, she has not alleged the classic agreement between competitors that concerned the Court in *McLain*. There is no claim that competing hospitals or associations of anesthesiologists have conspired to fix the prices for their services. In fact, there is no allegation of price-fixing in any of the operative language of the complaint. Though we do not doubt that a price-fixing conspiracy or a group boycotting scheme can be shown "as a matter [**14] of practical economics" to have an adverse effect on the perpetrator's interstate activities, this complaint fails to set forth any facts from which it is inferable that the defendants' activities, infected with the particular illegality alleged, are likely to have a substantial effect on commerce. That omission is not surprising, since it is not easy to imagine how the exclusion of Dr. Furlong from LIAA and the various harassments alleged to have prompted her withdrawal from the LICH medical staff might be shown to have a predictable tendency to restrict the defendants' purchase of supplies from out of state. Though we do not agree with Judge Sifton that defendants' activities are irrelevant as a matter of logic, we do agree that the complaint in its present form fails to set forth facts from which the jurisdictional element, based on defendants' activities, is inferable.

Whether the jurisdictional element was adequately pleaded with respect to plaintiff's own activities is a closer question. Plaintiff alleged that as a result of defendants' conduct she lost \$120,000 of income and that she derives a "substantial portion" of her income from third-party payments by out-of-state [**15] insurers.⁵ In *Rex Hospital* the Supreme Court included an antitrust plaintiff's loss of revenue from out-of-state insurers among a "combination of factors" that sufficed as an adequate pleading of a substantial effect on commerce where the revenue loss, plus diminished out-of-state purchases, totaled "thousands and perhaps hundreds of thousands of dollars." [425 U.S. at 744](#). However, out-of-state insurance payments alone have been held inadequate to establish the jurisdictional

⁴ It is possible that Judge Sifton was rejecting consideration of defendants' activities not as a matter of substantive law, but only as a matter of procedure for lack of an adequate pleading; if the latter is the case, we are in agreement with him, as our subsequent discussion will reveal.

⁵ In her brief Dr. Furlong alleges that she is prepared to prove that defendants' conduct affected interstate commerce by diminishing her purchase of out-of-state equipment and supplies. However, the complaint contains no allegation to this effect, much less an adequate claim of an amount of diminished out-of-state purchases that could be evaluated by the District Court against the standard of a "not insubstantial" effect on commerce. Plaintiff's opportunity to amend her complaint will enable her to plead such an allegation if it can be made in good faith.

element when they constituted only 1/4 of one percent of a plaintiff's income. [*Hahn v. Oregon Physicians' Service, 508 F. Supp. 970, 977 \(D. Ore. 1981\)*](#), rev'd on other grounds, [*689 F.2d 840 \(9th Cir. 1982\)*](#).

[**16] We are mindful of the generous approach to pleading outlined in [*Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 \(1957\)*](#), which has been applied in the antitrust context. [*McLain, supra, 444 U.S. at 246*](#). However, we think that *Conley* permits a pleader to enjoy all favorable inferences from facts that have been pleaded, and does not permit conclusory statements to substitute for minimally sufficient factual allegations. Antitrust suits like Dr. Furlong's, which are at best at the very margin of the Sherman Act's coverage, ought not to be initiated without some specificity concerning the jurisdictional facts readily within the plaintiff's knowledge. Moreover, while *Conley* cautions against hastily denying a plaintiff access to a court, it does not impair a district court's authority to dismiss with leave to amend a complaint of borderline jurisdictional sufficiency so that more refined allegations may be formulated and then definitively assessed for legal adequacy. Finally, [*928] a more detailed pleading requirement in such cases obliges a plaintiff to give some thought to the theory of his case, thought that may [**17] well reveal to him that he does not, after all, have a case worth pursuing in a federal jurisdiction; it also obliges his attorney to reckon with the "good ground" standard of [*Fed. R. Civ. P. 11*](#) when he endeavors to plead factual allegations.

Though we are not prepared to say that a diminution of a doctor's out-of-state payments cannot satisfy the jurisdictional element of an antitrust claim, we think Dr. Furlong should be more specific as to the jurisdictional facts of her claim before a district court can be asked to rule whether her claim involves a not insubstantial effect on commerce.

For these reasons, the judgment dismissing the complaint without prejudice is affirmed.

End of Document



Sun Newspapers, Inc. v. Omaha World-Herald Co.

United States District Court for the District of Nebraska.

June 14, 1983

No. CV 82-L-627.

Reporter

1983 U.S. Dist. LEXIS 16258 *; 1983-2 Trade Cas. (CCH) P65,522

Sun Newspapers, Inc. v. Omaha World-Herald Co., Suburban Newspapers, Inc., and Rapid Printing and Mailing, Inc.

Core Terms

advertising, Suburban, newspapers, Circulation, print, acquisition, monopoly, mailer, daily newspaper, monopoly power, merits, papers, relevant market, zones, inserts, mail, weekly, anti trust law, competitor, percent, Air, directories, geographic, editions, compete, preliminary injunction, marriage, rates, national advertising, distributed

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1 [down arrow] **Injunctions, Preliminary & Temporary Injunctions**

In order to grant a preliminary injunction in this circuit, the standards which require consideration are: (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and,(4) the public interest.

Antitrust & Trade Law > Sherman Act > General Overview

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

Liability under the Sherman Act, [15 U.S.C.S. § 2](#), can be determined upon a showing of: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident. The plaintiff must demonstrate that it has been injured in its business or property by the acts of the defendant. A finding of monopoly power can best be described as a showing that the defendant has the power to control prices or exclude competition. The existence vel non of monopoly power depends on the market that is used as the measuring stick for the defendants' power. Both the geographic area and the products are concerns in a market definition. Once that market has been defined, the defendant's power over it must be determined.

Antitrust & Trade Law > Sherman Act > General Overview

[HN3](#)[] Antitrust & Trade Law, Sherman Act

Use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Sherman Act > General Overview

[HN4](#)[] Relevant Market, Geographic Market Definition

In determining whether there has been a use of monopoly power in some proscribed manner, the court must in the first step in this analysis, define the relevant product and geographic market. The bounds of the relevant product market are determined by looking to whether the commodities are reasonably interchangeable by consumers for the same purposes. Determining whether two products are the same frequently can rest in part on the cross-elasticity of demand, i.e., whether consumers would likely be prone to shift from one product to another based on relative prices. The analysis to determine the bounds of the local advertising market for the first claim suffices to define the advertising market relating to the second claim. The second phase of defining a relevant market is to define the geographic market.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

[HN5](#)[] Antitrust & Trade Law, Sherman Act

An attempt to monopolize as proscribed by the Sherman Act, [15 U.S.C.S. § 2](#), involves at a minimum the specific intent to monopolize, some conduct in furtherance of that intent, and a dangerous probability of success. A specific intent to destroy competition or build monopoly is essential to an attempted monopolization case.

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 > Market Definition

[**HN6**](#) [down] **Antitrust & Trade Law, Clayton Act**

The essentials of a case under the Clayton Act, [15 U.S.C.S. § 7](#), are a merger or corporate acquisition in any line of commerce where the effect may be to lessen competition substantially or tend to create a monopoly in a substantial portion of commerce.

Antitrust & Trade Law > Clayton Act > General Overview

[**HN7**](#) [down] **Antitrust & Trade Law, Clayton Act**

The requisite injury to sustain the burden under the facet of the test is not a static amount but is dependent upon the degree of the demonstrated probability of success on the merits and the state of the balance of the harms. Those equitable principles are fully applicable in antitrust cases. [15 U.S.C.S. §§ 4](#) and [26](#).

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Antitrust & Trade Law > Sherman Act > General Overview

[**HN8**](#) [down] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

Joint operating agreements between newspapers are specifically been exempted from the prohibitions of the antitrust laws. [15 U.S.C.S. § 1803](#).

Antitrust & Trade Law > Sherman Act > General Overview

[**HN9**](#) [down] **Antitrust & Trade Law, Sherman Act**

The freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.

Counsel: [*1] Richard Orlikoff and Thaddeus S. Machnik, of Frankel, McKay & Orlikoff, Chicago, Ill., E. Terry Sibbernse, of Selsh, Sibbernse & Roach, Omaha, Neb., For plaintiff.

James L. Koley, of McGill, Koley, Parsonage & Lamphier, Omaha, Neb., Henry P. Sailer, S. William Livingston, Jr., and Edward J. Beder, Jr., of Covington & Burling, Washington, D.C., For defendants.

Opinion by: URBOM

Opinion

Memorandum and Order on Motion for Preliminary Injunction

URBOM, Ch. J.: The plaintiff, Sun Newspapers, Inc., has asked for a preliminary injunction to restrain the defendants from engaging in certain alleged anticompetitive conduct in violation of [§ 2](#) of the Sherman Act, [15](#)

U.S.C. § 2, and § 7 of the Clayton Act, 18 U.S.C. § 18. Adequate jurisdictional facts concerning the connection of the parties to interstate commerce were shown in the stipulated facts. Those facts will not be repeated in this memorandum.

I.

Sun Newspapers, Inc. publishes weekly newspapers circulated in the Omaha, Nebraska, area under seven separate names, as well as five shopper-type advertising papers for distribution in the Omaha area. It also publishes the Bellevue Leader, a weekly newspaper circulated in Bellevue, [*2] Nebraska, and a weekly newspaper titled Air Pulse, printed under contract with the United States Air Force and circulated to Offutt Air Force Base in Sarpy County.

Each of the newspapers bearing the Sun's name and each of the shoppers is circulated in different areas of Douglas and Sarpy counties. The advertising appearing in each of the newspapers and the shoppers is sold separately, enabling potential advertisers to reach a segment of the residents within the area. Advertising in the Bellevue Leader and Air Pulse is also sold separately from that in the other Sun papers and that shoppers. The Sun newspapers include items of news and editorial comment common to all and a certain amount of news and editorial comment that is particular to the area in which the paper is circulated. In 1972 Sun Newspapers was awarded a Pulitzer prize for reportorial work.

The Omaha World-Herald is a daily newspaper in Omaha, Nebraska, owned by the Omaha World-Herald Company, a Delaware corporation with its principal offices in Omaha, Nebraska. The World-Herald newspaper is published in a number of editions each day of the week and is circulated over a wide area, including Douglas and Sarpy [*3] counties. In the year preceding March 31, 1981, the average paid circulation of the Omaha World-Herald in Douglas and Sarpy counties was in excess of 130,000 for the daily editions and in excess of 140,000 for the Sunday edition. These figures comprise over one-half of the total daily circulation and slightly under one-half of the Sunday circulation. In 1980 the World-Herald Company, through a subsidiary corporation called Suburban Newspapers, Inc., purchased the stock of Papillion Times Printing Co., which published the Papillion Times/La Vista News, the Ralston Recorder/Millard Edition, Springfield Monitor, Gretna Breeze, and a shopper known as the Suburban Signal. As of the end of November 1982, the circulation of the Papillion papers was around 6,700 copies and the Signal about 11,000 copies a week. Each of the Papillion publications is circulated in a different part of Douglas and Sarpy counties.

In mid-1981 World-Herald Company created a subsidiary called Printers and Mailers, Inc. and with it purchased the stock of Rapid Printers and Lithographers, Inc., merged the two entities, and formed Rapid Printers and Mailers, Inc.; Rapid Printers and Mailers, Inc. is believed [*4] by the parties to be the largest printer of newspaper advertising inserts in Nebraska. For several years prior to January 1981, the plaintiff's Step-Saver shoppers were printed by Rapid.

Beginning in September of 1981, Rapid Printers and Mailers embarked on a venture to mail advertising circulars to almost all of the residences in Douglas and Sarpy counties. The circulars involved a "marriage mailer" concept, whereby the advertising of several advertisers is placed in a single tabloid paper. Rapid prints some but not all of the inserts that are put together to form the mailer, called the Golden Courier.

From March to November of 1982, the World-Herald Company distributed pre-printed advertising in a program termed Circulation Plus. The concept of the program was to offer advertisers distribution of preprinted advertising materials to the subscribers of the Omaha World-Herald through the regular newspaper distribution channels and to nonsubscribers of the newspaper through mail delivery. Rapid assisted the World-Herald in the preparation of the mailing list for the Circulation Plus program, which was designed to reach most of the homes in Douglas and Sarpy counties.

Suburban [*5] offered local advertisers distribution of advertising materials in the areas where the particular publications were circulated.

In February 1981 the stock of Sun Newspapers, Inc. was purchased by Bruce Sagan. Neither the Golden Courier nor the Circulation Plus program was in existence at that time. After his purchase of Sun Newspapers, Sagan purchased the Step-Saver publications and then consolidated the Sun operations with those of the Step-Savers and eliminated a publication called the Bargain Finder that was being published by the Sun organization and was similar to the Step-Savers in advertising content.

When Sagan purchased the Sun, it had been losing money on the newspapers for many months. The losses continued every month through November 1981, when the papers made their first profit, \$4,593.00, but no profit has apparently been made since. Sagan testified that he felt the one month's profit was the result of the reorganization efforts he had undertaken. He also testified that the Golden Courier, Circulation Plus, and Suburban have eroded the profitability of the Sun, because they have taken key advertising accounts from the Sun that would have kept the operations [*6] profitable.

In early 1981, Sagan had discussions with Rapid concerning its printing all of the Sun newspapers. At that time, Rapid was printing the weekly Step-Savers; the Sun newspapers and Air Pulse were being printed at a printing plant in Norfolk, Nebraska. Sagan wanted to have all of the Sun publications printed at Rapid and on a single day each week, but Rapid was unable to do that. In January 1982 Sagan began printing all of the Sun publications at a printing plant he owns in Chicago, Illinois. He testified that he began printing in Chicago because Rapid was then owned by the World-Herald Company, a competitor, thereby giving it price control over the Sun and competitive information. Sagan felt that the price control was being used to the detriment of the Sun, because the Sun was paying a slightly higher price than world have been necessary.

The Sun newspapers are weekly and appear on Wednesday of each week. As previously mentioned, each edition contains news, features, and editorials common to the others and some that appear only in a particular paper. The Sun newspapers are circulated in particular zones that cover the majority of Douglas and Sarpy counties; certain [*7] portions of the county not covered by regular carrier delivery can receive the Sun newspapers by mail. Sagan testified that there is no carrier delivery downtown or in several of the rural areas where there are insufficient people living to justify the service but that mail delivery is adequate to service the subscribers in those areas. The Step-Savers are delivered to residences of those who do not subscribe to the Sun newspapers.

The Sun's advertising is sold by a regular sales force. An advertiser seeking non-classified advertising in a single edition of the Sun newspaper without purchasing it in another edition or may purchase it in a combination that represents less than all of the papers. Classified advertising must be purchased for the entire set of the Sun papers. Advertising space is sold in various sizes ranging from classified to full-page ads. The Sun newspapers also employ seventy-seven full-time and forty-four part-time employees in addition to approximately 150 carriers to deliver the papers.

The Omaha World-Herald is a much larger operation. The daily editions are delivered to 75 percent of the homes in Douglas and Sarpy counties and the Sunday editions [*8] are delivered to 80 percent of the homes in the two-county area. The percentage of homes covered by the World-Herald diminishes somewhat when the Omaha Standard Metropolitan Statistical Area (SMSA) or the Omaha Retail Trading Zones (

Z) are used as the basis for determining the percentages. The Omaha SMSA includes the two counties plus one county in Iowa; the daily editions are delivered to 67 percent of the SMSA homes and the Sunday editions to 73 percent. The RTZ includes a number of counties surrounding the Omaha area; the daily percentage falls to 57 percent of the RTZ and the Sunday to 65 percent when this area is used as the base.

The Omaha World-Herald sells advertising in a sales force that is separate from that of the Golden Courier or the Suburban. Advertising is offered in a number of varieties, including the run-of-the-paper (ROP) and zoned inserts. ROP advertising involves placing an ad that is to appear in every newspaper printed. The inserts are separately printed advertising circulars that are manually inserted into the newspaper. It is possible to buy placement of inserts for less than the full run of the World-Herald in a "zone" within certain portions [*9] of the Douglas and Sarpy counties area. John Gottschalk, vice president for general management of the Omaha World-Herald Company, testified that the number of different combinations of zones was limited to four, a limit necessitated by the physical

size of the plan in which the World-Herald is printed and distributed to carriers. The zoning is limited on Wednesday and Sunday, because frequently the requests for zoning on those days -- prime advertising days -- exceed the paper's capabilities to zone.

According to Gottschalk, the acquisition of Suburban by World-Herald was made for a number of reasons: the newspapers were in growing communities and thereby represented good investments, and Papillion Publications printed its papers with offset presses, a different type than that used by the World-Herald to print its newspaper and the offset press capability was thought to be a good tool for learning techniques of that type of printing. There was also a concern about how well the World-Herald could manage acquired companies.

The World-Herald began the Circulation Plus program in March 1982 in an effort to provide a total-market-coverage advertising vehicle. Copies of Circulation [*10] Plus were inserted in the Omaha World-Herald destined for Douglas and Sarpy county subscribers and were mailed to nonsubscribers in the same areas. The endeavor apparently was never a success and was discontinued in November of 1982, because it was unable to attract sufficient advertisers. During the start-up phase of the project, Rapid assisted the World-Herald in preparation of a mailing list. The list needed to be tailored to the Circulation Plus program, because addresses of subscribers of the World-Herald were to be eliminated from the mailing list. Rapid's computer was used to perform this task and the World-Herald was charged for the service.

The Golden Courier was started by Rapid in September 1981, after it had been acquired by the World-Herald Company. According to testimony at the hearing, the concept of the Golden Courier as a "marriage mailer" was feasible only a short time before September. Prior to that time the United States Postal Service had required separate postage for each different advertiser in a particular mailer. When the Service changed its interpretation of a regulation, several advertisers could have ads in a mailer and postage was charged only [*11] for the entire mailer itself. This allowed businesses such as Rapid to assemble advertising from several advertisers and place it in a single tabloid mailer. There was testimony at the hearing that John Brown, one of the co-owners of Rapid before it was acquired by the World-Herald Company, had described a marriage mailer as an idea of his "that was just waiting to happen" when he was negotiating with Berkshire-Hathaway concerning the sale of Rapid; his statement was made well in advance of the change in the interpretation of the postal service regulation.

The Golden Courier is distributed on Wednesday of each week by mail. There was agreement among those testifying that Wednesday is the most desirable day of the week for a tabloid such as the Golden Courier to reach consumers. Print advertising tends to have a delayed effect upon consumers' behavior, necessitating its reaching them by Wednesday in order to influence buying behavior on Saturday, typically the peak day for retail sales.

Brown testified that not all of the inserts that go into the Golden Courier are printed by Rapid; that soon after World-Herald acquired Rapid it infused substantial amounts of capital into [*12] the enterprise to purchase new presses and a building to house them; that the new presses are not used to print the Golden Courier and the printing for the Golden Courier did not require the new presses in order to free up time on the old presses; and that Rapid had accesss to adequate capital funding to begin the Golden Courier before it was acquired by the World-Herald Company.

Generally, the Golden Courier sells advertising of a minimum size of a full tabloid page. On at least two occasions, however, it sold advertising for a smaller size ad in a section called Food Fare; the Food Fare portion of the Golden Courier only appeared twice and has not been used since. That type of supplement allowed the Golden Courier to reach advertisers who desired to place less than a full page ad. The Sun newspapers all contain a great deal of display advertising that is less than a full tabloid page.

At the time the World-Herald Company acquired Suburban the latter was losing money. There had been no significant competition between the World-Herald and Suburban. The rates for advertising in the two papers were and are vastly different; the Suburban papers were published weekly, the World-Herald [*13] daily. Gottschalk testified that Suburban does not perform an appreciable amount of work for the World-Herald and could recall only two instances where Suburban performed work for the World-Herald and neither exceeded \$1,000.00. Gottschalk also testified that Suburban's sales staff is separate from that of the World-Herald.

The Suburban newspapers are circulated primarily in the Ralston and Papillion, Nebraska, areas. At the hearing Sagan made allegations that the Papillion paper was attempting to expand its territory into Bellevue, where one of his papers is circulated. Terry Ausenbaugh, who is president of the Suburban newspapers, testified that the Papillion Times was available at four stores in Bellevue for one week in November of 1982 and only twelve copies were sold; that they were placed in those locations because local election results were printed in the paper; and that since November 1982 the Papillion Times has been sold at a convenience store in Bellevue, the sales averaging about five copies a week.

At some time after the Suburban papers were acquired by the World-Herald Company they began a new paper called the MWR Revue that was circulated on the Offutt Air Force [*14] Base in Sarpy County. There was no testimony or other evidence to show whether the MWR Revue had any effect on the Sun's publication, Air Pulse, that is circulated on the air base. The MWR Revue like Air Pulse, is printed under a contract from the federal government. Suburban sells advertising space in the MWR Revue. There was no evidence as to the extent of those sales or whether there has been any advertising sales taken from the Sun publication.

A logical place to begin when considering any monopolization case under the Sherman and Clayton Acts is to define the relevant market. Such a definition takes on a number of aspects, including the geographic area, the product, and the manner in which other similar products compete with the product in question. In this regard the plaintiff presented extensive evidence through an expert witness, John S. Coulson.

Coulson identified two distinct types of advertisers within print media advertising. One group is the national advertiser who seeks to promote the image of a particular product. The purpose of the advertising is not to promote purchasing of a product in a particular location but only the eventual purchase of a product [*15] at some location. Typically, large manufacturers purchase national advertising. Local advertising on the other hand, is geared toward encouraging a purchase at a particular store or outlet and is not much concerned with what brand of goods is purchased. The advertisers tend to be local businesses, placing ads in media close to their place of business. National advertising uses a more complex chain of distribution, involving several intermediaries, while local advertising tends to involve only the advertiser and the representatives of the particular medium. The markets for local and national advertising are recognized as separate by trade publications reporting advertising data.

In studying the Omaha market, Coulson divided advertising into local and national, based on the content of the ad. Local advertising was defined as containing a local addresss of the business. Coulson used three local areas in his study: the Omaha SMSA, the Omaha RTZ, and Douglas and Sarpy counties. Using statistical sampling methods and other reported data, he arrived at an estimated total dollar volume of advertising contained in electronic media, billboards, directories, direct mail advertising, [*16] transit advertising, and newspapers in Omaha for 1981. While the estimate of revenues is for 1981-1982, 1982 advertising rates were used. Of his estimated total of a market for \$64.2 million for the Omaha SMSA and \$57.7 million for Douglas and Sarpy counties, Coulson estimated that the Omaha World-Herald and its subsidiaries account for 50 percent of the total local advertising market in the Omaha SMSA and 54 percent of the total local advertising market for Douglas and Sarpy counties.

Coulson excluded several media from the study to determine the share of the print media market that the Omaha World-Herald and its subsidiaries occupied in 1981. He excluded electronic media, directories (including yellow pages of the telephone book), billboards, and transit advertising, because he felt that they did not serve the same function as newspaper advertiisng. Electronic media are able to project a verbal or visual image for a short period of time; the image does not last more than a few seconds and the consumer cannot refer back to it, as with newspaper advertising. Directories differ from newspaper advertising, because they contain an exhaustive listing of businesses without the "here [*17] and now" aspect that a newspaper ad may contain. Newspaper ads can be tailored to the particular time at which they are run, while directories are published infrequently and often do not contain more than location and general business information. Billboards and transit advertising were excluded because they are similar to directories; both are able to use only a very limited number of words and pictures to convey a message and their limited nature deprives them of the "here and now" aspect that newspaper advertising is able to convey. It would also seem that their limited message capability would make them unlike newspaper advertising, because consumers could not refer back to the ad at a later time for information. When these categories were eliminated from the total of advertising revenues, the Omaha SMSA yielded \$42.1 million in print

advertising and Douglas and Sarpy counties yielded \$37.8 million under Coulson's study. Of that total, Coulson calculated that the World-Herald companies held 77 percent of the Omaha SMSA market and 82 per cent of the Douglas and Sarpy county market.

Coulson arrived at the dollar and percentage figures by examining sample issues of the publications [*18] and determining the total linage of the advertising and converting that to dollar volume by multiplying the rates in rate cards by the linage. Only standard rates were used; no attempt was made to determine whether revenues could vary because of rates that were negotiated off the rate card. Coulson felt that if there was any error in determining the dollar amount under this method it would work to underestimate the World-Herald companies' share of the market. His comment was also directed at the use of the 1982 rates in computing revenue figures for a period in both 1981 and 1982.

There was a certain amount of dispute between the parties as to a number of aspects of Coulson's study that bear on its validity to prove the relevant market. One of those areas was his noninclusion of electronic media and directories. Gottschalk testified that the Omaha World-Herald competes with electronic media and directories, such as the telephone yellow pages, for advertising. In addition, the defendants' counsel sought to show, without success, that certain ads in the newspaper lacked the "here and now" aspect discussed by Coulson, thereby making directory advertising and newspaper advertising [*19] sufficiently comparable that directories should be included in the relevant market. The defendants' attack on the study does not seem to assail it seriously. Gottschalk's opinion, unsubstantiated by any foundation, is not convincing in comparison to the detailed analysis used by Coulson. The yellow page ads used tended to differ in content from the newspaper ads in that the latter conveyed some aspect of "here and now," while the yellow pages ads did not.

The second line of attack used by the defendants was that even if Coulson's exclusions prove valid, the local advertising market in which the World-Herald and the Sun newspapers compete is different and cannot be used as a valid means of comparison to determine the relevant market. What this line of reasoning seems to suggest is that it is necessary to break down further the World-Herald companies' revenues into categories that represent areas in which the Sun organization and the World-Herald organization truly compete. This is supposedly necessitated by the difference in the products offered by the two organizations, the contention being that the Sun offer advertising to customers who wish to advertise in a publication that [*20] appears only weekly, while advertisers in the World-Herald could be attracted by the fact that it is a daily publication. It should be noted, of course, that the Golden Courier and the Suburban publications would likely compete for the advertiser seeking to place advertising in a weekly publication, because they appear weekly. It should also be noted that a portion of the World-Herald's advertising is weekly in nature. Testimony at the hearing indicated that a disproportionate number of advertisers sought to place inserts in the World-Herald on Wednesday and Sunday. This would seem to add a weekly characteristic to the World-Herald's advertising market that the defendants' counsel's arguments tend to ignore. By arguing that weekly advertising is separate from daily advertising, the defendants are placing themselves in the precarious position of seeking to constrain the relevant market to include even less than the plaintiff included in its study. At best this seems to be an inadequate effort to cloud the plaintiff's study. While there appear to be less than mathematically certainty with respect to the accuracy of the plaintiff's study, it is supported by logical, well explained [*21] reasoning and appears to follow a consistent methodology that was testified to as being in accordance with normal statistical procedure. The number of subcategories of local advertising could go on ad infinitum. Logic and good judgment suggest that subdividing of the market must cease somewhere in order to define the relevant market. The defendants have not shown that weekly advertising is sufficiently different from daily to justify a separate sub-market analysis. The defendants' attempt to cast a shadow on the study by pointing to some alleged inconsistency does not persuade me that the study is invalid to show that the World-Herald companies have a dominant market position in the print advertising market in the Douglas Sarpy county area. I am persuaded that the differences between print and other types of local advertising testified to by Coulson are sufficiently significant to allow the exclusion of electronic media, directories, billboard, and transit advertising from the relevant market in which the World-Herald companies compete. The defendants' attempted refutation of the rationale for this exclusion through the testimony of Gottschalk that the World-Herald competes with [*22] the other forms of media for advertising is not sufficient. The degree of competition referred to by Gottschalk is not specified

in the testimony. The competition may be only a minimal area with each type of media having a distinct market. The distinctions drawn by Coulson appear to be valid.

There was evidence presented at the hearing by which the plaintiff attempted to show that the World-Herald companies had exercised their monopoly power within the relevant market to the plaintiff's detriment. A part of the evidence dealt with the World-Herald's attempt to create a total-market-coverage vehicle through the Circulation Plus program. As previously discussed, World-Herald used the Rapid computer to develop a nonsubscriber mailing list. Circulation Plus began in March 1982, after the Golden Courier had begun to be mailed by Rapid. The Circulation Plus program encountered difficulties from the beginning, as the Postal Service would not guarantee the World-Herald that it would be delivered on Wednesday. The days that the mailed copies of the Circulation Plus appeared varied from Tuesday to Thursday, and, according to Gottschalk, this caused Circulation Plus to lose business, [*23] because many would not run advertisements unless Wednesday delivery was assured. The Circulation Plus endeavor was unable to attract sufficient advertising accounts to remain in existence and it was phased out in November 1982; the final issue contained ads from only one advertiser.

Sagan claimed that the deliveries on Tuesday or Thursday were an intentional effort by the World-Herald to preempt the market by having an advertising supplement on Wednesday in the form of the Golden Courier and on either Tuesday or Thursday with Circulation Plus. The testimony of Gottschalk indicated that the delivery on either Tuesday or Thursday was the result of limited postal service, rather than a design by the World-Herald to preempt the entire midweek advertising market.

Sagan also complained of what he felt was another improper exercise of the World-Herald's monopoly power: the timing of the Golden Courier. About the same time as the Golden Courier began, the Sun was negotiating with K-Mart stores to provide total market coverage for the Omaha area and the World-Herald was attempting to start the Circulation Plus program but was having difficulty with it. Sagan testified that he felt that [*24] the Golden Courier was speedily launched to capture the K-Mart account before Sun was able to compose a total-market-coverage system. There was scant evidence at the hearing concerning the underlying reasons for the timing of the Golden Courier's introduction. Although John Brown apparently had the idea for beginning a "marriage mail" program long before the Golden Courier began, he did not testify as to any rationale for the date of the start-up of the mailer. While there is insufficient evidence to demonstrate that the introduction of the Golden Courier was intended to rob the Sun organization of an opportunity to begin its own total-market-coverage advertising medium, the effect of the timing of the start-up can hardly said to have been less than devastating to the Sun organization.

Another alleged use of the monopoly power by the World-Herald organization is through the interselling of accounts. Sagan alleged that the sales staffs of the Golden Courier, the World-Harold, and the Suburban publications were engaging in the interselling of accounts. He based his allegations on some incidents that he observed where an advertiser would change from one of the World-Herald publications [*25] to another. The Sun's general manager, Dixie Cavner, testified that some accounts had shifted from Circulation Plus to the Golden Courier. Gottschalk testified that the sales staffs of the Golden Courier, the World-Herald, and Suburban are separate and do not work together. The plaintiff has shown only isolated instances of an advertising account's shifting from one World-Herald entity to another, without any testimony that the shifts were the result of interselling. Based on that evidence, I do not believe there has been a showing that the World-Harold entities were interselling.

Cavner related another alleged illicit use of monopoly power by the World-Herald through its Rapid subsidiary. Rapid first began the Golden Courier by selling advertising for the full run of the mailing list only, but as time progressed Rapid began to zone the distribution and as a final step created zones as small as 5,000 mailing addresses. Cavner testified that this had a debilitating effect on the Sun, because the Golden Courier was then able to appeal to small grocery businesses that had previously been a staple item among Sun's advertisers. There was no testimony concerning whether the down-zoning [*26] of the Golden Courier's distribution was a deliberate attempt to drive the Sun newspapers out of the market. The effect of the reduction in the Golden Courier's zones on the Sun's operation can easily be seen; it was then possible, as Cavner testified, for the Golden Courier to offer advertising to businesses wishing to saturate only a small portion of the Douglas and Sarpy counties area. This seriously challenged the Sun, because previously it had held out as its forte the ability to segment advertising into small zones.

Another alleged use of monopoly power by the Golden Courier was through its rate structure for insert advertising. World-Herald rate cards introduced into evidence indicate that the full rate for inclusion in the Omaha World-Herald ranged from \$41.25 to \$61.50 per thousand. Certain discounts are available, depending upon the frequency and the degree of circulation covered. The Sun's rate card for insertion shows rates varying from \$20.00 to \$35.00 per thousand for newspaper insertion. The Golden Courier offers a number of rates, the lowest of which was under the "50-50" program. In that program the advertiser must sign a contract agreeing to place a four-page [*27] tabloid in the Golden Courier for fifty weeks. A price of \$50.00 per thousand is charged for printing and insertion with a 5,000-copy minimum. This price is considerably lower than the rate offered for only the insertion of an advertiser's tabloid in the Golden Courier. The "50-50" program offers a four-week test period during which advertisers can try the Golden Courier and can withdraw without penalty or further commitment. Brown testified that there are currently about ten "50-50" contracts outstanding and that ten contracts were entered into at the initiation of the program.

The combination of the rate structure, the "50-50" program, and the smaller zones can easily be seen to have created a strong threat to the Sun's advertising sales: businesses could be given greater control over their advertising costs through the use of smaller, more-targeted zones, and long-term contracts with the Golden Courier than had previously been possible with the Sun.

There was testimony and other evidence presented concerning the publication of Suburban titled the MWR Revue. Because, as discussed earlier in this memorandum, there was no evidence to demonstrate the effect of the MWR Revue [*28] on Air Pulse's ability to attract advertising, I am unable to determine whether Suburban's publication of MWR Revue was detrimental to Sun's publication, Air Pulse. Therefore, there can be no determination as to the anticompetitive effects, if any, that were occasioned by the introduction of the MWR Revue by the World-Herald organization.

The plaintiff also complains about Suburban's attempts to sell advertising to merchants located in the Park Drive Shopping Center in South Omaha. It does not appear that these efforts were anything but bona fide efforts to sell advertising in an area that seems to be within the circulation area of the Suburban papers. Ausenbaugh testified that the Park Drive merchants logically would seek to advertise in the Suburban publications because many of their customers came from the regions served by the Suburban publications.

II.

The plaintiff seeks to have the defendants enjoined during the pendency of this action from engaging in certain anticompetitive actions. Specifically, the Sun requests this court to order the World-Herald, Rapid, and Suburban from publishing and distributing the Golden Courier, or a similar publication, in Douglas and [*29] Sarpy counties, distributing a publication in the nature of Circulation Plus in either of the counties, or distributing a weekly shopper-type publication in the circulation area of the Suburban publications. HN1 In order to grant a preliminary injunction in this circuit, the standards set forth by Dataphase Systems, Inc. v. C L Systems, Inc., 640 F. 2d 109, 114 (C.A. 8th Cir. 1981), must be met. Dataphase requires consideration of:

- (1) the threat of irreparable harm to the movant;
- (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant;
- (3) the probability that movant will succeed on the merits; and
- (4) the public interest.

The parties have vigorously contested each of the elements under Dataphase. The probability of success on the merits, however, is clearly the most vigorously contested, and I shall discuss it first.

A.

The plaintiff has introduced evidence that may possibly bear on four alternative causes of action under federal **antitrust law**, three of which are based on § 2 of the Sherman Act, 15 U.S.C. § 2, and one which is based on § 7 of the Clayton Act, 15 U.S.C. § 18. This court is [*30] authorized to enter forms of injunctive relief by § 4 of the Sherman Act, 15 U.S.C. § 4, and by § 16 of the Clayton Act, 15 U.S.C. § 26.

(1)

The first cause of action under § 2 of the Sherman Act is a claim that the Omaha World-Herald used its monopoly power in a daily newspaper market to smother competition in the weekly local advertising market, the allegation being that the World-Herald has done this through the acquisition of Rapid and Suburban, coupled with the use of the Golden Courier by Rapid and the expansion of the territory of Suburban. The plaintiff has also alleged that there was interselling among the three entities, although this was not borne out by the evidence. This aspect of the plaintiff's case draws on the interpretation of § 2 of the Sherman Act found in United States v. Griffith, 334 U.S. 100 (1948), and seeks to hold the World-Herald liable for using monopoly power in one market to gain an advantage in another market. See, also, Berkley Photo, Inc. v. Eastman Kodak Co., 603 F. 2d 263, 275 (C.A. 2nd Cir. 1979).

HN2 [↑] Liability under a § 2 claim can be determined upon a showing of:

(1) the possession of monopoly power in the relevant market and

[*31] (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966).

In addition, the plaintiff must demonstrate that it has been injured in its business or property by the acts of the defendant. Sargent-Welch Scientific Co. v. Ventron Corp., 567 F. 2d 701, 709 (C.A. 7th Cir. 1977).

A finding of monopoly power can best be described as a showing that the defendant has the "power to control prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). The existence vel non of monopoly power depends on the market that is used as the measuring stick for the defendants' power. Both the geographic area and the products are concerns in a market definition. Id., at 404; Paschall v. Kansas City Star Co., 695 F. 2d 322, 326, n. 3 (C.A. 8th Cir. 1982). Once that market has been defined, the defendant's power over it must be determined. Id.

The plaintiff urges that the relevant geographic market should be limited to Douglas and Sarpy counties. Failing that, it urges [*32] that the maximum size of the market should be held to encompass only the Omaha SMSA which would add portions of Pottawatamie County, Iowa, to the market. I am persuaded that the Douglas and Sarpy county area is the best geographic market for determining whether the World-Herald possesses a daily newspaper market. A crucial aspect to determine the scope of the relevant market is the ability of a firm to sell its product in certain locations. II Areeda & Turner, Antitrust Law P522 (1978). Statistics derived from plaintiff's Exhibit 13 are helpful. At the hearing the penetration of a newspaper in a locale was considered indicative of its market power. This figure appears to be derived by dividing the number of copies distributed in an area by the total number of households. In Douglas County, the Omaha World-Herald paid subscriptions, as shown by the exhibit, appear to go to over 83 per cent of the households on Sunday and about 79 per cent on other days. The figures for Sarpy County are about 79 per cent for Sunday and 69 per cent for weekdays. The figures in Pottawatamie County, Iowa, are about 36 per cent for Sunday and 26 per cent for weekdays, a drastic difference from Douglas [*33] and Sarpy counties. In Douglas and Sarpy counties, the combined penetration appears to be about 82 per cent for Sundays and 77 per cent for weekdays.

It appears that the Omaha World-Herald is very effective at selling its product in Douglas and Sarpy counties but that the effectiveness falls off significantly in Pottawatamie County. Exhibit 13 also shows that the World-Herald does not attain penetration percentages anywhere near those figures throughout Iowa and Nebraska. The importance of the Douglas and Sarpy county area circulation of the World-Herald is further illustrated by the fact

that it represents over 50 per cent of its total Sunday paid circulation and over 57 per cent of the combined daily circulation. It appears that the Douglas and Sarpy county market is the mainstay of the World-Herald operation and should be considered as the relevant market for determining whether it is a monopoly daily newspaper.

The percentage figures developed above concerning market penetration do not have sufficient relevance to determine the existence vel non of the World-Herald's daily newspaper monopoly without some discussion of the other daily newspapers sold in Omaha. For example, [*34] some other newspaper could conceivably have a circulation reaching the same percentage of Omaha households as the World-Herald if those households subscribed to more than one newspaper. The evidence at the hearing demonstrated that no other daily newspaper had even a five percent penetration in the Douglas and Sarpy county area. The circulation of other daily newspapers in the two-county area appears, therefore, to be only negligible. The defendants did not contest the dominance of the World-Herald in the daily newspaper market.

Given all the evidence, I conclude that the Omaha World-Herald possesses a monopoly position in a daily newspaper market in the two counties.

This conclusion, of course, is based on an assumption regarding the relevant product market. Specifically, the relevant product market was assumed to be comprised only of local daily newspapers. Weekly local newspapers, magazines, and other such publications differ significantly from a local daily newspaper. The testimony of Sagan was enlightening on the difference. Daily newspapers, with their frequency, are able to carry current news of a wide variety; they tend to carry a number of stories written by wire [*35] services covering national and international events. Local weekly newspapers are more restricted in their news coverage and tend to have considerably less emphasis on news with a short-lived time value; they tend to carry more news and feature stories concerned with events around the community than national or international news. National and international news stories in local weeklies differ from those in a daily, because they do not contain extremely time-critical material. Local weekly newspapers also tend to carry less national advertising and fewer syndicated features and comics than daily newspapers. The sum of the differences between daily and weekly newspapers makes it clear that they cater to different interests and should be grouped in different product markets. This conclusion results in the exclusion of nondaily newspapers from the market for purposes of ascertaining whether the Omaha World-Herald has a daily newspaper monopoly in the two-county area.

I also believe that magazines and other such publications should be excluded from the market. The testimony of Coulson leaves me with the impression that only one or two magazines have an edition that is specially [*36] tailored to the midwest region surrounding Omaha. Both of the magazines mentioned readily appear to cater to a specialized audience and not to the general public, asa does a daily newspaper. In addition, the frequency of the magazines' being less than daily would dictate sufficiently different contents to distinguish them from a daily newspaper.

Although the evidence shows a probability that the plaintiff will be able to show at trial that the Omaha World-Herald has a monopoly in the daily newspaper market, the plaintiff to be entitled to relief must show that the World-Herald somehow used the daily newspaper monopoly as a lever to gain an advantage in another market. See United States v. Griffith, supra, 334 U.S. at 108; Berkey Photo, Inc. v. Eastman Kodak Co., supra, 603 F. 2d at 275. Realistically, the only thing the plaintiff has shown in this regard is that the World-Herald used its financial resources to purchase Rapid and Suburban. Ido not believe that there has been a sufficient showing that there was any use of the World-Herald's monopoly power in other ways, such as interselling or account shifting. The issue then is whether the use of its financial resources amounted [*37] to an impermissible use of monopoly power to gain an advantage in the markets served by Rapid and Suburban. I believe that the advantage sought, if any, was in the local advertising market. The bounds of that market are discussed in my analysis, immediately below, of the plaintiff's second § 2 claim.

The mere acquisition of Rapid would not have been enough by itself to find improper conduct under the Griffith rationale. The evidence, however, is sufficiently clear for me to infer that Rapid was a potential competitor of the World-Herald in a related market -- local advertising. As my findings of fact given above indicate, Brown considered a "marriage mailer" like the Golden Courier as an "idea just waiting to happen" when the sale of Rapid was being

negotiated with Berkshire-Hathaway in 1980. The idea surely must have been "just waiting to happen," for he testified that Rapid, without any financial assistance from the World-Herald Company, would have been fully able to start the Golden Courier. Rapid possessed adequate capital and credit reserves to provide the financing for the operation. Only a minimal amount of capital expenditures was necessary; a few tables needed to [*38] be built and some additional space rented, but no new presses or major equipment was necessary. Given that set of circumstances, it is curious that the World-Herald Company was willing to pay a premium of about \$1.5 million over the price for which the owners of Rapid had been willing to sell to Berkshire-Hathaway only a few months earlier. Even the name of the World-Herald subsidiary formed for the Rapid acquisition, Printers and Mailers, Inc., suggests that there was some inclination at the time of the acquisition to do some mailing. The acquisition of Rapid obviated the need for the World-Herald to move quickly with a total-market-coverage mailer to avert the potential competition of Rapid, as well as the problems in going forth with such a program, which would have been similar to Circulation Plus. The World-Herald had a great deal of difficulty in beginning the Circulation Plus program because of problems in preparing a nonsubscriber list for the mailed copies. Rapid readily assessed in this task with its computer and the data concerning mailing addresses that had been previously acquired.

The defendants assert that the acquisition of Rapid should not be held to be an [*39] unlawful use of monopoly power, because the introduction of the Golden Courier -- the true gist of plaintiff's complaint against the World-Herald and Rapid -- represents aggressive competition on the merits through innovation. See *Berkey Photo, Inc. v. Eastman Kodak Co., supra, 603 F. 2d at 281*. I cannot agree with the defendants' assertion. The supposed innovation -- use of a marriage mailer -- was abundantly testified to at the hearing as an idea not unique to Rapid or the World-Herald. There was testimony that the Des Moines Register and another company, Avco, had engaged in similar projects in other cities prior to the time of the introduction of the Golden Courier. The innovation sought to be permitted by the Berky decision was of a wholly different character and represented the introduction of a novel product into the marketplace. Such conduct, even by a monopolist, should not be discouraged. But, as in this case, when the conduct is not an innovation, it is more properly viewed as an unlawful act of a monopolist: there is a suppression of competition without any corresponding benefits.

The result with respect to the acquisition of Suburban should be the same, although [*40] for slightly different reasons. Suburban represented a small competitor with the World-Herald for a portion of its business in local advertising revenues. The acquisition of it by the World-Herald Company thereby tended to reduce the competition that the World-Herald had to face outside its fold of companies. The World-Herald could be quite happy for Suburban to seek aggressively advertising accounts at the expense of the World-Herald, when the revenues would ultimately come to rest in the same corporate coffers.

The only remaining barrier to the plaintiff's relief is an answer to whether the World-Herald Company's actions in purchasing Rapid and Suburban in some way harmed the plaintiff. There was adequate evidence to show that the plaintiff was harmed by the purchase of Rapid and the attendant start-up of the Golden Courier. The plaintiff has lost a number of advertising accounts to the Golden Courier that would have contributed to a reduction in its money-losing financial picture or possibly to profitability of its operation. The acquisition of Rapid allows the World-Herald to reap the profits that a potential competitor would have made in the submarket of local advertising [*41] in a weekly mailer at the expense of some of the World-Herald's insert accounts or Circulation Plus accounts.

As to the acquisition of Suburban, the plaintiff has not presented sufficient evidence for me to find that it has been harmed by the elimination of competition. The evidence at the hearing demonstrated that the overlap of the Suburban papers with the Sun papers is minimal. Only a few copies of the Papillion Times are sold in Bellevue each week. In addition, there was little evidence that would convince me that the Sun's Air Pulse was being harmed by the presence of the World-Herald's MWR Revue on Offutt Air Force Base. The evidence concerning the Park Drive Shopping Center advertising is not concrete enough for me to believe that the Sun newspapers actually lost an account to Suburban.

Accordingly, the plaintiff has shown a probability of success on the merits with respect to this theory as to the World-Herald's acquisition of Rapid, but not as to the acquisition of Suburban.

The plaintiff's second cause of action under § 2 of the Sherman Act is also based on a theory that the World-Harold monopolized the market in Omaha by acquiring Rapid and Suburban. The relevant [*42] market, however, differs slightly under this theory. This theory again relies on the language in United States v. Grinnell Corp., supra, and looks to the possession of monopoly power within the relevant market, coupled with either willful acquisition or maintenance of that power. The Supreme Court of the United States in United States v. Griffith, supra, 334 U.S. at 107, was instructive in this regard, when it stated that the "HN3" use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful." Another variant on the doctrine holds that unlawfully acquired monopoly power itself is "anathema even when kept dormant." Berky Photo, Inc. v. Eastman Kodak Co., supra, 603 F. 2d at 275.

The plaintiff has not demonstrated that the monopoly power that the World-Herald may have gained through the acquisition of Rapid and Suburban was unlawfully acquired through coercive tactics or other impermissible means. The inquiry, then, HN4 must turn to whether there has been a use of monopoly power in some proscribed manner.

The first step in this analysis, as discussed in the previous section, is to define the relevant product [*43] and geographic market. The bounds of the relevant product market are determined by looking to whether the commodities are "reasonably interchangeable by consumers for the same purposes." United States v. E.I. du Pont de Nemours & Co., supra, 351 U.S. at 395. Determining whether two products are the same frequently can rest in part on the cross-elasticity of demand -- i.e., whether consumers would likely be prone to shift from one product to another based on relative prices. Superturf, Inc. v. Monsanto Co., 660 F.2d 1275, 1278 (C.A. 8th Cir. 1981). The analysis to determine the bounds of the local advertising market for the first claim suffices to define the advertising market relating to the second claim.

The kingpin of the plaintiff's desired definition of the relevant market is the testimony of its expert, John S. Coulson. His testimony lends itself to a conclusion that the advertising market can be viewed as a whole with several sub-markets. This type of analysis is a recognized tool in antitrust cases where markets are frequently divided into sub-markets and the sub-markets considered as relevant markets for monopoly analysis. See Superturf, Inc. v. Monsanto Co., supra. [*44]

Coulson considered the sub-market of "local newspaper advertising" to comprise the relevant market. His analysis would define local newspaper advertising by making several exclusions from the advertising market as a whole. First, he excluded national advertising, which he defined as advertising that was directed more at product image promotion than to promotion of purchasing at a business in a particular locality. As discussed in the earlier portion of this memorandum, there are numerous differences in the distribution networks of local and national advertising as well as the type of businesses purchasing the advertising. It is clear that different markets exist for local and national advertising, mirroring the different purposes of the two types. The industry recognizes the difference. The World-Herald, for example, has different advertising rates for local and national advertising. Given the widely accepted differences, I do not believe that there is a strong cross-elasticity of demand between national and local advertising. The difference in purpose and advertisers and recognition of that difference through different rate structures lead me to believe that Coulson's exclusion [*45] of national advertising is reasonable, and his methodology of counting local advertising as that with an address in Douglas and Sarpy counties only is reasonable. The fact that the method exclusion does not produce results to a mathematical certainty does not concern me and is not required; all that is required is a reasonable methodology that is consistently applied and produces estimates in which the court can be reasonably confident. See United States v. Empire Gas Corp., 537 F.2d 296, 303 (C.A. 8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977). I note that the defendants did not seriously challenge Coulson's method of excluding national advertising.

Coulson also excluded four types of local advertising from the market -- television, radio, billboard, and transit advertising. Their exclusion rested basically on the same premise: their inability to convey the same amount of information as print advertising and their inability to be referred to later. Coulson's testimony concerning the rationale for this distinction was discussed earlier in this memorandum and appears to be reasonable. The defendants sought to show that they directly compete with radio and television, at [*46] least, for local advertising,

Gottschalk testifying that the World-Herald competes with the electronic media for local advertising. No specifics were given nor any statistics concerning the amount of business the World-Herald loses to the two electronic media. The testimony given is simply not enough to refute the plaintiff's evidence.

Coulson's most controversial exclusion from the local advertising market was directories and similar publications. His reasons for doing so were discussed earlier in the memorandum. As was also stated there, the defendants' attempt at casting doubt on the exclusion failed. Given these circumstances, I shall consider the relevant market as not including directory advertising.

The second phase of defining a relevant market is to define the geographic market. I conclude that the area to be considered is the Douglas and Sarpy county area. Much of the reasoning for deciding that the World-Herald possesses a monopoly in the daily newspaper market is applicable here. Local advertising is a sub-market of the daily newspaper market and would necessarily be inextricably bound to the circulation of the World-Herald with respect to the geographic market.

[*47] Another reason for holding that the Douglas-Sarpy county area is the relevant geographic market is that this is the area in which the plaintiff and the defendants effectively compete. *TV Signal Co. of Aberdeen v. American T. & T. Co.*, 462 F.2d 1256, 1260 (C.A. 8th Cir. 1972). The evidence at the hearing demonstrated that the Sun newspapers are circulated almost exclusively within Douglas and Sarpy counties; some rural areas are covered only by mail subscriptions and there is no delivery in the downtown Omaha area. The World-Herald circulates throughout Douglas and Sarpy counties, as does the Golden Courier. The suburban publications cover only certain portions of Sarpy county and their circulation area is not entirely overlapping with the Sun circulation area.

The defendants brought out a fair amount of evidence concerning the lack of the exactness of the Sun's circulation area and the circulation areas of the World-Herald, the Golden Courier, and the Suburban publications. The obvious thrust of this evidence was to support an allegation that the plaintiff's attempted definition of the geographic market was inadequate, because it failed to take into account incongruities between [*48] the various publications' circulation areas. It is difficult, if not plainly impossible, to define a geographic market with mathematical precision. There is always some inherent fuzziness in an attempt to define the geographic market. See *United States v. Philadelphia National Bank*, 374 U.S. 321, 360, n. 37 (1963). In the present case the defendants quibbled with the plaintiff's evidence but did not introduce any evidence as to the significance of market area incongruities.

Within the Douglas-Sarpy county area Coulson's study found that the World-Herald companies accounted for 82 percent of the total revenues from local print advertising. Within the Omaha SMSA the percentage decreases only slightly, to 77 per cent, thereby making the choice between the Douglas-Sarpy county area and the Omaha SMSA as the relevant geographical market less critical than if there were greater disparity in the figures.

The competitor with the next largest market share is the Sun newspapers, with about a seven per cent share of the total local print advertising market. Coulson's report contains estimates that all but one of the remaining competitors are below four per cent of total market share. [*49] The two largest competitors -- the Sun and the Daily Record -- have financial troubles. Given the World-Herald's high share of the market and the total lack of a strong competitor, either in market share or financially, it cannot be seriously questioned that the World-Herald group of companies possesses a monopoly share of the market. The fact that the monopoly is dispersed in a total of three corporate entities, the World-Herald, Rapid, and Suburban, should not alter the result with respect to the finding of monopoly. Separate corporate existence is properly ignored in this case. See *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 215 (1951).

Given that the World-Herald group possesses monopoly power over the local print advertising market, the next issue is whether that monopoly power has been improperly acquired to used. See *United States v. Grinnell Corp., supra*. I conclude that there is inadequate evidence to demonstrate that the World-Herald unlawfully acquired the monopoly power. There is no evidence of predatory pricing or coercive tactics to acquire a monopoly. The spearhead of the plaintiff's attack under this theory is that the World-Herald group engaged [*50] in various

activities to maintain a monopoly. The plaintiff's counsel clearly stated that this was the direction of the plaintiff's case. See transcript of preliminary injunction hearing at 371, lines 12-25.

Under the guise of maintenance of a monopoly I am presented with two competing lines of analysis. The one advocated by the plaintiff would have me hold that the acquisitions of Rapid and Suburban, coupled with the later product introductions and changes, are an unlawful acquisition and maintenance of a monopoly. The defendants would have me focus on the post-acquisition period and call the activities of the World-Herald entities aggressive competition on the merits, following the Berky decision. I am persuaded that the plaintiff's line of reasoning more closely reflects the legal significance of the facts that were presented at the hearing.

At the time the World-Herald Company acquired Rapid the idea of the Golden Courier was already conceived. Rapid was then poised and ready to enter the market as a competitor to the World-Herald, but this entry was not possible until the change in the interpretation of the postal regulation that allowed marriage mailers. The World-Herald [*51] was already into the same sub-market with its zoned inserts. By acquiring Rapid, the World-Herald was able to assure itself of retention of a dominant position in local advertising. The evidence does not show the extent of the pre-Golden Courier dominance of the World-Herald. It does show, however, that the World-Herald possessed about an 80 percent share of the local advertising market at the time of Coulson's study, without the revenues of either the Golden Courier or the Suburban group. The acquisition of Rapid, without more, would then violate §2. See [Paschall v. Kansas City Star Co., supra, at 329.](#)

The situation with respect to the Suburban publications acquisition is somewhat different. The testimony reflects that the Suburban newspapers and the World-Herald publications did not compete in any significant degree for advertising, and they have vastly different rate structures. The limited circulation of the Suburban publications restricted the local businesses that would want to advertise in them. The advertising carried by Suburban, however, can still be considered as local advertising under Coulson's definition. Thus, the World-Herald Company through the Suburban [*52] acquisition was able to eliminate an independent purveyor of local advertising by making it a part of the World-Herald aggregate of companies. The aim of the antitrust laws is to preserve healthy competition. See [Berky Photo, Inc. v. Eastman Kodak Co., supra.](#) To accomplish this end, monopolists should not be permitted to lessen competition through expansion of their domain by corporation acquisitions. The defendants point out that the Suburban papers were a losing operation prior to the acquisition by World-Herald and have since been returned to financial health. Nearly any monopolist could make a similar argument. Except in the case of a failing company, such acquisitions are suspect, inasmuch as they tend to lessen competition. The defendants have not made an attempt to avail themselves of the failing company doctrine. Thus, I hold that the acquisition of Suburban was improper.

In addition to the language in Grinnell proscribing acquisition of a monopoly, there is language that proscribes the maintenance of a monopoly. That language has been interpreted as requiring some form of exclusionary conduct by the monopolist. See [Paschall v. Kansas City Star Co., supra, 695 F.2d \[*53\] at 326.](#) Of course, the acquisition of potential competitors, as discussed above, could be termed exclusionary, because it removes one source of competition and helps erect a greater barrier to entry by further cementing the monopolist's market position and displaying a willingness to acquire any of those who dare to compete. The primary actions that the plaintiff has brought to issue in this case, however, are the rates and sales practices of the Golden Courier, Suburban, and, to a limited degree, the World-Herald in competing for local advertising sales.

The plaintiff's attack on the Golden Courier's practices focuses on the rate structure and the zoning of its sales. It also raises an issue as to whether certain issues of the Golden Courier containing the Food Fare section were a further attempt by the World-Herald to smother the Sun newspapers as a competitor. As to the rates of the Golden Courier, there does not appear to be any form of predatory pricing. Typically, such pricing involves sales below costs in order to drive a rival out of business. See III Areeda & Turner, [Antitrust Law](#) P710 et seq. (1978). The plaintiff did not present sufficient evidence to demonstrate [*54] that the prices for the Golden Courier were below cost. John Brown testified that the Golden Courier "50-50" program was cost-feasible because of a standardized print layout for each advertiser plus smaller, lightweight paper. The "50-50" program was the only serious challenge

that the plaintiff made to the Golden Courier rate structure and the evidence adduced falls far short of showing predatory pricing.

The plaintiff also has not produced sufficient evidence to show that the zoning of the Golden Courier was exclusionary. This aspect of the marriage mailer clearly seems to be aggressive competition on the merits, as described in Berky. The use of the Food Fare supplements does not present a problem either, as it falls under the same permissible principle as the zoning of the Golden Courier. It simply appears to be aggressive competition on the merits that cannot be characterized as exclusionary.

As to Suburban, the plaintiff has not shown anything that could be termed exclusionary. The placing of the papers in Bellevue and the start of the MWR Revue all represent aggressive competition on the merits and are not condemned under the antitrust laws.

(3)

The plaintiff's [*55] third theory under [§ 2](#) of the Sherman Act is that the defendants attempted to monopolize the local print medial advertising market in Douglas and Sarpy counties. [HN5](#)↑ An attempt to monopolize as proscribed by [§ 2](#) involves at a minimum the specific intent to monopolize, some conduct in furtherance of that intent, and a dangerous probability of success. [Times-Pacayune Publishing Co. v. United States, 345 U.S. 594, 626 \(1953\)](#); [Swift & Co. v. United States, 196 U.S. 375, 396 \(1905\)](#); III Areeda & Turner, [Antitrust Law](#) P820 et seq. (1978).

There is a critical lack of proof in the plaintiff's attempted monopoly case. There has been virtually no evidence that would sustain a finding that the defendants had the requisite intent. A specific intent "to destroy competition or build monopoly is essential" to an attempted monopolization case. [Times-Pacayune Publishing Co. v. United States, supra](#). The evidence of the plaintiff does not provide me with any basis for inferring that the World-Herald Company lowered its guns and put the Sun newspapers in its sights in hopes of destroying them, nor is there any evidence of specific intent to build a monopoly. The most probative evidence I have on [*56] this matter is the testimony of Gottschalk, who stated that the acquisitions of Rapid and Suburban were made for corporate reasons independent of any desire to monopolize or destroy competition. Furthermore, the decisions to begin the Golden Courier and modify its operations appear to have been made, at least from the evidence adduced at the hearing, without any proscribed intent. The plaintiff has failed on a critical element of proof of this claim and has not demonstrated a probability of success on the merits under it.

(4)

The plaintiff's final claim is that the World-Herald's acquisition of Rapid and Suburban violated [§ 7](#) of the Clayton Act. [HN6](#)↑ The essentials of such a cause of action are a merger or corporate acquisition in any line of commerce where the effect may be to lessen competition substantially or tend to create a monopoly in a substantial portion of commerce. [United States v. Falstaff Brewing Corp., 410 U.S. 526, 531 \(1973\)](#). A variant on the prohibition that the plaintiff has pursued is a merger or acquisition involving a company that is a potential competitor to another company in a market. [Id. at 532](#).

I believe that the plaintiff has shown a substantial probability [*57] of success on the merits of this claim. There are several factors that should be considered in determining whether the acquisition of Rapid and Suburban substantially lessened competition. See [Brown Shoe Co. v. United States, 370 U.S. 294, 311-323 \(1962\)](#). Those factors have been covered in the earlier discussion of the Sherman Act claims relating to monopolization in the local print advertising market. Those acquisitions do affect a substantial portion of commerce; the total advertising market of Rapid and Suburban amounted to substantial revenues. The acquisition of Rapid -- a potential competitor to the World-Herald in the local print advertising market -- would clearly tend to lessen competition. The acquisition of Suburban would also tend to have that effect, because it would eliminate an advertising source that was unconnected to the World-Herald. As stated earlier, there was not been a showing that Suburban was a failing company, thereby eliminating that line of defense.

In summary, there is a probability of success on the merits under three of the four theories that I perceive the plaintiff to be advocating.

B.

Dataphase Systems, Inc. v. C L Systems, Inc., supra, I^{*581} 640 F.2d at 114, requires a finding that the plaintiff will suffer irreparable injury in the absence of the requested relief. HNT↑ The requisite injury to sustain the burden under this facet of the test is not a static amount but is dependent upon the degree of the demonstrated probability of success on the merits and the state of the balance of the harms. Those equitable principles are fully applicable in antitrust cases. See 15 U.S.C. §§ 4 and 26.

The plaintiff has shown adequate irreparable injury. Sagan testified that the Sun newspapers are literally at the end of their rope; that the long string of losses has put the papers in a position of exhausting available financial reserves through lenders; and that he personally cannot further borrow to save the Sun newspapers. The import of this testimony is that the total collapse of the Sun organization is imminent, barring some sort of relief from this forum. There was also testimony that to begin again with the Sun newspapers after a shutdown would be extremely difficult if not impossible. Sagan testified that it would be akin to beginning a new paper, because reader loyalty and good will would quickly dissipate after cessation [*59] of operations. The magnitude of the injury to the plaintiff, coupled with the showing of substantial probability of success on the merits, indicates that some form of relief should be forthcoming, unless the balance of harms tips decidedly in favor of the defendants.

C.

The third of the four Dataphase factors is the balancing of harms between the parties. The evidence shows that the balance of harms tips decidedly in favor of the plaintiff. The plaintiff is faced with total shutdown of its operations. This would amount to a number of individuals losing their jobs, and the cessation of the publication of the Sun newspapers likely would be permanent, because of the rapid loss of subscriber loyalty and good will that would make a later resumption of the operations unfeasible. The harm to the World-Herald Company by the proposed relief, even in the extreme form of requiring the Golden Courier to cease distribution in Douglas and Sarpy counties and prohibiting other World-Herald entities from entering the market in place of the Golden Courier, would be less than the threatened harm to the plaintiff. The Golden Courier's operations are not limited to Douglas and Sarpy counties; [*60] it has marriage mailer distribution in Lincoln and Fremont, Nebraska, and Council Bluffs, Iowa, totaling over 100,000 copies. It should also be pointed out that the Golden Courier operation is only a portion of Rapid's printing enterprise; Rapid would still be able to engage in its production and printing of tabloid inserts for newspapers throughout the United States. Some of those tabloids might well be distributed in Douglas and Sarpy counties.

There was also testimony that Rapid would be able to maintain a constantly updated address file without a great deal of expense. Therefore, if any prohibition by this court of Rapid's distribution of the Golden Courier in Douglas and Sarpy counties were lifted, its task of market reentry would be much less than that of the Sun, because it does not depend on subscribers to determine the extent of its distribution. Only advertisers would have to be solicited and the Golden Courier mailed to the addresses on the mailing list; there would be no need to reestablish reader loyalty and good will to have a full circulation.

As to the Suburban papers, the harm from the only form of relief that I can determine is arguably possible -- preventing [*61] it from picking up the Golden Courier's operations -- would be minimal. The injunction would serve only as a prophylactic measure. The same would be true for the World-Herald, because it is not presently operating a total-market-coverage advertising publication other than the Golden Courier.

D.

The fourth Dataphase factor is the consideration of the public interest. Without serious question, this factor runs to the favor of the plaintiff. In the absence of some form of preliminary relief the plaintiff is doomed to collapse and extinction. This would silence an independent editorial voice in Douglas and Sarpy counties. There is a public interest in preserving such independent voices, as exhibited by Congress' passing certain exceptions to the

antitrust laws for newspapers in the Newspaper Preservation Act of 1970, Pub. L. No. 91-353, 84 Stat. 466 (1970). Congress felt that the antitrust laws should give way in certain instances to preserve independent editorial voices. It would seem that where the antitrust laws could be used reasonably to further the same purpose, they should be.

It is also in the public interest, as exhibited by the very existence of the antitrust laws, [*62] to try to preserve competition. The requested relief can be fashioned so as to further that end. Even the most extreme of the relief requested by the plaintiff would not insulate it from competitive forces in the marketplace. Another firm or firms could begin one or more marriage mail programs in the Douglas and Sarpy county area. Be that as it may, the new entrant would not hold a monopoly position over the local advertising market in Douglas and Sarpy counties and would fit within the framework of competition envisioned in the antitrust laws. The defendants should not be heard to cry that their market dominance will be lost. The plaintiff has made a significant showing that the defendant possesses a monopoly over the local print advertising market and has used a daily newspaper monopoly to gain leverage in the local print media advertising market.

III.

Although I have determined that the tests of Dataphase have been met, it still remains to be determined whether there are equitable defenses that would bar or alter the form of the preliminary injunction and what form the preliminary injunction should take.

As an equitable defense, the defendants raise the doctrine of [*63] unclean hands. There is some authority to support the proposition that this defense is properly considered with regard to preliminary relief. See *Heldman v. United States Lawn Tennis Assoc.*, 354 F.Supp. 1241, 1249-52 (U.S.D.C., S.D.N.Y. 1973). This defense is based on two attempts by Sagan to combine the Sun newspapers with the World-Herald Company. On one occasion, Sagan apparently approached the World-Herald with a proposal that a "joint operating agreement" between the Sun newspapers and the World-Herald be entered into. On another occasion, Sagan approached the World-Herald with a proposal that it acquire the Sun newspapers.

As to the first proposal, I can see no reason to consider it an instance of unclean hands. *HN8*[

Joint operating agreements between newspapers have specifically been exempted from the prohibitions of the antitrust laws. See *15 U.S.C. § 1803*. There is no evidence that Sagan was proposing a joint operating agreement outside the confines of the exemption.

The second proposal also is not a basis for application of the unclean hands doctrine. Sagan's proposal for the acquisition of the Sun by the World-Herald was premised, apparently, on the belief that [*64] the Sun newspapers could be considered a failing company. Mergers of corporations where one is a healthy business and one is a "failing one which no longer can be a vital competitive factor in the market," *Brown Shoe Co. v. United States, supra*, 370 U.S. at 319, are not proscribed by the antitrust laws.

The defendants also raise a defense to any preliminary injunctive relief by asserting that such relief would encroach on their *First Amendment* rights, relying on *Central Hudson Gas v. Public Service Comm. of N.Y.*, 447 U.S. 557 (1982), for the contention that their activities, as commercial speech, are protected by the *First Amendment*. That authority, however, belies their contention. In Central Hudson the Supreme Court held that government may ban forms of commercial speech that are related to illegal activity. Commercial speech related solely to proposing a commercial transaction is subject to regulation by the government in greater proportions than other forms of speech. See *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 384-386 (1973). I believe that the regulation may properly be extended to encompass the antitrust laws, given the facts of this case, for [*65] *HN9*[

the "[f]reedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The last assertion by the defendants is that the relief requested is "totally unprecedented" and would not be available to the plaintiff in the event of ultimate success on the merits. Courts, particularly courts of equity, are frequently faced with situations with a lack of precedent for the relief that they must fashion. If a court of equity were so bound to look to the past for a precedent, it would be unable to act in many cases. I recognize that the

proposed relief amounts to some alteration of the status quo and that drastic alterations of the status quo in preliminary relief contexts should be permitted only where there has been a strong showing of success on the merits in favor of the movant. See, e.g., [Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp.](#), [441 F.2d 560, 56-62 \(C.A. 5th Cir. 1971\)](#). In this case, however, the showing of probable success on the merits is adequate to allow some alteration of the status quo. I am persuaded as well that such an alteration should not allow [*66] the plaintiff to proceed in other than an expeditious manner toward an ultimate trial on the merits.

The defendants also argue that the preliminary relief sought cannot be allowed, because similar relief would be unavailable should the plaintiff ultimately prevail on the merits. In support of this claim they cite [ABA Distributing, Inc. v. Adolph Coors Co.](#), [661 F.2d 712 \(C.A. 8th Cir. 1981\)](#). That case does not support the proposition for which it is cited. ABA Distributing dealt with a failure of the plaintiff to demonstrate that there was a substantial probability of success on the merits, because it had failed to comply with a contract arbitration clause and thereby might have been unable to prevail because of a provision in Missouri law requiring such exhaustion. [Id., at 715-716](#). The case is not an equation of relief available after trial with that available, as preliminary relief but is simply an application of the probability-of-success-on-the-merits element of the Dataphase test. Inasmuch as I have made a determination that there is a probability of success on the merits, that element is fulfilled.

IV.

The sole task remaining in the disposition of the plaintiff's [*67] motion is the framing of the preliminary relief. The plaintiff has proposed a form of preliminary injunction that would enjoin distribution of the Golden Courier or a similar vehicle by Rapid, the World-Herald, and Suburban and would prevent Suburban from publishing the MWR Revue or any other new newspapers. I am persuaded that the plaintiff has demonstrated the need for relief running only to the distribution of the Golden Courier in Douglas and Sarpy counties, but I do not believe that there has been a sufficient showing that the Suburban group of newspapers has engaged in tactics that truly are the source of the plaintiff's economic difficulties. Accordingly, the preliminary injunction will run only to prohibit the World-Herald, Rapid, and Suburban, and any subsequently acquired subsidiary of the three, from distributing a marriage mailer or similar total-market-coverage vehicle in Douglas or Sarpy County. This would include a nonsubscriber mailer operation such as Circulation Plus.

As previously mentioned, the preliminary injunction should not take effect unless the plaintiff is willing to proceed to trial in an expeditious manner. What is an expeditious manner will depend [*68] on a number of factors that include the necessary discovery and the proposed length of the trial. The defendants at trial wished to participate in further proceedings to frame the terms of the injunction. I shall allow this in the form of briefs and affidavits and, if I deem it necessary after seeing the briefs and affidavits, oral argument.

One other factor will be considered in framing a preliminary injunction. The plaintiff must propose an expeditious trial date, and the defendants must respond to that proposal.

It Therefore Hereby Is Ordered:

1. That the parties are given twenty days from the date of this order to submit bids and affidavits with respect to the makeup of the preliminary injunction; and
2. That the plaintiff is given ten days from the date of this order to submit a proposal for the date of the trial of this case, consistent with the memorandum, and the defendants are given ten days thereafter to respond to the plaintiff's proposed trial date.



Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc.

United States Court of Appeals for the Second Circuit

December 15, 1982, Argued ; June 15, 1983, Decided

Docket No. 82-7627,

Reporter

710 F.2d 87 *; 1983 U.S. App. LEXIS 26714 **; 1983-1 Trade Cas. (CCH) P65,459

SAXE, BACON & BOLAN, P.C., ROY M. COHN, THOMAS A. BOLAN, STANLEY M. FRIEDMAN, MICHAEL ROSEN, THOMAS A. ANDREWS, JOHN F. LANG, LOUIS BIANCONE, B. VINCENT CARLESIMO, FILIP TIFFENBERG, LAWRENCE ABRAMSON, THEODORE TEAH, LAWRENCE CAMPANELLI, Plaintiffs-Appellants, v. MARTINDALE-HUBBELL, INC., Defendant-Appellee

Prior History: [\[**1\]](#) Saxe, Bacon & Bolan, P.C., and twelve of its affiliated attorneys appeal from a summary judgment of the United States District Court for the Southern District of New York (Robert W. Sweet, J.) dismissing appellants' claims for damages and injunctive relief under New York's Donnelly Act.

Disposition: Affirmed.

Core Terms

rating, district court, appellants', diversity, purposes, professional corporation, Donnelly Act, recommendations, principal place of business, summary judgment, legal ability, New York's Donnelly Act, provisions, unilateral, Directory, employees, benefits, Motions, ethical, falls, firms, card

LexisNexis® Headnotes

Business & Corporate Law > ... > Corporate Formation > Place of Incorporation > Principal Office

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > Business Entities

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

[HN1](#) [down arrow] Place of Incorporation, Principal Office

For purposes of removal under [28 U.S.C.S. § 1441\(a\)](#), a corporation is deemed a citizen of any State by which it has been incorporated and of the state where it has its principal place of business. [28 U.S.C.S. § 1332\(c\)](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN2 Public Enforcement, State Civil Actions

N.Y. Gen. Bus. Law § 340 (1968 & Supp. 1982) prohibits every contract, agreement, arrangement, or combination which establishes a monopoly or restrains the free exercise of competition in any business, trade, or commerce in New York.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3 Public Enforcement, State Civil Actions

N.Y. Gen. Bus. Law § 340 (1968 & Supp. 1982) required the existence of a reciprocal relationship of commitment between two or more legal or economic entities before liability may be found, at least where the defendant is not a public utility subject to the New York Public Service Law.

Counsel: Roy M. Cohn, New York, New York, (Saxe, Bacon & Bolan, P.C., New York, New York, Pro Se), for Plaintiffs-Appellants.

Robert MacCrate, New York, New York, (Sullivan & Cromwell and Nadine Strossen, New York, New York, of Counsel), for Defendant-Appellee.

Judges: Oakes, Van Graafeiland and Meskill, Circuit Judges.

Opinion by: VAN GRAAFEILAND

Opinion

[*89] VAN GRAAFEILAND, Circuit Judge:

Saxe, Bacon & Bolan, P.C., a New York professional legal service corporation, and twelve of its affiliated attorneys appeal from a summary judgment of the United States District Court for the Southern District of New York (Sweet, J.) dismissing their claims for damages and injunctive relief under New York's Donnelly Act, N.Y. Gen. Bus. Law §§ 340-347 (McKinney 1968 & Supp. 1982). We affirm.

Martindale-Hubbell, Inc. (Martindale), a Delaware corporation with its principal place of business [*2] in New Jersey, publishes the Martindale-Hubbell Law Directory. The lawyer-listing portion of this publication is divided into two sections, "Geographical", which lists the members of the United States' and Canadian Bars, and "Biographical", which publishes at prescribed rates the "professional cards" of subscribing law offices. Aided by confidential recommendations from lawyers and judges, Martindale gives firms legal ability ratings ranging from a high of "a" to a low of "c" and decides whether to award each firm a general recommendations rating reflecting that firm's adherence to ethical standards. Only those firms that receive both a general recommendations rating and either an "a" or "b" legal ability rating are eligible for inclusion in the Biographical Section.

Appellants commenced this action in Supreme Court, New York County, in August of 1980, alleging that Martindale's refusal to list Saxe, Bacon in the Biographical Section constituted a violation of the Donnelly Act. Martindale removed the action to the Southern District of New York on the ground of diversity, 28 U.S.C. § 1441(a), and Judge Sweet twice denied motions to remand. By opinion dated [*3] June 25, 1982, Judge Sweet granted

Martindale's motion for summary judgment addressed to appellants' second amended complaint. This appeal followed.

Motions to Remand

Saxe, Bacon says that the district court's decision not to remand this suit was error, since, in Saxe, Bacon's view, professional corporations must be treated as partnerships for diversity purposes. We disagree. [HN1](#) For purposes of removal under [section 1441\(a\)](#), a corporation is deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. [28 U.S.C. § 1332\(c\)](#). Whether Saxe, Bacon, a New York firm, is a corporation for diversity purposes must be determined by New York law. [Baer v. United Services Auto. Ass'n, 503 F.2d 393, 394-95 \(2d Cir. 1974\); Brocki v. American Express Co., 279 F.2d 785, 786](#) (6th Cir.), cert. denied, 364 U.S. 871, 5 L. Ed. 2d 92, 81 S. Ct. 113 (1960).

Saxe, Bacon was organized under Article 15 of the New York Business Corporation Law. [N.Y. Bus. Corp. Law §§ 1**41 1501 et seq.](#) (McKinney Supp. 1982). Article 15 was enacted to permit professionals "to utilize the corporate form of business to permit them to organize their activities more efficiently and to make available to them and to their employees Federal tax benefits now accorded to executives and employees in all other business endeavors." [Udel v. Udel, 82 Misc.2d 882, 883, 370 N.Y.S.2d 426 \(1975\)](#) (quoting N.Y. Legis. Ann., 1970, p. 529). Although the ethical and professional obligations which individual shareholders of professional corporations owe their clients preclude the grant to them of all the benefits of incorporation, *id.*, see Bus. Corp. Law §§ 1504-1512, except as so limited, the provisions of New York's Business Corporation Law applicable to ordinary business corporations are also applicable to professional corporations. Bus. Corp. Law § 1513. See, e.g., [Connell v. Hayden, 83 A.D.2d 30, 58-59, 443 N.Y.S.2d 383 \(1981\)](#). Saxe, Bacon is a corporation under New York Law and is therefore a citizen of New York for purposes of [28 U.S.C. § 1332\(c\)](#).

The question whether the New Jersey residence of three of the individual [\[*5\]](#) plaintiffs destroys the complete diversity required for federal jurisdiction has been answered in the negative by the district court in an opinion reported in 521 F. Supp. at 1046. We will not attempt to enlarge [\[*90\]](#) upon the district court's thorough and well-reasoned discussion.

We find no merit in appellants' contention that, assuming the district court had jurisdiction in this matter, it nonetheless should have abstained from exercising it. See [Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-19, 47 L. Ed. 2d 483, 96 S. Ct. 1236 \(1976\); Quinn v. Aetna Life & Cas. Co., 616 F.2d 38, 41 \(2d Cir. 1980\)](#).

The Merits

[HN2](#) New York's Donnelly Act prohibits "every contract, agreement, arrangement or combination" which establishes a monopoly or restrains the free exercise of competition in any business, trade or commerce in [New York. Gen. Bus. Law § 340](#) (McKinney 1968 & Supp. 1982). Appellants have made no showing that Martindale's allegedly wrongful conduct falls within this statutory prohibition. Despite [\[*6\]](#) appellants' allegations upon information and belief that appellee acted in concert with three named individuals, it is clear, from the uncontested affidavits of those persons and appellants' Local Rule 3(g) statement, that there is no genuine issue of fact concerning the falsity of this allegation.

[HN3](#) The New York courts have interpreted the Donnelly Act to require the existence of a "reciprocal relationship of commitment between two or more legal or economic entities" before liability may be found, [State v. Mobil Oil Corp., 38 N.Y.2d 460, 464, 381 N.Y.S.2d 426, 344 N.E.2d 357 \(1976\)](#), at least where the defendant is not a public utility subject to the New York Public Service Law, *id. at 466 n.4*. We already have taken cognizance of that interpretation, [Venture Technology, Inc. v. National Fuel Gas Co., 685 F.2d 41, 42](#) & n.1, 45 (2d Cir.), cert. denied, [459 U.S. 1007, 103 S. Ct. 362, 74 L. Ed. 2d 398 \(1982\)](#), and have no reason to believe that this was done in error. As in the case of [Hester v. Martindale-Hubbell, Inc., 659 F.2d 433 \(4th Cir. 1981\)](#), [\[*7\]](#) cert. denied, 455 U.S. 981, 71 L. Ed. 2d 691, 102 S. Ct. 1489 (1982), which was decided under the similar provisions of [section 1](#) of the

Sherman Act, [15 U.S.C. § 1](#), Martindale's unilateral refusal to publish Saxe, Bacon's "professional card" was not unlawful.

Assuming for the argument that a unilateral refusal to deal falls within the scope of the Donnelly Act, appellants do not contend that appellee's refusal to list Saxe, Bacon had, or was intended to have, an anti-competitive effect in the market in which appellee competes -- the publishing of legal directories. See [United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 \(1956\)](#). Under established principles of [antitrust law](#), appellee had the right in such circumstances to exercise its independent discretion as to the parties with whom it would deal. [United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#); 3 Von Kalinowski, [Antitrust Laws and Trade Regulation](#) § 8.02[4] (1982); see [Official Airline Guides, Inc. v. FTC, 630 F.2d 920 \(2d Cir. 1980\)](#), cert. denied [\[**8\]](#), 450 U.S. 917, 67 L. Ed. 2d 343, 101 S. Ct. 1362 (1981); [Dior v. Milton, 9 Misc.2d 425, 441, 155 N.Y.S.2d 443](#), aff'd, 2 A.D.2d 878, 153 N.Y.S. 2d 826 (1956).

The judgment of the district court is affirmed.

End of Document



Scott v. Sioux City

United States District Court for the Northern District of Iowa, Western Division.

June 17, 1983

No. C 79-4009.

Reporter

1983 U.S. Dist. LEXIS 16160 *; 1983-2 Trade Cas. (CCH) P65,589

Gene P. Scott, et al. v. The City of Sioux City, Iowa, et al.

Core Terms

immunity, urban renewal, municipal, defendants', summary judgment motion, state action, displace, urban renewal law, state policy, anticompetitive, supervision, Antitrust, powers

LexisNexis® Headnotes

Governments > State & Territorial Governments > Claims By & Against

HN1 [down arrow] **State & Territorial Governments, Claims By & Against**

An expression of state policy is sufficient to establish immunity if it is comprised of two elements. The legislature must have authorized the challenged activity and it must have done so with an intent to displace competition. A specific, detailed legislative authorization of monopoly service need not exist to infer the necessary state intent.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

HN2 [down arrow] **Antitrust & Trade Law, Exemptions & Immunities**

Sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Building & Housing Codes

Governments > Public Improvements > Community Redevelopment

Business & Corporate Compliance > ... > Environmental Law > Land Use & Zoning > Comprehensive & General Plans

Real Property Law > Zoning > General Overview

HN3 **Zoning, Building & Housing Codes**

Iowa Code § 403.12 provides, in part: For the purpose aiding in the planning, undertaking or carrying out of an urban renewal project located within the area in which it is authorized to act, any public body may, upon such terms, with or without consideration, as it may determine: Do any and all things necessary to aid or cooperate in the planning or carrying out of an urban renewal project; Plan or replan, zone or rezone any part of the public body or make exceptions from building regulations.

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

HN4 **Monopolies & Monopolization, Actual Monopolization**

The challenged restraint does not have to be necessary in order for a court to find legislative intent to displace competition.

Counsel: [*1] David E. Vohs, Emmanuel S. Bikakis and Wm. L. Heubaum, Sioux City, Iowa, for plaintiffs

Patrick Nupent, Sioux City, Iowa, Lance A. Coppock and Edward W. Remsburg, Des Moines, Iowa, for City of Sioux City; Timothy W. Shuminsky, Sioux City, Iowa, for Metro Center, for defendants

Opinion by: O'BRIEN

Opinion

O'BRIEN, D.J.: This matter comes before the Court pursuant to the defendants' motion to reconsider this Court's Order of May 3, 1983 in light of the recent opinion of the Eighth Circuit Court of Appeals in *Gold Cross Ambulance v. City of Kansas City*, No. 82-1913 (8th Cir. 4/26/83). In the alternative, the defendants request that this Court certify an interlocutory appeal pursuant to 28 U.S.C. 1292. The Court held a hearing in this matter at which plaintiffs and defendants were represented. This Court, having reconsidered its May 3, 1983 Order in light of *Gold Cross Ambulance*, now grants the defendants' motion for summary judgment.

The facts and circumstances leading to the filing of the complaint in this matter have been adequately set forth in this Court's prior opinions. This Court has twice denied motions for summary judgment when the defendants raised the state action immunity [*2] of Parker v. Brown 317 U.S. 341 (1943). In this Court's Order of December 17, 1982, the Court held that state zoning laws do not confer Parker immunity on the defendants in this case. In doing so, the Court relied heavily on the case of Westborough Mall v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982). In this Court's Order of May 3, 1983, a claim of Parker immunity under Iowa urban renewal law was rejected. However, it appears to the Court that its analysis of Parker immunity in the May 3, 1983 Order has been rendered inaccurate by the Eighth Circuit Court of Appeals' ruling in *Gold Cross Ambulance*.

This Court's May 3, 1983 Order

There were several concerns that prompted the Court to reject Parker immunity based on Iowa urban renewal law. First, this Court examined what it believed to be strong language in Community Communications v. City of Boulder, 455 U.S. 40 (1982), and Westborough Mall, supra, requiring that the state policy "clearly articulate and affirmatively express" an approval of the challenged anti-competitive activity. Analogizing this case to Boulder, this Court held that "the powers of eminent domain and rezoning do not necessarily contemplate that these [*3] powers will be

used in an anticompetitive manner.¹ (Emphasis added.) In light of Gold Cross Ambulance, the Court now believes that its use of the words "necessarily contemplate" was inaccurate.

Second, this Court was persuaded that the "active supervision" requirement for state action immunity set forth in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), applied in cases involving municipal defendants. As authority for this proposition, this Court noted that the Midcal case cited *Lafayette v. Louisiana Power and Light*, 435 U.S. 387 (1978), for the active supervision requirement. Lafayette, of course, was a case involving a municipal defendant.² However, this portion of this Court's May 3, 1983 opinion is also rendered questionable in light of Gold Cross Ambulance.

Finally, in support of their motion for summary judgment, the defendants cited Areeda, Antitrust Immunity for "State Action" after Lafayette, 95 Harv. L. Rev. 435 (1981). This Court discounted the persuasiveness of this law review article because it appeared to be critical of recent Supreme [*4] Court cases and was, in this Court's opinion, directed more towards the author's view of what the law ought to be as opposed to what the law is. This conclusion is also somewhat inaccurate after Gold Cross Ambulance.

The Effect of Gold Cross Ambulance on Parker Immunity Claims

Under Gold Cross Ambulance, it would appear to this Court that **HN1**[[↑]] an expression of state policy is sufficient to establish Parker immunity if it is comprised of two elements. The legislature must have authorized the challenged activity and it must have done so with an intent to displace competition. The Gold Cross Court emphasized language in *Lafayette v. Louisiana Power and Light, supra*, stating that a specific, detailed legislative authorization of monopoly service need not exist to infer the necessary state intent.

In other words, a **HN2**[[↑]] sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity. Areeda, *Antitrust Law*, supra, para. 212.3, at 54; Areeda, Antitrust Immunity for "State Action" after Lafayette, 95 Harv. L. Rev. 435, 446 (1981).³

In [*5] the context of the matter now before this Court, an important portion of the Gold Cross Ambulance case is the holding that active state supervision is not an element of Parker immunity for government defendants exercising traditional government functions such as the protection of public health and safety. This is also consistent with the opinion of Professor Areeda, who states that the courts requiring active supervision of governmental defendants are in error, Areeda, Antitrust Immunity for "State Action" after *Lafayette, supra*, at n. 50.

Application of Gold Cross Ambulance to Scott v. City of Sioux City

This Court, in its May 3, 1983 Order, noted the broad authority given to the City to conduct urban renewal activities. Among those activities authorized are as follows:

403.6 Powers of the Municipality. Every municipality shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this chapter, . . .

HN3[[↑]] 403.12 Powers of the Municipality.

1. For the purpose aiding in the planning, undertaking or carrying out of an urban renewal project located within the area in which it is authorized to act, any public body may, upon such [*6] terms, with or without consideration, as it may determine:

* * *

¹ May 3, 1983 Order at p. 7.

² Actually, the municipality was a defendant to a counterclaim.

³ Gold Cross Ambulance slip op. at pp. 12-13.

(c) Do any and all things necessary to aid or cooperate in the planning or carrying out of an urban renewal project;

* * *

(h) Plan or replan, zone or rezone any part of the public body or make exceptions from building regulations.

(Code of Iowa Chapter 403) (emphasis added). Thus, it appears from these sections and others contained in Chapter 403 that the municipality was given both general and specific powers to effectively provide for urban renewal.

The second question under Gold Cross Ambulance is whether the legislature authorized the activity with an intent to displace competition. If the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity, then the element of intent is satisfied. In Central Iowa Refuse Systems v. Des Moines Metropolitan Area Solid Waste Agency, No. 79-32-1 (S.D. Iowa 12/9/82), Chief Judge Stuart found, in the context of a solid waste disposal operation, that anticompetitive activity was necessary in order to assure financial protection for investors who bought bonds to support the project. If this example of "necessity" is accurate, [*7] it would surely apply to the matter now before this Court since approximately \$30 million in public financing was raised to support the Sioux City urban renewal project.

Under Gold Cross Ambulance, [HN4](#) [↑] the challenged restraint does not have to be necessary in order for the Court to find legislative intent to displace competition. If the challenged restraint is merely a reasonable consequence of engaging in urban renewal projects, then there is a sufficient inference of state intent to displace competition. The term "reasonable" has been defined as "fit and appropriate to the end in view," Black's Law Dictionary, 4th ed., p. 1431. The goal of urban renewal, of course, is to rehabilitate portions of the city that have suffered severe economic setbacks by concentrating municipal resources in the blighted area in an attempt to promote economic prosperity in the area. In light of the goals of urban renewal, the broad authority afforded the City to accomplish it, and the practical difficulties in achieving such a task, the Court cannot say that the displacement of competition in outlying areas was an unreasonable consequence of engaging in urban renewal.

The [plaintiffs] attempt [*8] to distinguish Gold Cross Ambulance by arguing that urban renewal is not a "traditional governmental function" as was present in Gold Cross Ambulance. The Court, in its May 3, 1983 Order, held that it is a traditional government function, p. 7. This conclusion is supported by the declaration of policy contained in the Iowa Urban Renewal Law, Code of Iowa Chapter 403:

It is hereby found and declared that there exist in municipalities of the state slum and blighted areas, as herein defined, which constitute a serious and growing menace, injurious to the public health, morals and welfare of the residents of this state; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime, constitutes an economic and social liability imposing onerous municipal burdens . . . and that the prevention and elimination of slums and blighted areas is a matter of state policy and state concern in order that the state in its municipalities shall not continue to be endangered by areas which are focal centers of disease, promote juvenile delinquency and consume an excessive portion of state revenues because of the extra services required for police, fire, [*9] accident, hospitalization and other forms of public protection, services and facilities.

Thus, the Court still believes that urban renewal is a traditional governmental function as the term is used in Gold Cross Ambulance.

The [plaintiffs] also direct the Court's attention to [*Neyens v. Roth, 326 N.W. 2d 294 \(Iowa 1982\)*](#), a state unfair competition case, wherein the Iowa Supreme Court refused to extend the state statutory counterpart of Parker immunity to actions taken pursuant to the Iowa home rule amendment. The Court notes that the Neyens opinion requires "active state supervision" as part of its Parker immunity. Gold Cross Ambulance, as previously noted, has specifically abandoned this requirement in federal antitrust cases. The Neyens opinion did not address Iowa urban renewal law. For these reasons, the Neyens case is distinguishable.

In this Court's Order of December 17, 1982, the Court denied the City Council defendants' claim of legislative immunity under [*42 U.S.C. 1983*](#) for two reasons. First, the case of [*Gorman Towers v. Bogoslavsky, 626 F. 2d 607*](#)

(8th Cir. 1980), seriously questioned whether zoning fell into the category of legislative functions protected by [*10] the immunity. Second, the Court held that a conspiracy to restrain trade and to monopolize were outside of the scope of clear legislative functions. The preceding analysis with respect to state action immunity suggests that the defendants were acting to authority given them under the law of the State of Iowa. Therefore, the defendants who were sued as members of the City Council have absolute immunity from suit under 42 U.S.C. 1983. On this basis, these defendants' motion for summary judgment is sustained. Having determined that a rational (reasonable) relationship existed between the challenged activities and Iowa urban renewal law, the Court will sustain the City of Sioux City's motion for summary judgment which attacks plaintiffs' equal protection claim. As in Gold Cross Ambulance, no fundamental right or suspect class is involved here and, thus, the Court looks only to see if a rational relationship exists between the challenged activity and the statute. The Court has found that such a relationship exists.

In granting defendants' motion for summary judgment, the Court sympathizes with the plaintiff landowners. One day they had something very valuable and, within a matter [*11] of years, the City sacrificed it for its project. However, the Court cannot write a new antitrust law that flies in the face of Gold Cross Ambulance. This Court has denied summary judgments on the premise that it was confining the exercise of state granted power to anticompetitive activities that were "clearly articulated and affirmatively expressed" as state policy. Gold Cross Ambulance expands the parameters to all situations where anticompetitive activity is reasonable under a state statutory scheme. On this basis, the Court concludes that the defendants acted within the Parker immunity.

Upon the foregoing,

IT IS Therefore Ordered that defendants' motion to reconsider is granted. The defendants' motion for summary judgment on all claims is granted.

IT IS Further Ordered that the Clerk of Court for the Northern District of Iowa shall enter judgment in favor of the defendants and against the plaintiffs on all claims for relief. This action is therefore dismissed.

End of Document



Lotter v. Collagen Corp.

Appellate Court of Illinois, First District, Second Division

June 21, 1983, Filed

No. 82-2046

Reporter

115 Ill. App. 3d 696 *; 450 N.E.2d 1338 **; 1983 Ill. App. LEXIS 1937 ***; 71 Ill. Dec. 459 ****; 45 A.L.R.4th 999; 1983-2 Trade Cas. (CCH) P65,524

ANNETTE M. LOTTER, M.D., Plaintiff-Appellee, v. COLLAGEN CORPORATION et al., Defendants-Appellants

Prior History: [***1] Appeal from the Circuit Court of Cook County; the Hon. Harold A. Siegan, Judge, presiding.

Disposition: Reversed and remanded.

Core Terms

Collagen, patients, preliminary injunction, patent, antitrust, monopoly, circuit court, malpractice

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1 [] **Injunctions, Preliminary & Temporary Injunctions**

In order for a preliminary injunction to issue, the movant must show, *inter alia*, he or she has a lawful right in need of protection.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN2 [] **Actual Monopolization, Anticompetitive & Predatory Practices**

In the absence of a purpose to create or maintain a monopoly, an **antitrust law** does not limit the right of the manufacturer engaged in an entirely private business, freely to exercise its own independent discretion as to parties with whom it will deal.

Patent Law > Ownership > Patents as Property

HN3 [] **Ownership, Patents as Property**

115 Ill. App. 3d 696, *696L⁴⁵⁰ N.E.2d 1338, **1338L⁹⁸³ Ill. App. LEXIS 1937, ***1L⁷¹ Ill. Dec. 459, ****459

Central to a patentee's legal monopoly is the right to prevent others from utilizing its discovery without its consent.

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

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Patent Law > Ownership > Patents as Property

HN4 Ownership & Transfer of Rights, Licenses

Incidental to the monopoly grant of a patent are the rights in the patentee to choose the licensees who will be authorized to practice the teaching of the patent.

Patent Law > Ownership > Patents as Property

HN5 Ownership, Patents as Property

The antitrust laws do not require a patent holder to forfeit the exclusionary power inherent in his patent the moment the patent affords him monopoly power over a pertinent market.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN6 Actual Monopolization, Anticompetitive & Predatory Practices

A private manufacturer retains his right to decide with whom he will deal so long as he does not intend to restrain competition or expand his monopoly and does not act coercively.

Counsel: John P. Scotellaro and John W. Rotunno, both of Bell, Boyd & Lloyd, of Chicago (Wilson, Sonsini, Goodrich & Rosati, of Palo Alto, California, of counsel), for appellants.

No brief filed for appellee.

Judges: JUSTICE HARTMAN delivered the opinion of the court. DOWNING, P.J., and STAMOS, J., concur.

Opinion by: HARTMAN

Opinion

[*697] [**1339] [****460] This controversy arises out of the business decision of defendant Collagen Corporation (Collagen) not to sell a product called Zyderm Collagen Implant (Zyderm) to plaintiff Annette Lotter, M.D. Count I of Lotter's amended complaint charged defendants Collagen, Judy Abbey, Robert Swartz, M.D., and Richard Roe, M.D., *inter alia*, with violating the Illinois Antitrust Act (Ill. Rev. Stat. 1981, ch. 38, par. 60 -- 1 *et seq.*) and the common law by conspiring together to restrain trade or commerce. Count II alleged that defendants violated the Uniform Deceptive Trade Practices Act (Ill. Rev. Stat. 1981, ch. 121 1/2, par. 311 *et seq.*) by making certain false representations with respect to Lotter. On August [***2] 19, 1982, the circuit court entered a written order granting Lotter's motion for a preliminary injunction from which this interlocutory appeal proceeds. 87 Ill. 2d R. 307(a)(1).

The issues raised on appeal include whether: Lotter established the prerequisites for preliminary injunctive relief; defendants were denied due process of law; the order complied with section 11 -- 101 of the Code of Civil Procedure (Ill. Rev. Stat. 1981, ch. 110, par. 11 -- 101); and the court properly allowed into evidence the letters written by Lotter's patients and the photographs of some of her patients. We reverse and remand with instructions.

At the hearing on Lotter's motion for a preliminary injunction, the president of Collagen, Howard Palefsky, stated that a patent, issued [*698] to Stanford University on the application of soluble collagen for soft tissue reconstruction, was ultimately licensed to Collagen for its use. Collagen has engaged in developmental and clinical testing, as well as marketing and sale of Zyderm since it received United States Food and Drug Administration clearance in July 1981. Collagen is concerned that the initial use of this product by physicians who may abuse [***3] it could ultimately ruin its availability for everyone. Under adverse examination, Palefsky stated that Collagen refuses to sell Zyderm [**1340] [****461] to Lotter because of her unfavorable reputation in the medical community.

The vice-president of marketing at Collagen, Judith Boshart, also testified as an adverse witness. She sought out information from others concerning the reputations of physicians with whom Collagen would be involved. Dr. Lotter had an inordinate number of lawsuits filed against her, lost her hospital privileges and had a patient die in her office from a phenol peel, which is a very common procedure. She made no independent investigation of Lotter.

Dr. Lotter testified that she belonged to numerous medical societies, won several academic awards and authored many publications. Since starting private practice in 1972, she performed over 8,000 surgical procedures. Of these, only 25, or three-tenths of one percent, had resulted in lawsuits against her, a much lower percentage than the national average. Most of the malpractice suits were settled; none resulted in a judgment against her. She resigned from her position at Grant Hospital because she [***4] was unable to comply with the hospital's bylaw requiring her to carry personal malpractice insurance. She was not then under investigation by the Illinois Department of Registration and Education. Based on her education and experience, she would be able to use Zyderm professionally and competently.

Zyderm is designed to elevate depressions in the skin and reduce disfigurement. The safety of the product is insured by pretesting the patient through administering a very small dosage. Two hundred of her patients were in need of Zyderm. She identified 21 sets of photographs, received in evidence, showing the specific skin problems of 21 patients. All had been treated to the fullest extent possible. Zyderm is the only further treatment available. All the patients desire this further treatment. Two of her patients were suicidal due to the nature of their appearance. Lotter introduced documentary evidence revealing that, until that time, the Medical Disciplinary Board of the State of Illinois found her not guilty of gross medical malpractice, "manifest" professional incompetence, or poor standards of care in her treatment of the patient who died in her office.

[*699] On the [***5] seventh day of the hearing, during Collagen's direct examination of its first defense witness, Palefsky, the court stated that it had "heard enough," and was ready to order injunctive relief. It refused to allow Collagen to complete Palefsky's testimony or to put on the remainder of its defense. Collagen offered to prove that Lotter lost her malpractice insurance because the insurance company felt that she presented an excessive risk due to the number of malpractice suits filed against her. Collagen was also prepared to introduce a certificate showing that Lotter was currently under investigation by the Illinois Department of Registration and Education.

The court's written order required: Collagen to "prepare" Lotter for use of Zyderm; Collagen to ship to Lotter two six-syringe boxes of "test" doses; Lotter to transmit to Collagen case report forms denoting the results of Zyderm testing; Collagen to ship one six-syringe box for each patient showing negative test results in accordance with Collagen's customary procedures, to a maximum of 12 boxes. This interlocutory appeal followed. On September 1, 1982, this court stayed the order of the circuit court during the pendency of the [***6] appeal.

I

Lotter previously moved to dismiss the interlocutory appeal, contending that the controversy is moot because of this court's stay of the preliminary injunction order and the lapse of time since the latter order was entered. She

115 Ill. App. 3d 696, *699 IL⁴50 N.E.2d 1338, **1340 IL⁴983 Ill. App. LEXIS 1937, ***6 IL⁴71 Ill. Dec. 459, ****461

asserted that the emergency status of her patients "no longer exists" and she would no longer object to the vacation of the preliminary injunction order. That motion was denied on March 1, 1983. We briefly comment on the reason for that denial. Although an appellate court will not review a case merely to resolve moot or abstract questions, to establish precedent, or to render a judgment to guide future potential litigation ([La Salle National Bank v. City of Chicago \(1954\)](#), 3 Ill. 2d 375, 379, [****462] [**1341] 121 N.E.2d 486; [Kohan v. Rimland School for Autistic Children \(1981\)](#), 102 Ill. App. 3d 524, 527, 430 N.E.2d 139), Lotter's motion failed to explain how the passage of time eliminated the emergency status of the patients in need. Her motion is contrary to the evidence she introduced at the proceeding before the circuit court, and her subsequent contention, that her inability to provide treatment requiring the "use of Zyderm [***7] * * * [was] effectively destroying her medical practice." More importantly, her motion declares an intent to proceed at the trial level with the merits of her complaint. Among the prayers for relief therein set forth is one for a permanent injunction based upon the same theories that were utilized at the preliminary injunction hearing. On the other hand, Collagen [*700] seeks a judicial determination as to its rights and duties, to which it is entitled. ([Two Hundred Nine Lake Shore Drive Building Corp. v. City of Chicago \(1971\)](#), 3 Ill. App. 3d 46, 49, 278 N.E.2d 216.) Accordingly, the motion to dismiss the appeal as moot was denied.

II

Lotter has failed to file a brief on appeal. Nevertheless, we elect to decide the merits of the case. [First Capitol Mortgage Corp. v. Talandis Construction Corp. \(1976\)](#), 63 Ill. 2d 128, 133, 345 N.E.2d 493.

Collagen contends that the circuit court erroneously entered the preliminary injunction because Lotter failed to establish any of the prerequisites for injunctive relief. In particular, Collagen maintains that Lotter did not demonstrate that she has a clearly ascertained right to purchase Zyderm from Collagen. [HN1](#)[¹] In order for [***8] a preliminary injunction to issue, the movant must show, *inter alia*, he or she has a lawful right in need of protection. [Kaplan v. Kaplan \(1981\)](#), 98 Ill. App. 3d 136, 141, 423 N.E.2d 1253.

Collagen maintains that it has the unilateral right to determine with whom it will and will not deal, asserting that [HN2](#)[¹] in the absence of a purpose to create or maintain a monopoly, an **antitrust law** does not limit the right of the manufacturer engaged in an entirely private business, freely to exercise its own independent discretion as to parties with whom it will deal. ([United States v. Colgate & Co. \(1919\)](#), 250 U.S. 300, 307, 63 L. Ed. 992, 997, 39 S. Ct. 465, 468; see [Reeves, Inc. v. Stake \(1980\)](#), 447 U.S. 429, 438-39, 65 L. Ed. 2d 244, 252, 100 S. Ct. 2271, 2278.) [HN3](#)[¹] Central to a patentee's legal monopoly is the right to prevent others from utilizing its discovery without its consent. ([Zenith Radio Corp. v. Hazeltine Research, Inc. \(1969\)](#), 395 U.S. 100, 135, 23 L. Ed. 2d 129, 155, 89 S. Ct. 1562, 1583.) [HN4](#)[¹] Incidental to the monopoly grant of a patent are the rights in the patentee to choose the licensees who will be authorized to practice the teaching of the patent. ([La Salle](#) [***9] [Street Press, Inc. v. McCormick & Henderson, Inc. \(7th Cir. 1971\)](#), 445 F.2d 84, 95.) [HN5](#)[¹] The antitrust laws do not require a patent holder to forfeit the exclusionary power inherent in his patent the moment the patent affords him monopoly power over a pertinent market. ([SCM Corp. v. Xerox Corp. \(2d Cir. 1981\)](#), 645 F.2d 1195, 1204, cert. denied (1982), 455 U.S. 1016, 72 L. Ed. 2d 132, 102 S. Ct. 85.) [HN6](#)[¹] A private manufacturer retains his right to decide with whom he will deal so long as he does not intend to restrain competition or expand his monopoly and does not act coercively. ([Official Airline Guides, Inc. v. FTC \(2d Cir. 1980\)](#), 630 F.2d 920, 927-28, cert. [¹*701] denied (1981), 450 U.S. 917, 67 L. Ed. 2d 343, 101 S. Ct. 1362.) Although the foregoing authorities dealt with Federal, rather than State, antitrust laws, under our Illinois Antitrust Act, our courts are bound to follow Federal court construction of statutes similarly worded, as in this case. Ill. Rev. Stat. 1981, ch. 38, par. 60 -- 11.

In the case *sub judice*, Lotter offered no evidence that defendants conspired together to unreasonably restrain competition or to expand their monopoly. The circuit [***10] court's decision to issue the preliminary injunction was not based upon any finding that defendants violated the antitrust laws. Rather, during the course of the proceedings, the court formed the foundation for its decision as follows:

[**1342] [****463] "I don't think that a human being['s] well-being because of a patent is something to be restricted because of a patent. * * * I can see where an opener for a bottle cap has a patent. That would be something entirely different. But when you [Collagen's counsel] are telling me that a drug is something that you have a right to determine who in the world is going to get it, I disagree with you."

Thus, the circuit court apparently believed that since the product involved here was a medical drug to be used for purposes of health care, Collagen did not have the right to refuse to sell to Lotter. No precedent was offered to support the court's theory. In the absence of an antitrust violation or some other illegal purpose, Collagen had the right to decide not to sell Zyderm to Lotter and was not required to justify its business judgment by showing that Lotter was unqualified or incompetent. Lotter failed to establish [***11] a right to purchase Zyderm from Collagen on any other basis. Accordingly, the preliminary injunction was improperly entered and must be vacated upon reversal. In light of the foregoing disposition, other issues raised by appellant need not be addressed.

Reversed and remanded with instructions.

End of Document



Pinney Dock & Transp. Co. v. Penn Cent. Corp.

United States District Court for the Northern District of Ohio, Eastern Division

June 21, 1983

No. C80-1733

Reporter

600 F. Supp. 859 *; 1983 U.S. Dist. LEXIS 16113 **; 1983-2 Trade Cas. (CCH) P65,607

Pinney Dock & Transport Co., Plaintiff v. Penn Central Corp., et al., Defendants and Third-Party Plaintiffs v. Consolidated Rail Corp., Third-Party Defendant

Core Terms

railroads, dock, anti trust law, rates, conspiracy, iron ore, antitrust, immunized, competitor, defendants', transportation, carriers, damages, conspired, ratemaking, allegations, Shipping, monopolize, regulation, charges, antitrust immunity, vessel, business of providing, plaintiff's claim, Lakes, cases, alleged conspiracy, ex-lake, practices, predatory

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Transportation Law > Carrier Duties & Liabilities > Through Rates

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Routes & Services

HN1[] Regulated Industries, Transportation

Under 49 U.S.C.S. § 1(4), the railroads are required to provide and furnish transportation upon reasonable request therefore, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto. Similarly, 49 U.S.C.S. § 1(10) and (11) mandate that the railroads establish reasonable rules with respect to the interchange of locomotives, rail cars, and other railroad property. However, despite the need for cooperation between the railroads and notwithstanding the Interstate Commerce Commission's oversight of that cooperation, the Interstate Commerce Act does not necessarily provide an impermeable shield of implied immunity from the antitrust laws for the railroad industry.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

Antitrust & Trade Law > Clayton Act > General Overview

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

Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a plain repugnancy between the antitrust and regulatory provisions will repeal be implied.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

HN3 [down] **Common Carrier Duties & Liabilities, Rates & Tariffs**

Congress has written an express immunity provision into the Interstate Commerce Act. Recognizing the need for cooperative activity among the railroads, Congress in 1948 amended the Interstate Commerce Act by adding 49 U.S.C.S. § 5b. Under § 5b, rail carriers are permitted to reach agreements as to rates, fares, classifications and a number of other railroad matters. Section 5(b)(9) provides that the railroads are relieved from the operation of the antitrust laws with respect to the making of such an agreement and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Interstate Commerce Commission. However, the pervasive regulation of railroad ratemaking activities by the Interstate Commerce Commission does not impliedly immunize all railroad ratemaking activities from the antitrust laws.

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

600 F. Supp. 859, *859L^A1983 U.S. Dist. LEXIS 16113, **16113

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

[**HN4**](#) [down] Antitrust & Trade Law, Regulated Industries

The Interstate Commerce Act, 49 U.S.C.S. § 5b(9), expressly authorizes certain agreements between competing railroads relating to rates, classifications, and other transportation matters. The section also allows the participating railroads to establish rules, regulations, and procedures for the joint consideration and implementation of rate schedules and classification systems, etc. When an agreement under this section is approved by the Interstate Commerce Commission, the participating railroads are expressly immunized from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

[**HN5**](#) [down] Railroads & Rail Transportation, Rates & Tariffs

See 49 U.S.C.S. § 5b(9).

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

[**HN6**](#) [down] Antitrust & Trade Law, Exemptions & Immunities

See 49 U.S.C.S. § 5b(9).

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

[**HN7**](#) [down] Railroads & Rail Transportation, Rates & Tariffs

Nothing in the structure of the Interstate Commerce Act suggests that the Interstate Commerce Commission can approve a conspiratorial ratemaking agreement between certain railroads to boycott and eliminate a direct competitor, or provide a remedy under the antitrust laws for the damages resulting from one.

600 F. Supp. 859, *859L^A1983 U.S. Dist. LEXIS 16113, **16113

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN8 [down] Railroads & Rail Transportation, Rates & Tariffs

See 49 U.S.C.S. § 5b(7).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Transportation Law > Carrier Duties & Liabilities > Through Rates

HN9 [down] Common Carrier Duties & Liabilities, Rates & Tariffs

See 49 U.S.C.S. § 15a(3).

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Transportation Law > Carrier Duties & Liabilities > Through Rates

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Transportation Law > Commercial Vehicles > Traffic Regulation

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN10 [down] Interstate Commerce, Restraints of Trade

The Interstate Commerce Act, 49 U.S.C.S. § 15a(3), only ensures that the Interstate Commerce Commission (ICC) will not disallow a reduced rail rate merely because it could potentially divert traffic away from competing modes of transportation such as trucks or airplanes. Section 15a(3) cannot in any way be read as stating that the ICC's approval of an agreement under the Act, 49 U.S.C.S. § 5a, shields a subsequent conspiracy to eliminate a direct competitor from the antitrust laws.

Governments > Legislation > Interpretation

HN11 [down] Legislation, Interpretation

The fears and doubts of the opposition to certain proposed legislation are no authoritative guide to the construction of that legislation. It is the sponsors that a court looks to when the meaning of the statutory words is in doubt. Remarks of the opposition made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. This is especially so with regard to the statements of legislative opponents who in their zeal to defeat a bill understandably tend to overstate its reach.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

600 F. Supp. 859, *859L^A1983 U.S. Dist. LEXIS 16113, **16113

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN12 [blue icon] Antitrust & Trade Law, Exemptions & Immunities

A conspiracy to eliminate a competitor cannot fall within 49 U.S.C.S. § 5b(9)'s limited grant of express antitrust immunity.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Transportation Law > Carrier Duties & Liabilities > Damages

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN13 [blue icon] Regulated Industries, Transportation

Antitrust damages may be recovered against rail carriers when they result from an enveloping conspiracy with its own illegal ends, the damages being measured not merely by the consequences flowing from the preference, but by those flowing from the conspiracy in all its comprehensive unity.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

HN14 [blue icon] Common Carrier Duties & Liabilities, Rates & Tariffs

With respect to transportation, a commodity rate is a rate on a specific commodity, or article, moving between specific points, sometimes in a specific direction, and sometimes for a specific minimum quantity. The purpose of the commodity rate is generally to provide a lower rate to reflect lower costs resulting from large scale movement or otherwise. The commodity rate can be higher than a class rate, but it usually is not.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > General Overview

HN15 [blue icon] Common Carrier Duties & Liabilities, Rates & Tariffs

With respect to transportation, a class rate is a rate resulting from a rating provided in a classification. While commodity rates are available only on limited commodities, a class rate can be found on practically any commodity. The rate in the class rate tariff is normally on class 100 commodities. To determine the class rate it is necessary to multiply the first class rate by a percentage figure applicable on its rating. In the uniform freight classification, the percentage of first class is automatically provided in the classification. That is, a class 87 would mean 87 percent of first class. Class rates were created to simplify the preceding process providing a specific rate on each commodity moved. A class tariff is a tariff containing only class rates.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

[**HN16**](#) Railroads & Rail Transportation, Rates & Tariffs

Railroad rates for ex-lake iron ore historically have been regarded as separate and distinct from the rates on all other commodities.

Antitrust & Trade Law > Regulated Industries > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

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

[**HN17**](#) Antitrust & Trade Law, Regulated Industries

Acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme. A conspiracy to eliminate a competitor and monopolize an industry falls outside the bounds of day-to-day railroad ratemaking. For this reason, such a conspiracy is subject to the harsh consequences of the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

[**HN18**](#) Standing, Clayton Act

Section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), provides a treble-damages remedy to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. Although § 4 of the Clayton Act's language is broad, questions of antitrust standing cannot be answered simply by reference to the broad language of § 4. Instead, the question requires a court to evaluate a plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. There are several factors to be analyzed by district courts in deciding antitrust standing questions. In addition to the threshold requirement that the claim be encompassed by the Clayton Act, these include (1) the nature of the plaintiff's alleged injury; (2) the directness or indirectness of the asserted injury; (3) whether the damage claims are highly speculative; and (4) the need to keep the scope of complex antitrust trials within judicially manageable limits.

Antitrust & Trade Law > Clayton Act > Scope

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

Antitrust & Trade Law > Clayton Act > General Overview

HN19 [] Antitrust & Trade Law, Clayton Act

Section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), plainly focuses on tangible economic injury. It may therefore be appropriate to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm. Difficulty of ascertainment should not be confused with a right of recovery. Another factor for consideration in determining the issue of standing under the Clayton Act is the strong interest in keeping the scope of complex antitrust trials within judicially manageable limits. Cases have stressed the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN20 [] Reviewability, Jurisdiction & Venue

The doctrine of primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

Counsel: [**1] Douglas J. Colton, of Wood, Lucksinger & Epstein, Washington, District of Columbia,

Harry C. Nester, of Hahn, Loeser, Freedheim, Dean & Wellman, Cleveland, Ohio,

Terry Warren & Carl F. Muller, of Warren & Young, Ashtabula, Ohio, Co-counsel, Ronald M. Dietrich.

Laurence Z. Shiekman, Richard M. Bernstein, Robert E. Heideck, of Pepper, Hamilton & Scheetz, Philadelphia, Pennsylvania,

Malvin E. Bank, George F. Karch, Thomas J. Collin, of Thompson, Hine & Flory, Cleveland, Ohio.

Myron N. Krottinger, of Burke, Haber & Berick, Cleveland, Ohio,

Carl L. Steinhause, of Jones, Day, Revis & Pogue, Cleveland, Ohio, Kenneth N. Hart, Robert J. Siverd, John E. Loptka, of Donovan, Leisure, Newton & Irvine, New York, New York,

R. W. Donneman, C. C. Rettberg, Jr., P. R. Hitchcock, Cleveland, Ohio.

Bryon D. Fair,

Eben G. Crawford, Cleveland, Ohio, Kenneth C. Anderson

Glenn M. Young, Washington, District of Columbia.

John Doar, Michael S. Devorkin, J. David Wade, of John Doar Law Office, New York, New York, Stephen J. Pollak, of Shea & Gardner, Washington, District of Columbia,

Sidley & Austin, Washington, District of Columbia

Judges: Thomas, Sr. J.

Opinion by: THOMAS

Opinion

[*862] [**2] Memorandum and Order

THOMAS, Sr. J.

In separate but related motions filed on April 15, 1982, defendants Baltimore & Ohio Railroad Company (B&O), Chesapeake & Ohio Railway Company (C &O), CSX Corporation, Chessie Systems, Inc. (sometimes collectively referred to as Chessie), Norfolk & Western Railway Company (N&W), and Bessemer & Lake Erie Railroad Company (B&LE) move to dismiss plaintiff Pinney Dock & Transport Company's (Pinney) complaint seeking damages for alleged

injuries to plaintiff's business and property caused by defendants' violations of [Sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1](#) and [2](#), [section 3](#) of the Clayton Act, [15 U. S. C. § 14](#) . . . and Ohio's Valentine Act.¹

Each defendant argues that the alleged activities underlying plaintiff's claims are expressly and impliedly immunized from the antitrust laws by the Interstate Commerce Act (ICA), and that the Interstate Commerce Commission (ICC) has exclusive jurisdiction over the substance of plaintiff's claims. Each defendant additionally asserts that plaintiff's treble damage claims are barred by the doctrine of [Keogh v. Chicago & Northwestern Ry., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. \[**3\] 47 \(1922\)](#). Defendant B&LE further contends that certain of plaintiff's claims should be dismissed either for lack of standing or "because they could not as a matter of law have caused direct or cognizable injury to plaintiffs." Finally, each defendant asserts that if this court does not dismiss plaintiff's complaint, "the case should be referred to the ICC under the doctrine of primary jurisdiction."

Since each of the parties has submitted factual exhibits in arguing the various issues, the court will apply [Rule 56 of the Federal Rules of Civil Procedure](#)'s summary judgment standards. Defendants' motions will be granted only if "there is no genuine issue as to any material fact and [defendants are] entitled to a judgment as a matter of law."

Before analyzing the various branches of defendants' motions, it is essential to review the principal allegations [**4] in this antitrust case.

Plaintiff, an Ohio corporation, provides dock and terminal services in Ashtabula, Ohio for goods moving over the Great Lakes. In its first amended complaint, plaintiff alleges that "from at least the mid-1950's" the defendants conspired and acted to monopolize "the business of providing dock services for iron ore and other goods moving over docks on the lower [*863] Great Lakes, and the business of providing land transportation for iron ore and other goods moving over such docks." Plaintiff further alleges that defendants concomitantly conspired and acted to "restrain trade in the business of providing water carriage for iron ore and other goods moving over docks on the lower Great Lakes, and in the business of building ships for such carriage."

Plaintiff asserts that defendants advanced the ends of the alleged conspiracy through a series of overt acts and practices, some of which are specifically set forth in the first amended complaint. The alleged overt acts include refusing to grant a competitive rail rate for the carriage of iron ore from Pinney Dock, arbitrarily placing Pinney Dock in a switching district where it was ineligible for competitive [**5] rail rates, and imposing unjustifiably high switching charges on the cars of a railroad competitor which sought to carry iron ore from Pinney Dock at competitive rail rates. Defendants are additionally accused of "deliberately and purposefully foreclosing Pinney Dock's development as an iron ore handling facility by . . . preventing and postponing the construction and use of the self-unloading vessels which Pinney Dock was designed to serve."

Plaintiff maintains that the above alleged overt acts and practices (and others) were planned and carried out through a series of unauthorized secret meetings and discussions and that coercion and intimidation were used to

¹The court does not address the related motion of defendant Penn Central Corporation at this time. See this court's memorandum and order of November 9, 1982.

- (1) [force] railroads to forego their right of independent action with respect to rail rates and services and other matters;
- (2) [force] railroads not to serve self-unloading vessels at railroad-owned docks; and
- (3) [force] railroads not to lower their dock handling charges on iron ore.

Plaintiff charges that defendants' alleged antitrust violations have effectively stifled technological progress and development in the construction and use of efficient dock facilities and vessels and impeded and prevented **[**6]** the development of non-rail modes of land transportation. Additional effects allegedly resulting from the charged conspiracy are: (1) that shippers were subjected to artificially and unjustifiably high rates and charges for dock and land transport services; and (2) that needed improvements in the efficiency, economy and competitiveness of dock and transport facilities were subverted.

Plaintiff further states that

as a direct and proximate result of the foregoing acts and violations, [plaintiff] has been greatly injured in its business and property because it was forestalled and excluded from participating in the business of providing dock services for various commodities, including iron ore, coal, and coke.

Plaintiff seeks treble damages under the federal antitrust laws and an order enjoining defendants from further violations of the federal and state antitrust laws.

I.

The court first addresses defendants' separate but parallel contentions that "the complaint should be dismissed because the matters at issue are within the exclusive jurisdiction of the Interstate Commerce Commission." Defendants argue that the Interstate Commerce Commission's pervasive regulation **[**7]** of railroad ratemaking activities supersedes the federal antitrust laws as to all "matters concerning the establishment of railroad rates." More precisely, defendants contend that the existence of the Interstate Commerce Act impliedly immunizes them from plaintiff's present antitrust action.

In support of their argument, defendants point out that the Interstate Commerce Act seeks to substitute collective action among the railroads under the supervision of the Interstate Commerce Commission for unrestrained competition between the railroads. Without question, the nature of the railroad industry necessitates collective action among competing carriers. For example, it is frequently necessary for one railroad to deliver freight to a destination located on the tracks of a competitor. Thus, [HN1](#)[↑] under 49 **[*864]** U. S. C. § 1(4), the railroads are required to "provide and furnish transportation upon reasonable request therefore, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto. . . ." Similarly, 49 U.S.C. § 1(10) and (11) mandate that the railroads establish reasonable rules with respect **[**8]** to the interchange of locomotives, rail cars, and other railroad property.²

However, despite the need for cooperation between the railroads and notwithstanding the ICC's oversight of that cooperation, the Interstate Commerce Act does not necessarily provide an impermeable shield of implied immunity from the antitrust laws for the railroad industry. In [Gordon v. New York Stock Exchange, 422 U. S. 659, 682-83, 45 L. I^{**91} Ed. 2d 463, 95 S. Ct. 2598 \(1975\)](#), the Supreme Court quoted language which has been oft repeated in the context of antitrust cases involving regulated industries:

Certain axioms of construction are now clearly established. [HN2](#)[↑] Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied. . . .

With that language in mind, the court turns to the relevant case law.

² The Interstate Commerce Act, 49 U. S. C. § 1, et seq., was recodified in 1978 as [49 U. S. C. § 10101, et seq.](#) While that recodification was not intended to make any "substantive change in the law" (see [section 3\(a\)](#) of P.L. 95-473, 92 Stat. 1466), it extensively revised the structure and language of the Act. Moreover, beginning in 1976, Congress made substantive changes in the Act culminating in the Staggers Rail Act of 1980, 94 Stat. 1895. This court will cite to the pre-1978 version of the ICA since its provisions were in effect during most of the period covered by the complaint.

In *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 (1945), the state of Georgia filed an antitrust suit against approximately 20 railroad companies³ alleging that the defendants conspired to fix railroad rates so as to discriminate against the state of Georgia and that the defendants used coercion in the fixing of discriminatory joint through rates. After examining selected provisions of the Interstate Commerce Act, including 49 U.S.C. §§ 1(4) and 6, the Court addressed the defendants' contention that the ICC had exclusive jurisdiction over railroad rate cases. Unequivocally emphasizing that the railroads were "subject to the antitrust laws," [**10] *id. at 456*, the Court observed that "conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act" and that Congress had never adopted legislation legalizing rate-fixing combinations. Failing to find a "clear repugnancy" between the Sherman Act and the Interstate Commerce Act, the Court left it to Congress to statutorily create any antitrust immunity which the railroad industry needed to function efficiently.

Similarly, in *Carnation Co. v. Pacific Conference*, 383 U.S. 213, 15 L. Ed. 2d 709, 86 S. Ct. 781 (1966), defendant shipping conferences argued that the Shipping Act "repealed all antitrust regulation of the rate-making activities of the shipping industry." Finding that the defendant associations of shipping companies' unlawful rate-making activities were not expressly immunized [**11] from Sherman and Clayton Act coverage by *section 15* of the Shipping Act, 46 U.S.C. § 814, the Court continued:

We do not believe that the remaining provisions of the Shipping Act can reasonably be construed as an implied repeal of all antitrust regulation of the shipping industry's rate-making activities . . . we have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust [*865] laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts.

Id. at 217-18. The Court further observed that the express immunity language inserted into the Shipping Act by Congress

must have been selected as a matter of deliberate choice in order to indicate the extent to which the industry's [**12] rate-making activities remain subject to the antitrust laws as well as the extent to which those activities are exempted from antitrust regulation.

Id. at 219-20.

As with the Shipping Act, **HN3**[] Congress has written an express immunity provision into the Interstate Commerce Act. Recognizing the need for cooperative activity among the railroads and responding in part to the Court's decision in *Georgia v. Pennsylvania R. Co., supra*, Congress in 1948 amended the Interstate Commerce Act by adding 49 U.S.C. § 5b. See H.R. Rep. No. 1100, 80th Cong., 2nd Sess. 1845-1848, reprinted in 1948-2 U.S. Code Cong. & Ad. News 1844. Under section 5b, rail carriers are permitted to reach agreements as to rates, fares, classifications and a number of other railroad matters. 49 U.S.C. § 5(b)(9) provides that the railroads are "relieved from the operation of the antitrust laws with respect to the making of such [an] agreement and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the [Interstate Commerce] Commission."

This court concludes that the "pervasive regulation of railroad ratemaking [**13] activities by the Interstate Commerce Commission" does not impliedly immunize all railroad ratemaking activities from the antitrust laws. Any immunity which the defendants can invoke in this case must be found in the Interstate Commerce Act's express grant of antitrust immunity. To the scope and breadth of that immunity, attention is now turned.

³The suit was filed in Georgia's capacity as both *parens patriae* and as a proprietor to redress wrongs suffered by the state as the owner and operator of various other state institutions.

II.

A.

Defendants argue that plaintiff's antitrust allegations are based upon coordinated ratemaking activities which were conducted in accordance with a joint ratemaking agreement expressly approved by the Interstate Commerce Commission. Defendants contend that their joint ratemaking activities are expressly immunized from the antitrust laws by section 5a of the Interstate Commerce Act, as amended by the Reed-Bulwinkle Act, 49 U.S.C. § 5(b) (1948).

HN4 [↑] 49 U.S.C. § 5b(9) expressly authorizes certain agreements between competing railroads relating to rates, classifications, and other transportation matters. The section also allows the participating railroads to establish rules, regulations, and procedures for the joint consideration and implementation of rate schedules and classification systems, etc. When an agreement under this section [**14] is approved by the ICC, the participating railroads are expressly immunized

from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.⁴

⁴ **HN5** [↑] 49 U.S.C. § 5b(9) sets the standard for ICC approval of an agreement among rail carriers:

Application to Commission for approval of agreements, rules and regulations

(2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6) of this section) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) of this section should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

HN6 [↑] 49 U.S.C. § 5b(9), the express immunity provision, provides in full:

Relief from operation of antitrust laws

(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

The validity of the ICC approved *Eastern Railroads -- Agreements, infra*, is not at issue in this case. Thus, none of the prohibitions in paragraphs (4), (5), and (6) set out below are claimed or found to be applicable. However, the plaintiff is not precluded from arguing that defendants agreed to forego their rights of independent action in violation of their agreement as part of a conspiracy to eliminate competition.

Agreements between carriers of different classes

(4) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping-car companies are carriers of one class; pipe-line companies are carriers of one class; carriers by motor vehicle are carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

Pooling or division agreements

[**15] [*866] Defendants in this case have jointly participated in a formal ICC approved eastern railroads rate bureau agreement since 1950. See *Section 5a Application No. 3, Eastern Railroads-Agreements*, 277 I.C.C. 279 (1950). Since the ICC approved agreement has (with minor modifications not relevant to this case) been in effect throughout the period of the alleged conspiracy, defendants argue that any rate actions they took which affected either Pinney Dock or iron ore traffic in general fell within the scope of section 5b(9)'s express grant of antitrust immunity. In response, plaintiff Pinney contends that defendants' conduct is not expressly immune under the Reed-Bulwinkle Act. Plaintiff urges that

the group boycott charged in this case is not protected by the Reed-Bulwinkle Act and is unapprovable by the ICC. Section 5a [49 U.S.C. § 5b] does not immunize conspiracies which have the purpose and effect of eliminating a competitor.

In determining whether the activities of defendants alleged by the plaintiff fall within the scope of section 5b(9)'s express grant of antitrust immunity, this court's analysis must commence with a study of the statute itself.

B.

[**16] Defendants maintain that their argument is supported by the "statutory language." This court, however, reads that statute's language differently than defendants. Certainly, the making of the Eastern Railroads Agreement approved by the ICC in 1950 is immunized from the reach of the antitrust laws by 49 U.S.C. § 5b(9). Nonetheless, the issue confronting this court is whether the ICC's approval of the defendants' basic 5a agreement operates as either an express or implied approval of a later [*867] "agreement" to eliminate a competitor and monopolize a market. Nothing in the actual language of section 5b(9) set forth earlier either suggests that it does or permits that implication.

Nonetheless, defendants argue that apart from the language of section 5b(9), "the structure of section 5a suggests that there is no need to create a predatory intent exception because such complaints are covered by the ICC's regulation." In support of this argument, defendants correctly observe that under 49 U.S.C. § 5b(2) the ICC only approves those "agreements" which are "in furtherance of the national transportation policy." However, nothing in the present record indicates that the ICC ever "approved" [*17] or even was aware of defendants' alleged predatory conspiracy to boycott and eliminate plaintiff as a competitor. The 1950 Eastern Railroads Agreement, which merely establishes the procedures for discussing rate matters and reaching rate agreements, cannot be read as impliedly or expressly "approving" such a predatory conspiracy.

In an attempt to bolster their "structure" argument, defendants note that under 49 U.S.C. § 5b(7) the ICC is authorized to investigate and determine whether any agreement it has approved conforms with the terms and conditions upon which its approval was earlier granted. Moreover, the ICC can modify or terminate an existing agreement where necessary.⁵ [*19] But the conformance of the Eastern Railroads Agreement of 1950 to the

(5) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this title is applicable.

Agreements for determining matters through joint consideration

(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

⁵ [HN8](#) [↑] 49 U.S.C. § 5b(7) reads in full:

(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2) of this section, or whether any such terms and conditions are not necessary for purposes of conformity with such standard, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the

ICC's requirements is not an issue in this case. The issue is whether defendants illegally conspired to boycott and eliminate a direct competitor so as to monopolize a market. [HN7](#) Nothing in the structure of the Interstate Commerce Act suggests that the ICC can approve such a conspiratorial agreement,⁶ or provide a remedy under the antitrust laws for the damages resulting from one. See [Carnation Co. v. Pacific Conference, 383 U.S. 213, 181 224, 15 L. Ed. 2d 709, 86 S. Ct. 781 \(1966\)](#).

Defendants additionally point to 49 U.S.C. § 15a(3) and argue that its language is "inconsistent" with applying the antitrust laws to rail carriers. Defendants cite the [\[**20\]](#) portion of [HN9](#) section 15a(3) which states:

Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy. . . .

[\[*868\] HN10](#) Section 15a(3) only ensures that the ICC will not disallow a reduced rail rate merely because it could potentially divert traffic away from competing modes of transportation such as trucks or airplanes. See [ICC v. New York, New Haven & Hartford Railroad, 372 U.S. 744, 83 S. Ct. 1038, 10 L. Ed. 2d 108 \(1963\)](#). Section 15a(3) cannot in any way be read as stating that the ICC's approval of a 5a agreement shields a subsequent conspiracy to eliminate a direct competitor from the antitrust laws.

The court therefore concludes that neither the actual language of 49 U.S.C. § 5b(9) nor the structure of section 5a as a whole can be read as shielding the conspiracy alleged by plaintiff from the antitrust laws.

C.

Defendants argue that the legislative history of the Reed-Bulwinkle Act illustrates "that Congress did not contemplate a predatory intent exception to section 5a because plenary and exclusive regulation [\[**21\]](#) of collective ratemaking, including control of any predatory conspiracies, was vested with the ICC."

By way of background, joint railroad bureaus, associations, committees and conferences existed in large numbers before the passage of section 5b, the Reed-Bulwinkle Amendment. See H.R. Rep. No. 1100, 80th Cong., 2nd Sess., reprinted in 1948 U. S. Code Cong. & Ad. News, 1844-1845. Cooperative action among the railroads was recognized by Congress as critical for integrating the country's railroad into a single efficient shipping network. For instance, "carriers could not be expected to adjust their rates intelligently so as to fulfill the requirements of the [Interstate Commerce Act] unless they were permitted to organize. . . ." *Id.* at 1849. As the House Report states:

The carriers cannot effectively meet the requirements of the law, or provide the type of transportation that the public has come to expect and demand of them, if each is to be compelled to go it alone without a reasonable degree of consultation and agreement with other carriers. . . .

Id. at 1851. The Reed-Bulwinkle Amendment was seen as necessary to ensure that the railroads could engage [\[**22\]](#) in cooperative ratemaking without fear that their activities might be subject to prosecution under the

extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

Paragraph 2 is set forth slip op. at 11, *supra*.

⁶Indeed, in *Iron Ore Rate Cases*, 44 I.C.C. 368, 376 (1917), the ICC discussed the issue of dock rates for iron ore at Lake Erie ports and observed:

It is of course in the interest of the carriers that the ore should move over their own docks, since the cost per ton for overhead expenses tends to decrease as the tonnage handled over the docks increases; *but the right of the shippers or others to operate docks of their own can not be denied*, and if they can perform the service at a less cost per ton than the carriers charge, of if they elect to assess a lower charge for the service than the maximum allowed to the carriers, these are matters with which, as the situation is now understood, we are not concerned . . . Any service performed by the private docks in the way of loading, handling or storing the ore prior to the time of shipment is a matter to be disposed of between the dock and the shipper of ore.

antitrust laws. To reach a proper accommodation between the antitrust laws and the national transportation policy, Congress provided that

rate conferences, when approved by the ICC, and whose rate decisions are under final control of the ICC, shall not be subject to the antitrust laws with respect to the making and carrying out of such agreement in conformity with the Commission's requirements.

Remarks of Representative Bulwinkle, 94 Cong. Rec. Append. 4032 (1948).

Defendants contend that the congressional debates "leave no doubt that I.C.C. approval of a 5a agreement was intended to confer absolute antitrust immunity." Defendants point to colloquies such as the following to support their argument:

MR. WHITE: Is it not true that for many years the Congress has over and over again directed that the procedure should be through the regulatory body and by means of the regulatory process, rather than through indictment in the courts for violation of the antitrust statutes?

MR. REED: Yes; the whole procedure has been through the strengthening of regulations, [**23] rather than to use the severe and sometimes arbitrary methods of proceeding under the antitrust act.

43 Cong. Rec. 6594 (June 9, 1947).

Although such colloquies lend support to defendants' position, the legislative history must be read in its full context. At no point in time did either Senator Reed or Representative Bulwinkle say that the bill would blanket the railroads with absolute antitrust immunity. Indeed, their consistent remarks suggest the opposite. Throughout the Senate hearings, opponents of the amendment, including Senator Russell of Georgia and others, argued that [*869] its passage would completely immunize the railroads from the reach of the antitrust laws. Senator Reed steadfastly rejected this position. The following exchanges are illustrative:

[Referring to a report of the Senate Small Business Committee, coauthored by one of its employees, Mr. Childe]

MR. SPARKMAN. I know Mr. Childe, and have a very high regard for him. I am particularly interested in seeing his testimony in the volume before us. I should like to read a little further from the testimony, where he says this:

However, I do not believe there is any necessity or reason for [**24] relieving carriers from liability under the antitrust laws.

That is Mr. Childe's testimony, and if I understand correctly, the pending bill does that very thing.

MR. RUSSELL. That is the purpose of it.

MR. SPARKMAN. That is Mr. Childe's testimony.

MR. REED. Mr. President, will the Senator from Georgia yield? I should like to submit a little more of the testimony.

MR. RUSSELL. I want to get along; but I yield.

Continuing with Mr. Childe's testimony, Senator Reed read:

I believe that the rate committees and other conferences of the carriers should be regulated by the Interstate Commerce Commission to make them more effective in the public interest and to guard against abuses, and that the antitrust laws should remain in full force and effect, as a protection against any combinations or conspiracies for unlawful purposes.

THE CHAIRMAN. Let me ask you there -- in one breath you say they should be under the supervision or regulatory power of the Interstate Commerce Commission; and in the next you say they should be subject to prosecution under the Sherman antitrust law. Of course, these two things are inconsistent for the simple reason that if you say they can make [**25] an agreement, regulated by the Interstate Commerce Commission, the Government could not prosecute them under the Sherman antitrust law unless coercion could be shown.

MR. CHILDE. That is true. I think prosecution under the antitrust law should be against collusive practices for unlawful purposes.

Senator Reed then added: "With that I agree." 93 Cong. Rec. 6613-14 (1947).

Senator Reed later continued:

Mr. President, the merits of this bill require consideration by the Congress, regardless of the pending antitrust litigation against the railroads.

This bill is prospective in its operation and does not have the effect of giving the railroads immunity for anything illegal that they may have done in the past.

Georgia's suit in the Supreme Court against the railroads is a suit that charges the railroads with having combined and conspired to fix rates, by coercion, that discriminate against Georgia.

He then emphasized:

This bill does not give any immunity to any coercive combination. Paragraph 6 leaves such a combination subject to the antitrust laws, just as it is today.⁷

⁷ At the time of the statement, paragraph 6 of S. 110, the Senate Bill, contained the following language inserted at the behest of Senator Russell:

Nothing in this section and no approval of any agreement by the Commission under this section shall be so construed as in any manner to remove from the purview of the antitrust laws any restraint upon the right of independent action by means of boycott, duress, or intimidation.

This language was removed by the House Conference Committee before passage of the final bill. The legislative history is barren of specific reasons as to why this language was removed. Hence, no legislative intent may be inferred from the removal of Senator Russell's amendment to the Senate bill. But it appears from the following exchange with Senator O'Mahoney (Montana) that Senator Reed felt that the Russell amendment was not needed:

MR. O'MAHONEY. Just another quotation, with the Senator's indulgence. This was an amendment which was inserted by the Senate in order to make sure that no conspiracies would be permitted under the Bulwinkle-Reed bill. I read from paragraph (6):

Nothing in this section and no approval of any agreement by the Commission under this section shall be so construed as in any manner to remove from the purview of the antitrust laws any restraint upon the right of independent action by any carrier by means of boycott, duress, or intimidation.

In other words, the Senate said there should be no approval of any device by which boycott, duress, or intimidation should be applied to any carrier. The conference eliminated that amendment. Is that the way to prevent conspiracy?

MR. REED. When some useless language is inserted in a bill for political purposes, and accepted by the Senator in charge of the bill at the end of 5 days' debate in order to get the bill through the Senate, and the conferees on the part of the House say, "If you expect us to consider that kind of bunk seriously you are mistaken."

MR. O'MAHONEY. Does the Senator say it is useless to prevent boycott, coercion, or intimidation, and can it be prohibited when exemption is being granted from the law which enforces it?

MR. REED. Of course we are not granting any exemption. The constant misstatements of the Senator from Wyoming -- I wish he would make them in his own time --

Mr. O'MAHONEY. There is no limitation on debate.

MR. REED. No; and certainly the Senator from Wyoming exercises his privilege very freely in that respect.

MR. O'MAHONEY. Does the Senator object to being catechised on this subject?

MR. REED. It would not do any good to object to the Senator from Wyoming utilizing his privilege as a Senator and taking a lot of time in debate.

MR. O'MAHONEY. The Senator can substitute personalities for argument, and I have no objection to that, because I know the RECORD will show that personalities cannot outweigh the facts. The facts are that the Senate put in the bill a prohibition against boycott, intimidation, and coercion, and the conferees took it out.

MR. REED. It is in the law, anyway.

MR. O'MAHONEY. Where?

MR. REED. I shall call attention to it later. I ask the Senator from Wyoming to permit me to complete my statement, and then make his speech and make his statements, including his misstatements, in his own time.

93 Cong. Rec. 7204 (1947).

[**26] A somewhat similar colloquy occurred during the course of an argument over [*870] whether the case of *Georgia v. Pennsylvania R. Co., 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716, (1945)* (see slip op. at 7, *supra*) would be mooted by passage of the amendment:

MR. MCFARLAND. The Department of Justice informed the Senator from Arizona that so far as the rate part of that case is concerned it will do away with it. Where does the Senator get his information? Is it the result of his own analysis, or is it from the attorneys for the defendants in those cases?

MR. REED. Mr. President, the case of the State of Georgia rests upon the allegation of a conspiracy between the railroads to establish rates which were illegal because discriminatory. The bill has no relation at all to any case that rests upon conspiracy. The bill, if enacted into law as I firmly believe it will be today, will not affect the Georgia case or the Lincoln case in the slightest degree.

Additional portions of the legislative history further reveal that the authors of the amendment never intended it to put conspiracies to drive competitors out of business beyond the reach of the antitrust laws.⁸ [**28] [**27] For example, after the final bill was [*871] passed in both Houses over the veto of President Truman, Representative Bulwinkle addressed the House with the "desire to state what the law will do and what it will not do." 94 Cong. Rec. Append. 4032 (1948). Firmly stating that the amendment would not moot the charge in *Georgia v. Pennsylvania R. Co., supra*, that certain railroads had violated the antitrust laws, Representative Bulwinkle stated:

The charge made against the railroads in the Georgia case is that they combined and conspired to fix rates by coercion and to discriminate against Georgia. A *combination or conspiracy of that kind would not be protected or immunized by S. 110.*⁹

MR. O'MAHONEY. Will the Senator be good enough to point out my misstatements?

MR. REED. I do not yield.

94 Cong. Rec. 8417 (1948).

⁸The court accords greater weight to the statements of the bill's authors as to the scope and breadth of the bill than to the assertions of the bill's opponents that its adoption would permit the railroads to engage in "boycotts, coercion, or intimidation." The opponents' warnings do not override the intent of the bill's framers. As the Supreme Court stated in *Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 394-95, 95 L. Ed. 1035, 71 S. Ct. 745 (1951)*:

HN11 [↑] The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.

Similarly, in *Ernst & Ernst v. Hochfelder, 425 U.S. 185, 204, 47 L. Ed. 2d 668, 96 S. Ct. 1375, n. 24 (1976)*, the court observed:

Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. See, e.g., *United States v. United Mine Workers, 330 U.S. 258, 276-77, 91 L. Ed. 884, 67 S. Ct. 677 (1947); United States v. Wrightwood Dairy Co., 315 U.S. 110, 125, 86 L. Ed. 726, 62 S. Ct. 523 (1942)*. This is especially so with regard to the statements of legislative opponents who "in their zeal to defeat a bill . . . understandably tend to overstate its reach." *NLRB v. Fruit Packers, 377 U.S. 58, 66, 12 L. Ed. 2d 129, 84 S. Ct. 1063 (1964)*. See *Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-395, 95 L. Ed. 1035, 71 S. Ct. 745 (1951)*.

⁹ Representative Bulwinkle continued:

The conspiracy charged by the State of Georgia is a conspiracy to fix rates by coercion and to discriminate against the State of Georgia in the rates so fixed. This is the way the Supreme Court construed Georgia's pleading; it was this kind of a cause of action that the Supreme Court permitted the State to bring. . . .

The Supreme Court in its opinion granting the State of Georgia leave to file its amended bill of complaint held that a certificate issued under a statutory provision similar to S. 110 did not prevent the Court from granting the State of Georgia equitable relief if the State could prove its charges. This holding was made with respect to the effect of certificate 44 which

[**29] Moreover, the final House and Senate Reports observed:

The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to such agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted.

H. R. Rep. No. 110, 80th Cong. 2nd Sess., reprinted in 1948 U.S. Code Cong. & Ad. News, 1848.

These excerpts from the legislative history contradict defendants' contention that the Reed-Bulwinkle Amendment was enacted with the intent of conferring absolute antitrust immunity upon railroads who are signatories to a 5a agreement. The legislative history, read as a whole, strongly suggests that the Reed-Bulwinkle Amendment's authors never envisioned its grant of antitrust immunity as being absolute. As a result, this court is unable to embrace defendants' assertion that the legislative history "leaves no doubt" that approval of a section 5a agreement by the ICC necessarily confers [**30] antitrust immunity upon signatories [*872] who conspire to eliminate a competitor.

D.

The court now turns to the relevant case law cited by each side to support their respective positions. In support of its argument against defendants' motions, plaintiff cites several cases. Plaintiff's lead case is *Atchison, Topeka & Santa Fe Railway v. Aircoach Transportation Association*, 102 U.S. App. D.C. 355, 253 F.2d 877 (D.C. Cir. 1958), cert. denied, 361 U.S. 930, 80 S. Ct. 372, 4 L. Ed. 2d 354 (1960).

In *Aircoach*, four supplemental air carriers and the transportation association to which they belonged sued forty railroads and two rate committees for treble antitrust damages and an injunction. Plaintiffs alleged that two specific practices of the railroads in connection with their charges for United States military traffic violated sections 1 and 2 of the Sherman Act. The practices included the railroads' concerted quotations of "variable spot bids" for military traffic at rates below their published schedules, and the making of "package bids" in which the railroads agreed to carry military personnel only on an "all or nothing" or "package" basis.

The defendants argued [**31] that their rate quotations "were made pursuant to section 22 of the Interstate Commerce Act and [were] immunized from the operation of the antitrust laws by an agreement approved by the Interstate Commerce Commission pursuant to section 5a of that Act." *Id.* at 880. The district court ruled that section 22 rate quotations were excluded from section 5a agreements and, therefore, left unprotected from the antitrust laws. The D.C. Circuit reversed the ruling and held that section 22 rate activities, like other commercial railroad rate activities, were in certain circumstances entitled to express antitrust immunity protection under 49 U.S.C. § 5b(9). The court remanded the case to the district court with instructions to initially submit the case to the ICC to determine whether the activities at issue were carried out pursuant to the railroads' section 5a agreements.

had been issued under section 12 of the act of June 11, 1942. The provisions of that act were analogous to the provisions of S. 110. The act authorized the Chairman of the War Production Board to issue certificates which provided that the antitrust law should not apply to certain kinds of activity which were found by the Chairman of the War Production Board to be requisite to the prosecution of the war. Such a certificate had been issued by the Chairman of the War Production Board with respect to the rate conferences and committees involved in the Georgia case. The Supreme Court held that this certificate did not prevent the State of Georgia from bringing suit in the Supreme Court. Speaking of certificate 44 the Court said: It does not sanction the use of coercion. It does not authorize any combination to discriminate against a region in the establishment of rates. ([Georgia v. Pennsylvania R. Co., 324 U.S. 439, 459, 65 S. Ct. 716, 89 L. Ed. 1051](#)), footnote 7.)

This holding of the Supreme Court is a decisive answer to the suggestion that if S. 110 becomes law the Georgia case will be moot and the Supreme Court will be prevented from granting relief to the State of Georgia.

It follows that if the State of Georgia can prove that, in fact, the railroads have combined and conspired to fix rates by coercion and to discriminate against the State of Georgia, nothing in S. 110 will prevent the Supreme Court from issuing an injunction that prohibits the railroads from engaging in that kind of activity.

In instructing the district court to initially submit the case to the ICC, the circuit court attached a critical condition to its order. The court stated:

One further substantive legal question must be considered. Even though it should be found in the end that the practices as such have been validly immunized by [**32] section 5a approved agreements, nevertheless, if they are part of an effort by railroads in combination or conspiracy to eliminate the competition of Aircoach, rather than used merely to meet that competition, the practices would be removed from the protection of section 5a(9). We do not think the Act or any agreement which has been approved under it can be construed as authorizing the use of such practices for the purpose of eliminating the competition of Aircoach for the section 22 transportation involved.

Id. at 887. The court further stated that "This aspect of the case need not be submitted for consideration or initial decision by the Commission as to either questions of fact or law." *Id.* If Aircoach prevailed on this aspect of the case, defendants "would be liable in damages, and an appropriate injunction also could be granted." *Id.*

Aircoach was immediately followed by *Riss & Company v. Association of American Railroads*, 170 F. Supp. 354 (D.D.C. 1959), cert. denied, 361 U.S. 804, 80 S. Ct. 108, 4 L. Ed. 2d 57 (1959). *Riss* involved a suit by a trucking company against first class railroads for allegedly conspiring to destroy the trucking company's [**33] business and to acquire a monopoly of land transportation of property in the United States. The railroads argued that the case involved ratemaking over which the ICC had primary jurisdiction. Defendants argued that their rates had been approved by the ICC, and were immune from the antitrust laws under 49 U.S.C. § 5(b)(9).

The *Riss* court pursued the path laid down in *Aircoach*:

[*873] It is clear from the . . . language in the ACTA case that a court need not refer to the Commission the issue of whether a rate quotation was made as a part of a combination or conspiracy to eliminate a competitor. This follows logically because such a joint act if combined with the unlawful intent of eliminating a competitor would fall outside of the immunity granted by 49 U.S.C. § 5b(9) regardless of a possible I.C.C. ruling that the methods of arriving at the new rate conformed to prior procedural agreements filed with and sanctioned by the Commission.

170 F. Supp. at 362. Summarizing, the court stated:

. . . if it should develop at trial that the plaintiff can prove that the rate reduction . . . was one of several overt acts alleged, and prove that this rate reduction [**34] was made for the purpose of effectuating one of the principal objects of the conspiracy charged therein; that is, the elimination of plaintiff as a competitor with the railroads for explosives traffic, then under ACTA no amount of coverage by approved agreements and no degree of immunity under 49 U.S.C.A. § 5b(9) could remove the rate reduction from the prohibitions of the Sherman Act . . . it would seem that the antitrust immunity that defendants invoke was designed to protect ordinary rate-making in the course of regular business so as to adjust to changing costs and to meet the challenges of outside competition . . . Even if a given joint act of reducing rates were to be considered as lawful standing by itself, it may still be properly alleged as one of the means used to effectuate a conspiracy to accomplish an unlawful object.

Id. at 366.

Thus, *Aircoach* and *Riss* do not attack regulated rates in and of themselves; they assail predatory conspiracies to eliminate competition within regulated industries. Nevertheless, defendants launch a direct assault on *Aircoach*. They argue that the D.C. Circuit cited no direct authority for its "remarkable revision of [**35] the clear language of the [Interstate Commerce] Act." As seen, however, the actual language of the Reed-Bulwinkle Amendment cannot be read as shielding conspiracies to eliminate competitors from the antitrust laws. Moreover, the citation of authority in *Aircoach* confirms that the decision stands upon solid ground.

The court in *Aircoach* cited *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 (1945) as a leading authority for its proposition that neither the Interstate Commerce Act nor any agreement approved under it

can be construed as shielding from the antitrust laws conspiratorial conduct undertaken to eliminate a competitor. *253 F.2d at 887*. In *Georgia*, the Supreme Court grappled with defendants' contention that a discriminatory conspiracy carried out through the coercive fixing of rates was shielded from the antitrust laws by an immunity provision similar to 49 U.S.C. § 5b(9). In a footnote, the Court observed:

We have considered the argument that Certificate No. 44, issued March 20, 1943 under § 12 of the Act of June 11, 1942 (56 Stat. 357) by the *Chairman of the War Production Board* (8 Fed. Reg. 3804) protects this alleged combination [**36] from the charges contained in the bill. That certificate approves joint action by common carriers through rate bureaus and the like in the initiation and establishment of rates. We do not stop to analyze it beyond observing that in no respect would it be a bar to the present action. It does not purport to be retroactive. It does not sanction the use of coercion. It does not authorize any combination to discriminate against a region in the establishment of rates. Moreover, legal means may be employed for an illegal end.

324 U.S. at 459, 65 S. Ct. 716, 89 L. Ed. 1051 n. 7. The *Aircoach* court's reliance on *Georgia* was correct because as previously shown, *Georgia* continued to represent binding precedent after the passage of the Reed-Bulwinkle [**874] Amendment. See slip op. at 26, *supra*.

The *Aircoach* court also relied on the persuasive legal analysis in *Slick Airways v. American Airlines*, 107 F. Supp. 199 (D.N.J. 1952), *appeal dismissed sub nom.*, *American Airlines, Inc. v. Forman*, 204 F.2d 230 (3rd Cir.), cert. denied, 346 U.S. 806, 98 L. Ed. 336, 74 S. Ct. 54 (1953). In *Slick*, plaintiff alleged that defendant American conspired with other [**37] airlines to drive it out of business in order to monopolize the business of air freight transportation. Plaintiff maintained that as part of a conspiratorial campaign, defendants engaged in a series of predatory rate activities. Similar to the Interstate Commerce Act, the Civil Aeronautics Act provides express antitrust immunity for air carriers carrying out any acts authorized, approved, or required under an agreement filed with the Civil Aeronautics Board. As in this case, defendants contended that the alleged combination and conspiracy was immunized by an agreement which had been approved by the CAB. But the court did not "concur with the suggestion that a conspiracy to drive a competitor out of business . . . is the type of agreement encompassed within the statute and subject to the primary jurisdiction of the CAB for approval or disapproval and for possible immunity from the antitrust laws." *Id. at 207*. The court explained:

The defendants misconceive the nature of the complaint by confusing the means allegedly used with the result to be achieved. They view the complaint as alleging combinations or conspiracies to waste the resources of the plaintiff through predatory [**38] rate policies, to abuse the privilege of intervention in CAB proceedings, and to conduct a campaign of unfair competitive practices which amount to contracts and agreements within the purview of § 492. It is in this that they fall into error for these alleged acts rather constituted the means and methods by which the defendants conspired to drive the plaintiff out of business in violation of the anti-trust laws. As the Supreme Court said in *American Tobacco Co. v. United States*, 328 U.S. 781, 809, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575: "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. 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."

Id.

Several recent cases have applied an *Aircoach* type analysis in regulated industry antitrust suits. For example, *BBD Transportation Co. v. U.S.* [**39] *Steel Corp.*, 1976-2 TRADE CASES (CCH) P 61,079 (N.D. Col. 1976), held that a plaintiff motor carrier's allegations that defendant steel companies and railroads conspired to reduce railroad rates in order to force the trucking industry to lower its rates could not be eliminated on a motion for summary judgment. The allegations, the court stated, "if eventually proven to be true . . . would strip away immunity otherwise conferred by 49 U.S.C. § 5b(9)." *Id.* at p. 69,873. Similarly, *United States v. Baltimore & Ohio R.R.*, 538 F. Supp. 200 (D.D.C. 1982), the criminal analogue of the present case, adopted *Aircoach*'s holding that "section 5a immunizes the

collusive making of rates but does not immunize the collusive making of rates which are intended to eliminate competitions." *Id. at 207-08.*¹⁰

[**40] The court now turns to defendants' contention that "the better reasoned cases [***875**] hold that lawsuits charging railroads with predatory ratemaking are precluded by § 5a." As their lead case, defendants cite *Asbury Graphite, Inc. of California v. Dehyco Co.*, 1981-1 TRADE CASES (CCH) P 63,980 (N.D. Cal. 1980). In *Asbury*, the court confronted a claim by a processor of furfural residue that another processor had conspired with ten railroads to monopolize the market in the Pacific Northwest by means of a railroad tariff allegedly favoring the competitor. The court ruled that [49 U.S.C. § 10706](#), which now replaces section 5(b) (see n. 2, *supra*), "on its face" immunized the defendants from the antitrust laws:

Even if the ratemaking were actually 'conspiratorial' and 'monopolistic,' as alleged, since it unquestionably took place within the context of amending an approved freight bureau rate, the antitrust laws are inapplicable.

Id. at p. 76,072.

The *Asbury* court based its decision upon its finding that the enactment of 49 U.S.C. § 5(b) resulted from an adverse congressional reaction to [*Georgia v. Pennsylvania R. Co., supra*](#). As previously [**41] seen, this court does not read the legislative history or the words of 49 U.S.C. § 5(b)(9) as nullifying the impact of [*Georgia v. Pennsylvania R. Co., supra*](#). Nor does this court find persuasive the *Asbury* court's citation of [*McLean Trucking Co. v. United States*, 321 U.S. 67, 88 L. Ed. 544, 64 S. Ct. 370 \(1944\)](#). In *McLean*, a trucking company challenged under the antitrust laws an ICC approved merger of seven motor carrier companies. Since 49 U.S.C. § 5(11) expressly immunizes ICC approved mergers from the antitrust laws, the Court in *McLean* held that the Commission had the power to approve and thereby immunize a merger which might otherwise violate the antitrust laws. Consequently, the holding in *McLean* has little if any bearing on the issue of whether the ICC's approval of a section 5a railroad agreement completely shields from the antitrust laws signatory railroads that conspire to eliminate a competitor.¹¹ Therefore, this court finds the reasoning in *Asbury* to be unpersuasive.

¹⁰ The Aircoach reasoning has been applied in the context of a variety of other regulated industries. For example, see [*U.S. v. Braniff Airways, Inc.*, 453 F. Supp. 724 \(W.D. Tex. 1978\)](#) (conspiracy to eliminate an air competitor not immunized by the Federal Aviation Act's express immunity provision), and [*Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203 \(9th Cir. 1973\)](#), cert. denied, *417 U.S. 913, 41 L. Ed. 2d 217, 94 S. Ct. 2612 (1974)*. Also see [*United States v. American Telephone & Telegraph Co.*, 461 F. Supp. 1314, 1328-29 \(D.D.C. 1978\)](#), in which the court ruled:

This complaint alleges a broad conspiracy to monopolize various aspects of the telecommunications industry through a symbiotic relationship among AT&T, Western Electric, Bell Labs, and the Bell Operating Companies (see p. 1350, *supra*). Even if it be assumed, *arguendo*, that the Commission exercised explicit regulatory authority over some segments of the activities challenged in the complaint, it does not follow that defendants are immune from antitrust liability even with respect to them. Defendants' purpose is alleged to be the monopolization of the telecommunications service and equipment market, and the bulk of their conduct, including that revolving around Western Electric and Bell Labs, cannot under any reasonable view be regarded as immune from antitrust enforcement by virtue of regulation. In that circumstance, the remainder of the challenged conduct is likewise subject to antitrust consideration, both because it constitutes a means for achieving an unlawful end [*California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 515, 92 S. Ct. 609, 30 L. Ed. 2d 642 \(1972\)](#), and because it represents one facet of a larger monopolistic scheme.

Id. at 1329-30.

¹¹ As noted in the House Report accompanying the Reed-Bulwinkle Amendment with respect to 5a agreements:

It is important to note . . . that in the case of a rate association, or any similar joint organization, it is not the rates or other collective actions resulting from the association procedures that the bill contemplates will be submitted by the carriers to the Commission for approval. What is to be submitted in such case is the basic agreement setting up the association and defining the nature and scope of its activities and its mode of procedures.

H. Report at p. 1855. Unlike the plaintiff in *McLean*, plaintiff Pinney is not challenging the immunity of the ICC approved agreement. Rather, plaintiff alleges that the defendants acted outside of and contrary to the agreement by conspiring to eliminate it as a competitor and monopolize the industry.

[**42] Calling attention to antitrust cases raised in the context of other regulated industries, [*876] defendants argue that they are inconsistent with the holding in *Aircoach*. In [*Dreisbach v. Murphy*, 658 F.2d 720 \(9th Cir. 1981\)](#), plaintiff owner of a ship devanning facility in Los Angeles alleged that a rival devanner and three shipping companies conspired to boycott his company's services. Pursuant to a [section 15](#) agreement¹² the defendant carriers had agreed to exclusively use the devanning services of one of plaintiff Dreisbach's competitors.¹³ The court held that the joint choice of an exclusive devanning company was the type of "routine operating practice" within the scope of the carriers' FMC approved [section 15](#) agreement. *Id. at 729*. It was, therefore, outside the reach of the antitrust laws. Because the Ninth Circuit found it "unnecessary to determine whether there was a conspiracy," *id. at 729, n. 9*, defendants argue that *Dreisbach* is inconsistent with the *Aircoach* ruling that "a purpose to destroy competition . . . would have the legal result of removing [the] railroads from any possible protection from the antitrust laws." 253 F.2d at 887. [**43] However, the anticompetitive activities and conspiracy which Pinney alleges in this case involve far more than the established industry-wide practice which the *Dreisbach* court evaluated.¹⁴

For the reasons outlined, the court also finds [*Interstate Investors, Inc. v. Transcontinental Bus Sys., Inc.*, 310 F. Supp. 1053 \(S.D.N.Y. 1970\)](#), cited by the defendants, to be inapplicable to the present case. See also [*Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 34 L. Ed. 2d 577, 93 S. Ct. 647 \(1973\)](#), and [*Pan American World Airways v. United States*, 371 U.S. 296, 9 L. Ed. 2d 325, 83 S. Ct. 476 \(1963\)](#).

Two additional cases cited by defendants as supporting the *Asbury* decision are also inapposite. In [*Monticello Heights, Inc. v. Morgan Drive Away, Inc.*, 1974-2 TRADE CASES \(CCH\) P 75,282 \(S.D.N.Y. 1974\)](#), plaintiff's antitrust claims were dismissed on the grounds that they were barred by [*Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 \(1922\)](#). The *Keogh* doctrine and its applicability to this case are discussed in section III, *infra*.

[*Baltimore & O.R. Co. v. New York, N.H.&H.R. Co.*, 196 F. Supp. 724 \(S.D.N.Y. 1961\)](#), concerned a suit to recover per diem rental rates for the use by defendants of plaintiffs' freight cars. As a defense, defendants claimed that despite the existence of a binding contract, they were not bound to pay the contractual rate because plaintiffs had fixed the rates and forced defendants to pay them in violation of section 5A of the ICA and the Sherman Act. The court ruled that a finding by the Interstate Commerce Commission in a previous hearing that the plaintiffs had not engaged in the alleged activities precluded (under the doctrine of collateral estoppel) the defendants from relitigating the issue before the court.

Neither the *Monticello* court nor the *Baltimore & O.R. Co.* court ever addressed the immunity issue facing this court.

¹² [Section 15](#) of the Shipping Act, 46 U.S.C. § 814, permits water carriers to file with the Federal Maritime Commission (FMC) agreements relating to rates and other matters. When an agreement is approved by the FMC, it is immunized against the operation of the antitrust laws. But see [*Carnation Co. v. Pacific Conference*, 383 U.S. 213, 15 L. Ed. 2d 709, 86 S. Ct. 781 \(1966\)](#), and [*In re Ocean Shipping Antitrust Litigation*, 500 F. Supp. 1235 \(S.D.N.Y. 1980\)](#), for statements that [section 15](#) antitrust immunity does not extend to the implementation of agreements unapproved by the FMC.

¹³ The court observed that "the plain language of the [section 15](#) agreements on the present record encompasses carriers' agreement to use Murphy as their one devanner in Los Angeles, and that agreement is not directly contested by appellant Dreisbach. . . ." *Id. at 724*.

¹⁴ The Ninth Circuit noted that plaintiff Dreisbach's allegations were not "supported by evidence." [*658 F.2d at 729, n. 9*](#), and at 730, n. 11. Moreover, the court stated:

There is no evidence, and no allegation, that the Carriers here are the only carriers requiring a devanning service in Los Angeles, or that Dreisbach was impeded in any manner from seeking to render devanning services in Los Angeles to other carriers.

[*658 F.2d at 729, n. 10*](#). The *Dreisbach* court correctly observed that "every agreement of carriers to use one supplier of a service can be said to confer monopoly status and antitrust immunity on that supplier, at least insofar as rendering the service to those carriers is concerned." In this case, plaintiff alleges that the railroads conspired to completely eliminate them as a direct competitor in the dock handling of iron ore. Rather than choosing among competing services, as in *Dreisbach*, defendants in this case are alleged to have conspired to eliminate a competing service, thereby foreclosing the choices of their customers.

[**44] As additional support for their position, defendants cite [*U.S. v. Rock Royal Co-op., 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 \(1939\)*](#). The issue in the case concerned "the validity of Order No. 27 of the Secretary of Agriculture, issued under the Agricultural Marketing Agreement Act of 1937, regulating the handling of milk in the New York metropolitan area." [*307 U.S. at 541*](#). Certain milk dealers refused to comply with the provisions of the order. When the United States sought an order requiring them to comply, the dealers [*877] argued that the order was invalid because its adoption was secured by misrepresentations and because certain private organizations had sought to obtain a monopoly by means of the order. The district court concluded that the order was not enforceable because coercive tactics were used to secure the drafting, acceptance and adoption of the order so as to obtain a monopoly.

Under the Agricultural Marketing Act, the Secretary was authorized to issue orders applying to milk to establish and ensure orderly conditions in its marketing. On appeal, the Supreme Court ruled that the initial adoption of the order met with the required statutory standards. [**45] After then noting that efforts to compel dealer support of the order by the threat of diverting milk sales were "ineffective upon these defendants," the Court stated:

These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction.

[307 U.S. at 560.](#)

Although the defendants correctly argue that the Court minimized the importance of the "influences which caused the producers to favor" the order issued by the regulatory agency, the issue in this case is not whether any order of the ICC is constitutional or enforceable. The issue is whether the defendants acted outside the scope of 49 U.S.C. § 5b(9)'s limited grant of antitrust immunity by conspiring to exclude plaintiff as [**46] a competitor.¹⁵ Therefore, this court does not read *Rock Royal* as a mandate to hold that the activities alleged by plaintiff in this case are beyond the reach of the antitrust laws.

[**47] Defendant B&LE, in a supplemental letter, calls to the court's attention *National Association of Recycling Industries v. American Mail Line, Ltd.*, No. CV82-895-LTL (D.C. Cal. 12/3/82) (NARI). NARI involved an antitrust suit by a trade association for the paper recycling industry and three of its member firms against a number of ocean carriers and their rate conference. Plaintiffs alleged "that the rates charged by defendants for transporting plaintiffs' wastepaper to the Far East [were] so 'exceedingly high and unjustly discriminatory' that plaintiffs [could] not successfully compete against shippers of processed wood pulp and virgin wood chips, raw materials in direct competition with wastepaper." The court dismissed the complaint, holding that defendants' ratemaking activities were immunized from the antitrust laws by the Shipping Act "regardless of whether those rates [were] later found to

¹⁵ Citing [*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 \(1965\)*](#), defendants argue that "the Supreme Court has more recently confirmed that conduct which is otherwise immune from the antitrust laws cannot give rise to antitrust liability simply because it was undertaken with predatory intent." However, this court agrees with the following language of Judge Parker in [*United States v. Baltimore & O.R.R., 538 F. Supp. 200, 207 \(D.D.C. 1982\)*](#):

. . . These cases [*Noerr* and *Pennington*] provide [defendants] no solace. At issue was the question whether the lobbying of the legislature and the executive (*Noerr*) or the attempt to influence public officials (*Pennington*) would be immunized from the antitrust laws by the [*First Amendment*](#) even when the actions were intended to eliminate competition. *Aircoach*, on the other hand, was concerned not with whether activity otherwise illegal under the Sherman Act is impliedly immunized by a constitutional provision but, rather, with whether such conduct is explicitly immunized by the Reed-Bulwinkle Act. In other words, the *Aircoach* Court was guided not by abstract constitutional principles but, rather, by the legislative history and statutory intent behind section 5a.

be violative of substantive provisions of the Shipping Act." This court [***878**] finds *NARI* to be "analytically distinguishable" from *Aircoach*, and not inconsistent with it.¹⁶

[**48] E.

Having examined the actual language of the Interstate Commerce Act, the pertinent legislative history, and the relevant case law, the court concludes that it should apply an analysis similar to that employed in *Aircoach* and its progeny. Since [HN12](#)¹⁷ a conspiracy to eliminate a competitor cannot fall within 49 U.S.C. § 5b(9)'s limited grant of express antitrust immunity, plaintiff is entitled to prove its allegations that the defendants conspired to eliminate it as a competitor in order to monopolize the business of providing dock services for the unloading of ex-lake iron ore.

III.

As a separate ground for dismissal, defendants contend that "this case falls squarely within the *Keogh* doctrine, which bars plaintiff's claim for damages." The *Keogh* doctrine was developed in [*Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 \(1922\)*](#). Plaintiff *Keogh*, a manufacturer of excelsior and flax tow, sued eight railroad companies under the antitrust laws arguing that the uniform rates they set by agreement were arbitrary and unreasonable. As a defense, the railroads contended that the rates at issue had been approved by the Interstate Commerce [****49**] Commission. The Court held that "*Keogh*, a private shipper, [could not] recover damages under [the antitrust laws] because he lost the benefit of rates still lower which, but for the conspiracy, he would have enjoyed." [*Id. at 162*](#). The Court explained:

The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier (citations omitted). This stringent rule prevails, because otherwise the paramount purpose of Congress -- prevention of unjust discrimination -- might be defeated. If a shipper could recover under section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors"

[*Id. at 163.*](#)

The Court reaffirmed [*Keogh in Georgia v. Pennsylvania R. Co., 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 \(1945\)*](#). [****50**] See slip op. at 7, *supra*. The Court held that "it [was] clear from the *Keogh* case alone that Georgia [could] not recover damages even if the conspiracy alleged were shown to exist." [*Id. at 453*](#). The Court reiterated that under *Keogh*, "a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade." *Id.*

¹⁶ Finding the case before it to be "analytically indistinguishable" from [*Sabre Shipping Corp. v. American President Lines, Ltd., 285 F. Supp. 949 \(S.D. N.Y. 1968\)*](#), cert. denied, [*407 F.2d 173 \(2nd Cir.\)*](#), cert. denied, [*395 U.S. 922, 23 L. Ed. 2d 239, 89 S. Ct. 1774 \(1969\)*](#), the *NARI* court criticized the portion of the *Sabre* opinion which held that filed but unapproved rates established under the authority of an FMC-approved agreement are shielded from antitrust attack only if they meet the substantive requirements of the Shipping Act. Significantly, however, the *NARI* court never faced the one issue in *Sabre* which bears directly on this case.

In *Sabre*, an independent shipping line charged that defendant shipping lines and conferences conspired to unreasonably restrain and monopolize the Hong Kong -- United States and Japan -- United States shipping trade. Plaintiff alleged that in furtherance of the conspiracy, defendants plotted to drive it out of business through a series of predatory rate cuts. The *Sabre* court held that "predatory rate cutting . . . cannot be immunized by the Commission from the antitrust laws under [*Section 15*](#)." *Id. at 957.*

Since plaintiffs in *NARI* never alleged that defendants conspired to eliminate them as competitors (plaintiffs in *NARI* did not compete with the ocean lines), the case has little bearing on the issues confronting this court.

[*879] This court does not read either *Keogh* or *Georgia* as precluding plaintiff Pinney from recovering damages under the antitrust laws if it is able to prove the allegations in its first amended complaint. Plaintiff alleges that the defendants conspired to monopolize the business of providing dock services for iron ore and other goods moving over docks on the lower Great Lakes. In order to carry out the ends of the conspiracy, it is alleged that the railroads actively plotted to eliminate plaintiff as a competitor. To accomplish their alleged predatory ends, it is asserted that defendants committed various overt acts including refusing to grant shippers a competitive rate for the carriage of iron ore from Pinney Dock.

Unlike the plaintiff in *Keogh*, plaintiff Pinney does not bring its antitrust suit simply [**51] to recover an alleged discriminatory overcharge. Plaintiff seeks to recover damages for the loss of business it allegedly suffered as a direct competitor of defendants. Plaintiff alleges that defendants plotted and carried out a conspiracy to eliminate it as a direct competitor. Unlike in *Keogh*, plaintiff Pinney competed with defendant railroads for the same customers, and plaintiff could serve those customers only if it in turn was served by defendants. Thus, plaintiff asserts that discriminatory rail rates were merely "a symptom or an incident" of a conspiracy to eliminate it as a competitor. See [Terminal Warehouse v. Pennsylvania R. Co., 297 U.S. 500, 510, 80 L. Ed. 827, 56 S. Ct. 546 \(1936\)](#). As *Terminal Warehouse* points out, [HN13](#)¹⁵ antitrust damages may be recovered against rail carriers when they result from "an enveloping conspiracy with its own illegal ends . . . the damages being measured not merely by the consequences flowing from the preference, but by those flowing from the conspiracy in all its comprehensive unity."

[297 U.S. at 511, 516.](#)

Defendants correctly point out that in [Georgia v. Pennsylvania R. Co., supra](#), the state of Georgia sued not only in its [**52] *parens patriae* capacity, but in its "capacity as a proprietor to redress wrongs suffered by the State as the owner of a railroad . . .", [324 U.S. at 439](#); the Court nonetheless held that *Keogh* blocked its claims for monetary damages. However, the Supreme Court in its decision never treated the state as a direct competitor of the defendants. The Court based its holding on the statement in *Keogh* that a recovery by a shipper under the antitrust laws for a rate higher than that which otherwise would have prevailed would operate as a rebate to give the shipper a preference over his trade competitors. In the present case it cannot be said that plaintiff will unfairly benefit in its status as a competitor of the railroads if it is permitted to recover damages resulting from a conspiracy by those very same competitors to drive it out of business and monopolize the industry.

Approaching the issue from another angle, defendants argue that this case lies within *Keogh*'s bounds because "Pinney's claimed injury derives solely from alleged unreasonably high or discriminatory rail rates and charges." As support, defendants submit the various ICC approved iron ore rail tariffs in effect [**53] during the period of the alleged conspiracy. For example, Freight Tariff 93-K of the Pennsylvania Railroad Company issued on July 29, 1961 sets "commodity" rates for the transportation of iron ore from railroad docks to various destinations.¹⁷ Defendants argue that the following 93-K tariff section expressly limited iron ore "commodity rates" to iron ore that was transported from railroad owned docks:

[*880] Charges for Unloading Ore From Vessels . . .

On Iron Ore arriving by vessel at the ports of Ashtabula Harbor, Ohio, Buffalo, N.Y. and Cleveland, Ohio, and unloaded by means of the machinery and other facilities owned and furnished by the Pennsylvania Railroad Company, the charge against the vessel for taking the Ore from the hold of the vessel to the rail of the vessel will be 28 cents per ton of 2240 pounds.

Service will be performed only where said machinery and facilities are able to unload the vessel.

Dock Ore Rates From Ashtabula Harbor, Ohio . . .

¹⁷ The Transportation Logistics Dictionary contains the following definition for a "commodity rate":

[HN14](#)¹⁸ **Commodity Rate.** A rate on a specific commodity, or article, moving between specific points, sometimes in a specific direction, and sometimes for a specific minimum quantity. The purpose of the commodity rate is generally to provide a lower rate to reflect lower costs resulting from large scale movement or otherwise. The commodity rate can be higher than a class rate, but it usually is not.

The rates published in this tariff, as applying on Dock Ore from The Pennsylvania Railroad Docks at Ashtabula Harbor, Ohio, will also apply on Dock Ore from the Dock of the New York Central Railroad Company [**54] (Western District) at Ashtabula Harbor, Ohio, But Only When Such Ore is Delivered to The Pennsylvania Railroad Company at Ashtabula, Ohio.

Similarly, supplement 3 to Freight Tariff 2152-K of the Chesapeake and Ohio Railway Company read:

Item No.	Subject	Rules and Other Governing Provisions
		Special Rules and Regulations-Unlimited
125-A	Charge for unloading Ore From Vessel	On ore arriving by vessel at the port of Toledo Dock, Ohio, and unloaded by means of the machinery and other facilities owned and furnished by The Chesapeake and Ohio Railway Company, the charge against the vessel for taking the ore from the hold of the vessel to the rail of the vessel will be twenty-eight (28) cents per ton of 2,240 pounds.
		Defendant Note. -- This service will be performed only where said machinery and facilities are able to unload the vessel.

[**55] Defendants contend that these rates, by their express terms, did not apply to shipments of iron ore from Pinney Dock, so that iron ore shipments from Pinney were relegated to the higher "class rate" system in effect.¹⁸ For example, defendant B&LE states that "from February 1958 until April 1978 Pinney enjoyed class rates on any iron ore shipments tendered."

[**56] Several exhibits submitted as part of defendants' motion to dismiss based on the statute of limitations show that class freight rates applied off Pinney Dock. For example, G. B. Weir, Pinney's traffic manager, observed in an August 24, 1970 file memorandum:

The freight rate from Pinney Dock to Youngstown Sheet & Tube is roughly \$ 5.00.

The freight rate from public ports and certain private docks for iron ore pellets (a commodity rate) is \$ 2.08.

Similarly, in a June 9, 1971 memorandum, R. T. Beeghly, president of the Standard Slag Company, noted:

Shipment of ore can now be made from other Ashtabula docks to the steel mills at a \$ 2.60 rate, whereas the established rate from Pinney Dock is \$ 5.25.

¹⁸ The Transportation Logistics Dictionary contains the following definitions for "class rate" and "class tariff":

HN15 Class Rate. It is a rate resulting from a rating provided in a classification. While commodity rates are available only on limited commodities, a class rate can be found on practically any commodity. The rate in the class rate tariff is normally on class 100 commodities. To determine the class rate it is necessary to multiply the first class rate by a percentage figure applicable on its rating. In the uniform freight classification, the percentage of first class is automatically provided in the classification. That is, a class 87 would mean 87% of first class. Class rates were created to simplify the preceding process providing a specific rate on each commodity moved.

Class Tariff. A Tariff containing only class rates.

Additionally, in June 1975, J. A. Del Priore, Pinney Dock's director of sales, informed J. Hagen, vice president-operations and facilities planning, United States Railway Association:

Our present rate on iron ore is \$ 15.90 per gross ton to Pittsburgh and \$ 11.42 per gross ton to the Youngstown area versus \$ 4.83 per gross ton to Pittsburgh and [*881] \$ 3.62 per gross ton to Youngstown for the other facilities.

Nevertheless, it is disingenuous [**57] for B&LE to suggest that Pinney "enjoyed" ICC prescribed iron ore rates because "class rates" applied to Pinney Dock.¹⁹ [**59] As previously illustrated, [HN16](#) railroad rates for ex-lake iron ore historically have been regarded as separate and distinct from the rates on all other commodities. In *Iron Ore Rate Cases*, 41 I.C.C. 181 (1916), the Commission carefully set maximum rates for ex-lake iron ore from Ashtabula Harbor, Ohio to various destinations. The Commission stated:

The *maximum rates herein found reasonable* as set forth in the foregoing table include, as heretofore explained, only the rail-line service from the line-haul carriers' tracks at the lake ports, after the ore has been loaded into the cars, to the points at destination where the carriers' tracks connect with the private industry tracks that serve the furnace plants. They do not include the dock service and the service of placing carload shipments of ore at the point of unloading on private industry tracks at destination, for which services separate charges should be established.

Id. at 219. Since the transportation of ex-lake iron ore has historically been treated under a distinct commodity rate scheme, [**58] defendants cannot realistically argue that under the ICC's approved rate schedules, ore shipments from Pinney Dock were automatically covered by published and ICC approved "class rate" tariffs.²⁰

¹⁹ B&LE asserts that "this rate system was prescribed by the ICC in *Class Rate Investigation*, 1939, [281] I.C.C. 213 (1951)."

Neither the case cited by B&LE nor its earlier companion, *Class Rate Investigation*, 1939, 262 I.C.C. 447 (1945), provides any justification for defendants' assertions. The focus of these cases was an investigation by the ICC (on its own motion) into "the lawfulness of interstate class rates, all-rail, all-water, and rail-and-water, applicable in the United States generally, except in mountain-Pacific territory and between that territory and the remainder of the country." 262 I.C.C. at 454. Nothing in the Commission's wide-ranging findings supports defendants' statement that under ICC rules, they were justified in quoting "class rates" for iron ore shipments off of private docks at the same time that they were assessing approved "commodity iron-ore rates" for shipments off of their own docks. Indeed, if such were the case, private docks such as Pinney could never have hoped to compete with the railroads in the handling of ex-lake iron ore because the existing freight class rates were so much higher than the published commodity iron ore rates. Yet, as previously pointed out, *supra*, at 16, the ICC itself observed:

It is of course in the interest of the carriers that the ore should move over their own docks, . . . but the right of the shippers or others to operate docks of their own cannot be denied.

44 I.C.C. at 376.

²⁰ S. S. McKinley of the B&O noted in a letter of March 4, 1958 to S. I. Thompson:

You have no doubt received copy of proceedings of the joint meeting held at Pittsburgh, Pa. February 26, distributed by Chairman Kern March 3.

As additional information, after much discussion the attorneys agreed that we could not very well defend publication of higher specific line haul rates from the so-called public docks (Pinney at Ashtabula and Cleveland Stevedore at Cleveland) than are presently published from railroad and steel company private docks. You will recall higher rates previously had been suggested as a means of discouraging the handling of ore over public docks.

Therefore, it was decided to docket a proposal with the Coal, Coke & Iron Ore Committee, C.T.R., on behalf of all lines publishing rates from railroads docks, to restrict the application of the line haul rates so they will only apply on ore received over the railroads' own docks (see CTR Submittal 10448, as amended).

Along the same lines in a Penn Central interoffice memorandum of November 21, 1968 to F. R. Weis, R. L. Wilson concluded that under *Iron Ore Rate Cases*, *supra*, Penn Central "would have to publish 'line haul' rates from Ashtabula Harbor, Ohio [for Pinney Dock]."

[**60] Moreover, defendants' argument that plaintiff's claims are barred by *Keogh* because the injury resulted from discriminatory rail rates misses the heart of plaintiff's claim. It is the alleged conspiracy itself, rather than the implements used to carry the conspiracy out, which makes this more than a "simple ICC rate case." As the Supreme Court observed in [*Continental Co. v. Union Carbide, 370 U.S. 690, 707, \[**882\] 8 L. Ed. 2d 777, 82 S. Ct. 1404 \(1962\)*](#):

It is well settled that [HN17](#) acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.

A conspiracy to eliminate a competitor and monopolize an industry falls outside the bounds of day-to-day railroad ratemaking. For this reason, such a conspiracy is subject to the harsh consequences of the antitrust laws. Therefore, plaintiff is entitled to prove its allegations that defendants used the iron ore rate system to further a conspiracy to eliminate the direct competition of plaintiff in providing dock services for ex-lake iron ore. Should plaintiff prove its allegations, it will not be barred by [*Keogh v. Chicago & Northwestern Railway Co., supra*](#), from [**61] recovering damages.

IV.

Defendant B&LE separately argues that "certain of plaintiff's claims should be dismissed for lack of standing to assert them or because [the anticompetitive acts alleged] could not as a matter of law have caused direct or cognizable injury to plaintiffs."

[HN18](#) Section 4 of the Clayton Act, [15 U.S.C. § 15](#), provides a treble-damages remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." As the Court recently observed in [*Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 156, 102 S. Ct. 2540 \(1982\)*](#):

. . . the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. [Citations omitted] "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."

Although section 4 of the Clayton Act's language is broad, the [*Court \[**62\] in Associated General Contractors v. Carpenters, 459 U.S. 519, 103 S. Ct. 897, 907, 74 L. Ed. 2d 723, \(1983\)*](#), emphasized that questions of antitrust standing "cannot be answered simply by reference to the broad language of § 4. Instead, . . . the question requires the [court] to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." The Court in *Associated* set forth several factors to be analyzed by district courts in deciding antitrust standing questions.²¹ In addition to the threshold requirement that " the claim be encompassed by the Clayton Act," these include (1) "the nature of plaintiff's alleged injury;" (2) "the directness or indirectness of the asserted injury;" (3) whether the damage claims are "highly speculative;" and (4) the need to keep "the scope of complex antitrust trials within judicially manageable limits." [Id. at 543](#).

²¹ Under [*Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1235 \(6th Cir. 1981\)*](#), to establish standing in an antitrust action, the sixth circuit requires:

- (1) that the plaintiff allege injury in fact and
- (2) that the interest which the plaintiff seeks to protect is arguably within the zone of interests protected by the statute in question."

In [*Associated, supra*](#), the Court noted the sixth circuit's standing test, as well as the tests of several other circuits. The Court then observed that "these labels may lead to contradictory and inconsistent results." The Court stated "In our view, courts should analyze each situation in light of the factors set forth in the text, *infra*." at 536 n. 33.

[**63] Plaintiff's claims meet the Court's threshold requirement of being "encompassed by the Clayton Act."²² The thrust [**883] of plaintiff's complaint is that it was injured in its business and property by a conspiracy among the defendants to monopolize the business of providing dock services for iron ore and other goods moving over docks on the lower Great Lakes. Plaintiff contends that the alleged conspiracy was carried out through a series of anticompetitive activities: monopolizing ownership of docks on the lower Great Lakes used for the handling of iron ore; boycotting private docks; effectively tying the use of railroad-owned docks to the use of railroad lines; fixing and maintaining dock and railroad rates and charges; dividing markets; and raising spurious challenges to the legitimate business activities of competitors. Plaintiff's allegations meet section 4 of the Clayton Act's requirement that a plaintiff allege injury to its "business or property by reason of [something] forbidden in the antitrust laws."

[**64] Since plaintiff meets the threshold test, the court takes up the additional factors deemed pertinent to antitrust standing in *Associated*. Focusing first on the nature of plaintiff's alleged injury, the court notes that plaintiff is a direct competitor of defendants. As the Court stated in [*United States v. Topco Associates, Inc., 405 U.S. 596, 610, 31 L. Ed. 2d 515, 92 S. Ct. 1126 \(1972\)*](#):

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise . . . And the freedom guaranteed each and every business, no matter how small, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

Since Pinney Dock could not effectively compete with defendants unless it had access to railroad lines, a railroad conspiracy to boycott it could effectively stifle its ability to compete in the business of providing dock services for the Great Lakes iron ore trade. Thus, the injury alleged by plaintiff is the type for which the Sherman Act seeks to provide a remedy.

An additional factor under *Associated* "is the directness or indirectness of the asserted injury." [**65] [*Id. at 540*](#). In this case, the chain of causation between plaintiff's alleged injury and defendants' alleged antitrust violations is directly linked. According to the complaint, defendants sought to eliminate plaintiff as a competitor by boycotting it and charging it higher rates. Plaintiff was the direct target of defendants' alleged antitrust violations; defendants' alleged antitrust activities had as their ostensible purpose directly injuring plaintiff's ability to compete in the unloading of ex-lake iron ore.

In *Associated*, the Court expressed concern with allowing a party to proceed where its damage claims are "highly speculative." The Court noted its earlier ruling in [*Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 158 n. 11, 102 S. Ct. 2540 \(1982\)*](#) that:

HN19 [↑] Section 4 plainly focuses on tangible economic injury. It may therefore be appropriate to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.

In this case, the nature of the alleged economic injury suffered by plaintiff is the amount of business it lost as a result of defendants' alleged efforts to drive it out of the iron ore business. [**66] ²³ Although determining a precise dollar figure for the alleged injury could prove to be an arduous task, "difficulty of ascertainment [should not be]

²² In paragraph 1 of its complaint, plaintiff seeks redress for injuries to its business and property caused by defendants' alleged violations of [section 3](#) of the Clayton Act, [15 U.S.C. § 14](#). In pertinent part, that section reads:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . or fix a price charged therefor, . . . where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

On its face, [15 U.S.C. § 14](#) applies only to "commodities." Since plaintiff's suit deals with dock and railroad "services," the interests plaintiff seeks to protect are not encompassed by [15 U.S.C. § 14](#). Therefore, plaintiff does not have standing to raise [15 U.S.C. § 14](#) in this case. See [*Capital Temporaries of Hartford, Inc. v. Olsten Corp., 383 F. Supp. 902, 904, n. 8 \(D. Conn. 1974\)*](#).

²³ Defendant B&LE also moves for the dismissal of plaintiff's claims relating to coal and coke. The court reserves ruling on the issue in view of earlier discovery rulings, see transcript of December 4, 1980 hearing in this case.

confused with a right of recovery." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265, [*884] 90 L. Ed. 652, 66 S. Ct. 574 (1946). Thus, plaintiff's damage claims are sufficiently tangible and non-speculative to meet the Court's concern that antitrust damage allegations not be "highly speculative."

A fourth factor for consideration set forth in *Associated* is

the strong interest, identified in . . . prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits. These cases have stressed the importance of avoiding either the risk of duplicate recoveries on the one hand, or the [**67] danger of complex apportionment of damages on the other.

Associated, supra, at 543-44. Since plaintiff was a direct competitor of defendants in providing dock services for ex-lake iron ore, plaintiff's claim that it was injured by a railroad boycott and conspiracy to eliminate it as a competitor does not create the "risk of duplicate recoveries . . . or the danger of complex apportionment of damages. . . ." To the extent that plaintiff can prove that its ability to compete with defendants was damaged by the alleged conspiracy, its injury will have been sufficiently discrete and individualized to permit it to recover antitrust damages. Thus, plaintiff's complaint satisfies the Court's requirement that "the scope of complex antitrust trials [be kept] within judicially manageable limits."

As seen, plaintiff's complaint satisfies each of the factors deemed pertinent to antitrust standing by the Court in *Associated*. Therefore, plaintiff has standing to seek treble damages pursuant to section 4 of the Clayton Act.

Defendant B&LE takes its standing argument a step further and argues that even if plaintiff has standing to raise claims relating to an alleged boycott of [**68] its dock, it does not have standing to seek damages based on its allegations that defendants conspired to restrain "the business of providing water carriage for iron ore . . . moving over docks on the lower Great Lakes, and . . . the business of building ships for such carriage." Defendant B&LE further contends that plaintiff cannot show "cognizable injury in fact as a result of the alleged agreement to assess the same dock handling charges for bulkers and self-unloaders."²⁴

[**69] Defendant B & LE errs in seeking to have this court treat the alleged anticompetitive activities as a series of separate and unrelated events. Plaintiff claims that it was injured by a multi-pronged conspiracy partially aimed at eliminating the competition of private docks in the handling of iron ore. As the Supreme Court stated in *Continental Co. v. Union Carbide*, 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962):

In [conspiracy] cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States v. Patten*, 226 U.S. 525, 544, 57 L. Ed. 333, 33 S. Ct. 141 . . .

The alleged conspiracy to maintain dock handling charges in order to discourage the development and use of self-unloaders relates directly to plaintiff's claim that defendants sought to eliminate its competition in the dock handling of ex-lake iron ore. Thus, plaintiff must be afforded the [*885] [**70] opportunity to prove its theory that defendants sought to buttress their alleged conspiratorial scheme to thwart the development and use of iron ore self-unloaders on the Great Lakes by seeking to eliminate private dock competition.

Defendant B&LE additionally asserts that Pinney Dock lacks standing to pursue its paragraph 12 allegation that defendants conspired to eliminate competition in and monopolize "the business of providing land transportation for

²⁴In a supplemental letter to this court, defendant B&LE reiterates its argument that "plaintiff lacks standing to complain of defendants' iron ore dock handling charges. . . ." Defendant B&LE argues that under *Associated General Contractors v. Carpenters, supra*, plaintiff could not have been directly injured by the alleged conspiracy to fix dock handling charges. Defendant B&LE states:

Steel company shippers are the parties which incur -- and are directly affected by -- iron ore dock handling charges . . . Indeed, the alleged maintenance of handling charges . . . would necessarily aid Pinney as competitor of defendants.

iron ore and other goods moving over [docks on the lower Great Lakes]." The court agrees that plaintiff is not a proper party to raise such allegations. The alleged conspiracy to monopolize the land transportation of iron ore presents legal and factual issues wholly distinct from those generated by the alleged conspiracy to monopolize dock services. But as previously stated, plaintiff is entitled to prove that a group boycott of its dock effectively precluded it from competing with defendants. In so doing, plaintiff may offer evidence showing that alternate methods of iron ore transportation from Pinney Dock were either infeasible or unacceptable to Pinney's potential customers. Moreover, plaintiff may also attempt to prove its allegation [**71] that defendants conspiratorially harassed it in its attempts to truck iron ore from its dock, subject to the limitations imposed by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961). Additional questions relating to the scope of evidence plaintiff may offer in support of its case can be more appropriately handled at pretrial or trial.

V.

Since the court has ruled against defendants' motion to dismiss on each of the grounds raised, the court must address defendants' argument that this "case should be referred to the Interstate Commerce Commission in deference to that agency's primary jurisdiction." Defendants argue that the ICC should be afforded an opportunity to reach determinations as to the scope of the railroads' express immunity under section 5a and the validity of plaintiff's rate claims.

HN20 [Footnote] The doctrine of primary jurisdiction, as presented by the Supreme Court in *United States v. Western Pacific R. Co.*, 352 U.S. 59, 64, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1959),

applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution [**72] of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

The Court described the test to be applied in deciding whether the doctrine should be invoked:

No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

Id. The court then emphasized the purpose and importance of the doctrine:

Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Id. at 65, quoting *Far East Conference v. United States*, 342 U.S. 570, at 574-575, 96 L. Ed. 576, 72 S. Ct. 492 (1952).

Applying the Court's language, the relevant question in this case is whether considerations of uniformity in regulation and technical expertise mandate that the ICC be given an opportunity to pass on the [*886] questions before this court. See also *Nader v. Allegheny Airlines*, 426 U.S. 290, 304, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976).

Taking up first the question of uniformity and consistency in the regulation of the railroad industry, this court repeats its earlier conclusion that defendants are subject to the antitrust laws unless they acted within the narrow protective scope of the section 5a Eastern Railroads Agreement. Since the alleged conspiracy to eliminate plaintiff as a competitor in order to monopolize the business of providing ex-lake iron ore dock services is not and can not be

immunized by the ICC approved Eastern Railroad Agreement, any determination by the ICC as to the scope of defendants' antitrust immunity under their section 5a agreement is unnecessary.²⁵

[**74] Nor does this court find that the ICC's technical expertise in the area of railroad ratemaking is needed to properly adjudicate plaintiff's antitrust claims. As has been previously stated, plaintiff's claims amount to more than a "rate discrimination case."²⁶ The issue before this court is not whether the defendants' rates for hauling ex-lake iron ore were reasonable. The issue is whether defendants violated sections 1 and/or 2 of the Sherman Act by conspiring to eliminate Pinney Dock as a competitor and by seeking to monopolize the business of providing dock services for the handling of ex-lake iron ore. The antitrust issues must be decided on the merits in a district court. Since the ICC has neither the jurisdiction nor the unique expertise to decide the antitrust issues before this court, reference to the Commission is deemed unnecessary and inexpedient. Therefore, defendants' motion to refer this case to the ICC is overruled.

[**75] VI.

Treating the several motions as [Rule 56](#) summary judgment motions, it is concluded that there are genuine issues of material fact as to the issues raised in these motions. On the basis of the grounds raised in these motions, defendants are not entitled to judgment as a matter of law.

It Is So Ordered.

End of Document

²⁵ Defendants argue that the court should refer this case to the ICC under [United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474, 76 L. Ed. 408, 52 S. Ct. 247 \(1932\)](#), and [Far East Conference v. United States, 342 U.S. 570, 96 L. Ed. 576, 72 S. Ct. 492 \(1952\)](#). As the Court made plain in [Carnation Co. v. Pacific Conference, 383 U.S. 213, 220, 15 L. Ed. 2d 709, 86 S. Ct. 781 \(1966\)](#):

Those cases merely hold that courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Shipping Act in order to avoid the possibility of conflict between the courts and the Commission.

Since the conspiracy alleged in this case will, if proven, not be debatably legal under the Interstate Commerce Act, there is no possibility of conflict between the court and the Commission.

²⁶ Defendants argue that plaintiff is precluded from seeking relief under the antitrust laws because it could have sought relief for any unfair rates from the ICC. However, "the rights which [plaintiff] claims under the antitrust laws are entirely collateral to those which [plaintiff] might have sought under the [Interstate Commerce Act]." [Carnation Co. v. Pacific Conference, 383 U.S. 213, 224, 15 L. Ed. 2d 709, 86 S. Ct. 781 \(1966\)](#). Plaintiff's alleged failure to pursue any potential ICC remedies does not prevent it from seeking antitrust damages based on a conspiracy to eliminate it as a competitor.



Lamoille v. R. Co.

United States Court of Appeals for the District of Columbia Circuit

February 25, 1983, Argued ; June 28, 1983, Decided

Nos. 82-1498, 82-1523, 82-1578, 82-1668

Reporter

711 F.2d 295 *; 1983 U.S. App. LEXIS 26338 **; 229 U.S. App. D.C. 17; 1983-1 Trade Cas. (CCH) P65,469

LAMOILLE VALLEY RAILROAD COMPANY, PETITIONER, v. INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS, GUILFORD TRANSPORTATION INDUSTRIES, INC., ROBERT W. MESERVE and BENJAMIN H. LACY, TRUSTEES OF THE PROPERTY OF BOSTON AND MAINE CORPORATION, DEBTOR, EASTERN MAGNESIA TALC COMPANY, STATE OF VERMONT, INTERVENORS; PROVIDENCE AND WORCESTER RAILROAD COMPANY, PETITIONER, v. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS, GUILFORD TRANSPORTATION INDUSTRIES, INC., ROBERT W. MESERVE and BENJAMIN H. LACY, TRUSTEES OF THE PROPERTY OF BOSTON AND MAINE CORPORATION, DEBTOR, STATE OF VERMONT, INTERVENORS; STATE OF VERMONT, PETITIONER, v. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS, GUILFORD TRANSPORTATION INDUSTRIES, INC., ROBERT W. MESERVE, ET AL., INTERVENORS; CANADIAN NATIONAL RAILWAY COMPANY, CENTRAL VERMONT RAILWAY, INC., GRAND TRUNK WESTERN RAILROAD COMPANY and DETROIT, TOLEDO AND Ironton RAILROAD COMPANY, PETITIONERS, v. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS, ROBERT W. MESERVE and BENJAMIN H. LACY, TRUSTEES OF THE PROPERTY OF BOSTON AND MAINE CORPORATION, DEBTOR, INTERVENORS

Prior History: [**1] Petitions for Review of Orders of the Interstate Commerce Commission.

Core Terms

merger, traffic, carrier, railroad, shippers, conditions, truck, interchange, route, transportation, essential service, downgrade, public interest, diversion, rail service, reorganization, Junctions, employees, east-west, notice, abandonment, approve, merged, Talc, join, consolidation, adequacy, holding company, connects, midwest

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Mergers & Acquisitions Law > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

[**HN1**](#) [down] Railroads & Rail Transportation, Consolidation & Merger

The Interstate Commerce Act, 49 U.S.C.S. §11,343(a) requires the Interstate Commerce Commission to review all railroad mergers. The Interstate Commerce Commission must approve any merger that is consistent with the public interest, but can impose conditions on the merger when needed to advance the public interest.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Merger Guidelines

[**HN2**](#) [down] Railroads & Rail Transportation, Consolidation & Merger

In making the "public interest" determination for a proposed merger of two "class I" railroads, the Interstate Commerce Commission must consider five specific (but not exclusive) factors: (A) the effect of the proposed transaction on the adequacy of transportation to the public; (B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (C) the total fixed charges that result from the proposed transaction; (D) the interest of carrier employees affected by the proposed transaction; (E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region. 49 U.S.C.S. §11,344(b)(1).

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

[**HN3**](#) [down] Regulated Industries, Transportation

See 49 U.S.C.S. § 11,343(a).

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Transportation Law > Commercial Vehicles > Traffic Regulation

[**HN4**](#) [down] Regulated Industries, Transportation

The Interstate Commerce Commission defines "class I" railroads as those railroads with annual operating revenues of \$ 50 million or more. 49 C.F.R. §1240.1(a) (1982).

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

[**HN5**](#) [down] Regulated Industries, Transportation

The provisions of the Interstate Commerce Act, 49 U.S.C.S. §11 must be interpreted in light of the longstanding congressional policy favoring railroad mergers that increase efficiency and quality of service.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Mergers & Acquisitions Law > Merger Guidelines

Transportation Law > Interstate Commerce > Balancing Tests

HN6[Railroads & Rail Transportation, Consolidation & Merger

In deciding whether a merger is in the public interest, the Interstate Commerce Commission performs a balancing test, weighing the potential benefits to applicants and the public against the potential harm to the public. [49 C.F.R. §1180.1\(c\) \(1982\)](#).

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

HN7[Railroads & Rail Transportation, Consolidation & Merger

In weighing potential harm to the public, the Interstate Commerce Commission considers two principal factors -- the degree of reduction of competition from a merger and the harm, if any, to essential services. In determining whether competition will be significantly reduced, the Interstate Commerce Commission considers both "intramodal" competition among rail carriers and "intermodal" competition with trucks, barges, pipelines, and ships. [49 C.F.R. §1180.1\(c\)\(2\)\(i\) \(1982\)](#).

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

HN8[Regulated Industries, Transportation

The Interstate Commerce Commission defines rail service as essential if there is a sufficient public need for the service and adequate alternative transportation is not available. [49 C.F.R. §1180.1\(c\)\(2\)\(ii\) \(1982\)](#). The Interstate Commerce Commission does not take into account potential harm to individual competitors (except insofar as harm to competitors significantly reduces competition) because it is concerned only with rail service to the public, not the survival of particular carriers. [49 C.F.R. §1180.1\(c\)\(2\)\(ii\) \(1982\)](#).

711 F.2d 295, *295L^A 1983 U.S. App. LEXIS 26338, **1

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Mergers & Acquisitions Law > Merger Guidelines

HN9 [blue icon] **Regulated Industries, Transportation**

The Interstate Commerce Commission believes that protective conditions are generally not in the public interest because they may lessen the benefits of a consolidation to both the carrier and the public. [49 C.F.R. §1180.1\(d\)\(1\) \(1982\)](#). It recognizes that competition creates an incentive to provide efficient service and therefore will impose conditions when needed to ameliorate potential anticompetitive effects of a consolidation. But it will not normally impose conditions on a merger to protect a carrier unless the conditions are needed to preserve essential services and will neither impose unreasonable costs on the consolidated carrier nor frustrate the ability of the consolidated carrier to obtain the anticipated public benefits.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN10 [blue icon] **Regulated Industries, Transportation**

See [49 C.F.R. §1180.1\(d\)\(1\) \(1982\)](#).

Bankruptcy Law > Reorganizations > Railroad Reorganizations

Mergers & Acquisitions Law > General Overview

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > Mergers > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

HN11 [blue icon] **Reorganizations, Railroad Reorganizations**

The Interstate Commerce Commission has a statutory responsibility to decide both whether the merger of a railroad with a second railroad which is in bankruptcy reorganization is consistent with the public interest under the Interstate Commerce Act, 49 U.S.C.S. § 11,344(c), and whether the reorganization of the bankrupt railroad is compatible with the public interest under Bankruptcy Act § 77(d), 11 U.S.C.S. §205(d).

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

711 F.2d 295, *295 U.S. App. LEXIS 26338, **1

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Administrative Law > Judicial Review > Standards of Review > General Overview

HN12 [blue icon] **Standards of Review, Deference to Agency Statutory Interpretation**

The standard of review for the Interstate Commerce Commission's decision is well established. The Interstate Commerce Commission's interpretation of its governing statute, like that of any regulatory agency, is entitled to deference. A reviewing court must accept the Interstate Commerce Commission's interpretation if it is sufficiently reasonable, even if it is not the only reasonable one or even the reading the court would have reached on its own.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Administrative Law > Judicial Review > Standards of Review > General Overview

HN13 [blue icon] **Standards of Review, Substantial Evidence**

The Interstate Commerce Commission's substantive conclusions are subject to review under the "substantial evidence" test of the Administrative Procedure Act, [5 U.S.C.S. § 706\(2\)\(E\)](#). Under that test, the Interstate Commerce Commission's factual findings must be supported by enough evidence to justify a refusal to direct a verdict the other way in a case tried to a jury. When the facts are uncertain, the agency will so state and go on to identify the considerations it found persuasive. Moreover, the Interstate Commerce Commission must consider the relevant factors and articulate a rational connection between the facts found and the choice made.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN14 [blue icon] **Judicial Review, Standards of Review**

A court can insist that the agency's reasons and policy choices do not deviate from or ignore the ascertainable legislative intent. Beyond that, however, it is not for the court to strike down conclusions that are reasonably drawn from the evidence and findings in the case.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Mergers & Acquisitions Law > Merger Guidelines

HN15 [blue icon] **Railroads & Rail Transportation, Consolidation & Merger**

There are two potential results from consolidations which would ill serve the public -- reduction of competition and harm to essential services. [49 C.F.R. § 1180.1\(c\) \(2\) \(1982\)](#).

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

711 F.2d 295, *295LÁ1983 U.S. App. LEXIS 26338, **1

Mergers & Acquisitions Law > Merger Guidelines

HN16 [blue icon] Regulated Industries, Transportation

The Interstate Commerce Commission defines "essential services" as: A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available. [49 C.F.R. §1180.1\(c\)\(2\)\(ii\) \(1982\)](#).

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

HN17 [blue icon] Regulated Industries, Transportation

The Interstate Commerce Commission treats the existence of harm to competition or to essential services as a threshold test for when conditions may be needed to reduce the adverse effects of a merger. It will never impose protective conditions unless a merger will cause significant reduction in competition or harm to essential services. If a merger will reduce competition or harm essential services, the Interstate Commerce Commission will decide whether conditions are desirable by balancing the costs and benefits of imposing conditions.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN18 [blue icon] Regulated Industries, Transportation

The Interstate Commerce Commission will not subsidize carriers who are no longer able to compete efficiently in the marketplace. [49 C.F.R. §1180.1\(d\)\(1\) \(1982\)](#).

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

HN19 [blue icon] Railroads & Rail Transportation, Consolidation & Merger

In reviewing a merger, the Interstate Commerce Commission must consider not only adequacy of transportation but also whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region. 49 U.S.C.S. § 11,344(b)(1)(E).

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

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

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Abandonment of Lines

HN20 [blue icon] **Regulated Industries, Transportation**

The Interstate Commerce Commission will not under any circumstances require one carrier to indemnify another carrier for losses due to traffic diversion, because this transfer of funds would, in effect, be a massive cross-subsidization of inefficient operations of another railroad.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Mergers & Acquisitions Law > Merger Guidelines

HN21 [blue icon] **Railroads & Rail Transportation, Consolidation & Merger**

Self-serving statements by a merging railroad's officers are entitled to little credence.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Mergers & Acquisitions Law > Merger Guidelines

HN22 [blue icon] **Interstate Commerce, US Interstate Commerce Commission**

If the Interstate Commerce Commission believes that an unconditioned merger would harm the public interest but finds a proposed condition inappropriate, its duty to advance the public interest requires it to devise appropriate conditions, if such conditions can be developed with reasonable effort.

Administrative Law > Judicial Review > Standards of Review > General Overview

Torts > Transportation Torts > Rail Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

711 F.2d 295, *295L 1983 U.S. App. LEXIS 26338, **1

[**HN23**](#) [] **Judicial Review, Standards of Review**

If the Interstate Commerce Commission imposes too heavy a burden on competing railroads to prove the need for protective conditions, a reviewing court may find that the Commission has neither met its affirmative duty to determine whether the unconditioned merger is consistent with the public interest nor developed substantial evidence to support its conclusions.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Transportation Law > Rail Transportation > Personnel > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

[**HN24**](#) [] **Railroads & Rail Transportation, Consolidation & Merger**

In reviewing a railroad merger, the Interstate Commerce Commission must consider, as part of its public interest determination, the interest of carrier employees affected by the proposed transaction. 49 U.S.C.S. § 11,344(b)(1)(D). Moreover, 49 U.S.C.S. §11,347 requires the Interstate Commerce Commission to protect displaced employees: When a rail carrier is involved in a transaction for which approval is sought under 49 U.S.C.S. §11,344, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement for employees who are affected by the transaction.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Mergers & Acquisitions Law > Merger Guidelines

Transportation Law > Rail Transportation > Personnel > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

[**HN25**](#) [] **Railroads & Rail Transportation, Consolidation & Merger**

49 U.S.C.S. §§ 11,344(b)(4) and 11,347 require the Interstate Commerce Commission to protect only employees of the merging railroads and not employees of other railroads.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

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

[**HN26**](#) [] **Regulated Industries, Transportation**

49 U.S.C.S. §11,343(a)(5), requires Interstate Commerce Commission approval for acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

711 F.2d 295, *295 U.S. App. LEXIS 26338, **1

Mergers & Acquisitions Law > Merger Guidelines

HN27 [blue download icon] Regulated Industries, Transportation

The broad definition of control in 49 U.S.C.S. §10, [102\(7\)](#) includes indirect control. Control includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means.

Mergers & Acquisitions Law > Merger Guidelines

HN28 [blue download icon] Mergers & Acquisitions Law, Merger Guidelines

See 49 U.S.C.S. §10, [505\(a\)](#).

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

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

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

HN29 [blue download icon] Regulated Industries, Transportation

The Northeast Rail Service Act of 1981 §1164(a), [45 U.S.C.S. §1112\(a\)](#), requires the Interstate Commerce Commission to decide any merger application involving a bankrupt Northeast railroad within 180 days.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

HN30 [blue download icon] Agency Rulemaking, Rule Application & Interpretation

A procedural schedule is a "rule," as defined broadly in [5 U.S.C.S. § 551\(4\)](#) to include not only substantive rules but also the whole or a part of an agency statement of general or particular applicability and future effect describing the organization, procedure, or practice requirements of an agency.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Agency Rulemaking > Informal Rulemaking

HN31 [blue download icon] Agency Rulemaking, Formal Rulemaking

The Administrative Procedure Act's ([5 U.S.C.S. §§ 551-706](#)) notice and comment requirements apply, however, only to substantive rules and not to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. [5 U.S.C.S. §553\(b\)\(A\)](#).

Administrative Law > Agency Rulemaking > General Overview

HN32 [blue download icon] Administrative Law, Agency Rulemaking

All procedural rules affect substantive rights to greater or lesser degree. When an agency rule jeopardizes the rights and interests of parties, it must be subject to public comment, even if the rule can in some sense be called procedural.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

[HN33](#) [blue icon] Regulated Industries, Transportation

Under 49 U.S.C.S. §11,[301\(b\)\(1\)](#), a carrier defined in 49 U.S.C.S. §11,[301\(a\)\(1\)](#) to include a corporation organized to provide transportation by rail -- must obtain Interstate Commerce Commission approval before issuing securities, and unapproved securities are void.

Mergers & Acquisitions Law > Merger Guidelines

[HN34](#) [blue icon] Mergers & Acquisitions Law, Merger Guidelines

Premature control does not automatically defeat a transaction. Rather, it is simply a factor in the Interstate Commerce Commission's overall decision whether a merger is in the public interest.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

[HN35](#) [blue icon] Agency Rulemaking, Rule Application & Interpretation

The Interstate Commerce Commission has broad discretion in controlling its own calendar.

Counsel: Robert R. Gensburg for Lamoille Valley Railroad Company, petitioner in No. 82-1498.

Robert P. vom Eigen, Charles A. Spitulnik, for Canadian National Railway Company, et al., petitioners in No. 82-1668.

Joseph L. Manson, III, John L. Richardson, Thomas E. Acey, Jr., for Providence and Worcester Railroad Company, petitioner in No. 82-1523. Debra L. Willen, for petitioner.

Robert L. Calhoun for the State of Vermont, petitioner in No. 82-1578 and intervenor in Nos. 82-1498 and 82-1523. Paulette S. Kessler, David M. Schwartz, and Robert C. Schwartz, for petitioner and intervenor.

Edward J. O'Meara, Interstate Commerce Commission, with whom John Broadley, General Counsel, and Henri F. Rush, Associate General Counsel, Interstate Commerce Commission, and John J. Powers, III and Kenneth P. Kolson, Department of Justice, were on the brief for respondents. John J. McCarthy, Jr., Interstate Commerce Commission, for respondents.

James E. Howard, Kathleen D. Hendrickson and Robert M. Owsiany, for intervenor, Guilford Transportation Industries, Inc.

Hugh P. Morrison, Jr., and Rand McQuinn for intervenor, [\[**2\]](#) Eastern Magnesia Talc Company. Donald J. Mulvihill and William J. Sweeney, for intervenor.

Charles W. Mulcahy, Jr., for intervenor, Trustees of the Property of Boston and Maine Corporation, Debtor.

Judges: Wilkey and Wald, Circuit Judges, and Bonsal, * Senior District Judge for the Southern District of New York. Opinion for the Court filed by Circuit Judge Wald.

Opinion by: WALD

Opinion

[*300] WALD, Circuit Judge:

We review here a decision of the Interstate Commerce Commission (ICC or Commission) approving unconditionally the merger of the Maine Central Railroad with the Boston & Maine Railroad. *Guilford Transportation Industries -- Control -- Boston & Maine Corp., 366 I.C.C. 292 (1982)* [hereinafter cited as *Boston & Maine Merger*].¹ Petitioners, competitors of the Boston & Maine, asked the ICC to protect them from competitive harm due to the merger by imposing various conditions on the merged entity (including sale of track, trackage rights, and preservation of swift traffic interchanges). The ICC declined to impose any protective conditions, finding that none of the petitioners had shown that [*3] the conditions it requested were needed to prevent the loss of "essential services."

Petitioners appeal to this court, claiming that the ICC's "essential services" test for imposing protective conditions is too strict and does not comply with the statutory directive that the ICC consider the effect of the merger on "adequacy of transportation to the public." 49 U.S.C. § 11,344(b)(1). Petitioners also argue that some of the ICC's findings are not supported by substantial evidence and that the ICC committed [*4] a variety of procedural errors. We reject the procedural challenges as either without merit or not constituting prejudicial error. We conclude, however, that the ICC's essential services test, as applied to petitioner Lamoille Valley Railroad, does not comport with the statute. We also find flaws in the agency's reasoning with regard to protective conditions requested by petitioner Canadian National Railway. We therefore affirm in part, reverse in part, and remand to the ICC to determine whether protective conditions are needed to protect the public's right to adequate transportation.

I. STATUTORY AND FACTUAL BACKGROUND

A. The Statutory Scheme

1. Specific Provisions Governing Railroad Mergers

HN1 [↑] The Interstate Commerce Act, 49 U.S.C. § 11,343(a), requires the ICC to review all railroad mergers.² [*6] The ICC must approve any merger that is "consistent with the public interest," but can impose conditions on the merger when needed to advance the public interest:

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

¹ The ICC shortly thereafter approved unconditionally the merger of the combined Boston & Maine/Maine Central with the Delaware & Hudson Railroad. *Guilford Transp. Indus. -- Control -- Delaware & Hudson Ry., 366 I.C.C. 396 (1982)* [hereinafter cited as *Delaware & Hudson Merger*]. We review the ICC's decision concerning the Delaware & Hudson in a companion case to this one, also issued today. *Central Vt. Ry. v. ICC, 711 F.2d 331 (D.C. Cir. 1983)*.

² 49 U.S.C. § 11,343(a) provides, in pertinent part:

HN3 [↑] The following transactions . . . may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger . . . of at least 2 carriers into one corporation. . . .

. . .

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

The Commission shall approve and authorize a [merger] when it finds the transaction **[**5]** is consistent with the public interest. The Commission may impose conditions governing the transaction.

[*301] *Id.* § 11,344(c).³ **[**7]** [**HN2**](#) In making the "public interest" determination for a proposed merger of two "class I" railroads,⁴ the ICC must consider five specific (but not exclusive) factors:

- (A) the effect of the proposed transaction on the adequacy of transportation to the public.
- (B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.
- (C) the total fixed charges that result from the proposed transaction.
- (D) the interest of carrier employees affected by the proposed transaction.
- (E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

Id. § 11,344(b)(1).

2. Congressional Policy on Railroad Mergers

[**HN5**](#) These statutory provisions must be interpreted in light of the longstanding congressional policy favoring railroad mergers that increase efficiency and quality of service. Since 1920, the ICC has operated under "the congressional policy of encouraging consolidation of the Nation's railroads." [Penn-Central Merger & N&W Inclusion Cases, 389 U.S. 486, 492, 19 L. Ed. 2d 723, 88 S. Ct. 602 \(1968\)](#). The Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, 90 Stat. 31 (current version in scattered sections of 45, 49 U.S.C.), reinforces that policy.

The 4R Act did not alter the substantive **[**8]** "public interest" standard for ICC approval of railroad mergers, but did provide new, expedited procedures for ICC review of merger proposals as an alternative to the existing procedures.

⁵ It also declared Congress' purposes to include:

- the encouragement of efforts to restructure the [rail] system on a more economically justified basis, including . . .
- . an expedited procedure for determining whether merger and consolidation applications are in the public interest.

Id. [§ 101\(a\)\(2\), 45 U.S.C. § 801\(a\)\(2\)](#).

The Senate committee report explained that the new procedures were needed because "the cumbersome, slow process of . . . processing merger proposals . . . has drastically slowed change needed in the industry." S. Rep. No. 499, 94th Cong., 1st Sess. 2-3 (1975), *reprinted* **[**9]** in 1976 U.S. Code Cong. & Ad. News 14, 16. The

We use the term "merger" as shorthand for the achievement of common control in any of these ways.

³ The sentence in § 11,344(c) referring to conditions does not explicitly refer to the "public interest." Nevertheless, the context strongly suggests, and the legislative history establishes beyond cavil, Congress' intent that the Commission apply the same "public interest" test both to the basic merger and to any conditions it imposes on the merger. Prior to 1978, the Act directed the ICC to approve a merger 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 . . . consistent with the public interest." 49 U.S.C. § 5(2)(b) (1976) (emphasis added). The Interstate Commerce Act was recodified to its current form in 1978 "without substantive change." 49 U.S.C. note preceding § 10, [101](#). The revisers deleted the words "just and reasonable" as redundant "in view of the words 'the transaction is consistent with the public interest.'" 49 U.S.C. § 11,344 revision note.

We therefore reject the suggestions by Guilford and the ICC that the Commission has broader discretion in imposing conditions on a merger than in approving or rejecting the merger as a whole.

⁴ [**HN4**](#) The ICC defines "class I" railroads as those railroads with annual operating revenues of \$ 50 million or more. 49 C.F.R. § 1240.1(a) (1982). Under that definition, both the Maine Central and the Boston & Maine are class I railroads.

⁵ See 4R Act, §§ 402 (amending existing law), 403 (providing new, alternative procedures), 90 Stat. 31, 62-66 (1976) (current version at 49 U.S.C. §§ 11,345, 11,346).

committee expected the new procedures to "encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system." *Id.* at 20, 1976 U.S. Code Cong. & Ad. News at 34. Similarly, the House expected that the new procedures would permit railroads "to voluntarily rationalize the system in a short period of [*302] time." H.R. Rep. No. 725, 94th Cong., 1st Sess. 63 (1975).⁶

The Staggers Rail Act of 1980, [**10] Pub. L. No. 96-448, 94 Stat. 1895 (amending 49 U.S.C. §§ 10,101-11,917), also shows Congress' endorsement of mergers that enhance railroad efficiency. The Staggers Act did not change the Interstate Commerce Act provisions governing mergers of two or more class I railroads. However, it substantially deregulated the railroad industry in a variety of ways (notably rate-setting practices) and established "the policy of the United States Government . . . to minimize the need for Federal regulatory control over the rail transportation system" and "to foster sound economic conditions in transportation." 49 U.S.C. § 10,101a(2), (5).

B. ICC Railroad Merger Policy

In response to the congressional directives in the 4R Act and the Staggers Rail Act, the ICC has established policy guidelines which favor railroad mergers that improve efficiency and disfavor imposing conditions on a merger that might reduce potential efficiency gains. [49 C.F.R. § 1180.1 \(1982\)](#); see [Railroad Consolidation Procedures, 363 I.C.C. 200 \(1981\)](#) (statement of basis and purpose).⁷ In general, the Commission "encourages . . . rationalization of the [*11] nation's rail facilities and reduction of its excess capacity." [49 C.F.R. § 1180.1\(a\) \(1982\)](#). [HN6](#)[↑] In deciding whether a merger is in the public interest, the Commission "performs a balancing test," weighing "the potential benefits to applicants and the public against the potential harm to the public." *Id.* [§ 1180.1\(c\)](#).

[HN7](#)[↑] In weighing potential harm to the public, the ICC considers two principal factors -- the degree of reduction of competition from a merger and the harm, if any, to "essential services." In determining whether competition will be significantly reduced, the Commission considers both "intramodal" competition among rail [**12] carriers and "intermodal" competition with trucks, barges, pipelines, and ships. *Id.* [§ 1180.1\(c\)\(2\)\(i\)](#). [HN8](#)[↑] The ICC defines rail service as "essential" if "there is a sufficient public need for the service and adequate alternative transportation is not available." *Id.* [§ 1180.1\(c\)\(2\)\(ii\)](#). The Commission does not take into account potential harm to individual competitors (except insofar as harm to competitors significantly reduces competition) because it is concerned only with rail service to the public, "not the survival of particular carriers." *Id.* [§ 1180.1\(c\)\(2\)\(ii\)](#).

[HN9](#)[↑] The ICC believes that protective conditions are generally not in the public interest because they "may lessen the benefits of a consolidation to both the carrier and the public." *Id.* [§ 1180.1\(d\)\(1\)](#). It recognizes that competition creates an incentive to provide efficient service and therefore will impose conditions when needed to "ameliorat[e] potential anticompetitive effects of a consolidation." But it "will not [*13] normally impose conditions" on a merger "to protect a carrier" unless the conditions are needed to preserve "essential services" and will neither impose "unreasonable" costs on the consolidated carrier nor "frustrate the ability of the consolidated carrier to obtain the anticipated public benefits." *Id.* [§ 1180.1\(c\)\(2\)\(ii\)](#).

⁶ See also H.R. 10,979, 94th Cong., 1st Sess. [§ 101\(3\)-\(4\)](#), reprinted in H.R. Rep. No. 725, 94th Cong., 1st Sess. 3 (1975):

The Congress finds and declares that --

...

(3) a clear need exists to eliminate duplication, inefficiency, and deterioration of the rail plant and equipment of the Nation's railroads;

(4) procedures . . . with respect to . . . mergers and consolidation . . . have become obsolete and have often been an obstacle to the improvement of rail efficiency. . . .

⁷ At the time the ICC issued its decision in this case, these guidelines were codified at [49 C.F.R. § 1111.10 \(1981\)](#). For convenience, we cite to the current codification in [49 C.F.R. § 1180.1](#).

⁸ [49 C.F.R. § 1180.1\(d\)\(1\) \(1982\)](#) provides:

[14] [*303] C. The Railroads Involved in this Case**

Guilford Transportation Industries (Guilford) is a holding company that is 100% owned by Timothy Mellon. Guilford owns the Maine Central Railroad, a profitable railroad with a near-monopoly over rail service to the Maine paper and forest products industries.

The bulk of the traffic carried by the Maine Central originates in Maine and travels west (to Montreal, Buffalo, Chicago, etc.) or south (to Boston, New York, and the mid-Atlantic states); there are also significant shipments of grain from the Midwest to the Maine poultry industry. Rail traffic that originates on the Maine Central can move *south* over the Boston & Maine Railroad. Traffic from the Maine Central can move *west* over four routes: over the Canadian National Railway to Montreal and points west; over the Canadian Pacific Railroad to Montreal and points west; over the Lamoille Valley Railroad to the Canadian National to Montreal and points west; and over the Boston & Maine to Albany and from there via Conrail or the Delaware & Hudson Railroad to Buffalo and points west.

The Canadian National and the Canadian Pacific are large and profitable transcontinental **[**15]** railroads. The Lamoille Valley operates a single 98-mile east-west line between Swanton, Vt. (its western gateway, connecting to the Canadian National) and St. Johnsbury, Vt. (its eastern gateway, connecting to the Maine Central). Only a small volume of traffic originates or terminates on Lamoille Valley's line. Thus, it depends on "overhead" traffic (carried from the Maine Central over the Lamoille Valley to the Canadian National or vice-versa) for financial viability. Even with its current level of overhead traffic, the Lamoille Valley has been only marginally profitable, and then only because the State of Vermont spent some \$ 16 million during the 1970's in upgrading Lamoille Valley's track and equipment.

The Boston & Maine operates east-west and north-south rail lines in Vermont, New Hampshire, Massachusetts, Connecticut, and New York. It is bankrupt and has been in reorganization since 1970. The Boston & Maine has lost money for the last 25 years; its revenue insufficient to support its extensive network of rail lines.⁹

[16]** The Providence & Worcester is a small, profitable railroad serving Rhode Island and Connecticut. It connects primarily with the Boston & Maine and the Canadian National in the north and Conrail in the west.

D. Proceedings Below

On October 28, 1981, Guilford applied to the ICC for permission to acquire the Boston & Maine. Its plan to make the Boston & Maine profitable depended on three major elements: federal subsidy (in the form of low-interest loans); operating cost savings from merging the Boston & Maine with the Maine Central; and increased revenue from diverting to the Boston & Maine some of the east-west traffic that now travels over the Canadian National, the Canadian Pacific, or the Lamoille Valley.

1. Conditions Requested by the Boston & Maine's Competitors

HN10 The Commission has broad authority to impose conditions on consolidations, including those that might be useful in ameliorating potential anticompetitive effects of a consolidation. However, the Commission recognizes that conditions may lessen the benefits of a consolidation to both the carrier and the public. Therefore, the Commission will not normally impose conditions on a consolidation to protect a carrier unless essential services are affected and the condition: (i) is shown to be related to the impact of the consolidation; (ii) is designed to enable shippers to receive adequate service; (iii) would not pose unreasonable operating or other problems for the consolidated carrier; and (iv) would not frustrate the ability of the consolidated carrier to obtain the anticipated public benefits. Moreover, the Commission believes that indemnification is ordinarily not an appropriate remedy in consolidation proceedings. Indemnification conditions can be anticompetitive by requiring the consolidated carrier to subsidize carriers who are no longer able to compete efficiently in the marketplace.

⁹ See *In re Boston & Maine Corp.*, 46 Bankr. 930, mem op. at 2 (D. Mass. 1983), *appeal filed*, No. 83-1086 (1st Cir. Feb. 3, 1983).

Petitioner Lamoille Valley did not oppose the basic merger. Lamoille Valley claimed, however, that diversion of east-west traffic from it to the Boston & Maine would cause [*304] it to go bankrupt. Lamoille Valley therefore sought to obtain a substitute source of revenue by purchasing part of a Boston & Maine line that would carry some of the diverted traffic.

Petitioner Canadian National¹⁰ [**17] also did not oppose the overall merger. It was concerned, however, that Guilford might seek to increase traffic diversion from the Maine Central/Canadian National east-west route to the Maine Central/Boston & Maine route by delaying the interchange of traffic between the Maine Central and the Canadian National. This would reduce the time advantage of the Maine Central/Canadian National route over the Maine Central/Boston & Maine route. Canadian National therefore asked the ICC to require Guilford to maintain current interchange service at Danville and Yarmouth Junctions, Maine.¹¹

[**18] Petitioner Providence & Worcester is not a direct competitor of the Boston & Maine but rather carries north-south traffic that originates on the Boston & Maine to Connecticut and Rhode Island. Providence & Worcester opposed the merger on the grounds that the merged railroad would not be financially viable and would be unable to maintain current service over those Boston & Maine lines that connect with the Providence & Worcester.

2. The ICC's Decision

The ICC approved the merger and denied all requests for protective conditions. It found that the "quintessential public benefit" from the merger was "the emergence of the [Boston & Maine] from reorganization as part of a potentially strong unified rail network." *Boston & Maine Merger*, 366 I.C.C. at 336. The Commission also found that "the primary competitive impacts of the [merger] are favorable." *Id.* at 340. There would be no direct reduction of competition because the Boston & Maine and the Maine Central "meet end-to-end" and "do not operate any parallel lines." *Id.* at 341. In addition, the combined Maine Central/Boston & Maine would be a stronger competitor against [**19] "the Canadian lines and Conrail." *Id.*

The ICC further found that the merger would not lead to cessation of essential services. The Commission rejected Canadian National's request for protective conditions on traffic interchanges at Danville and Yarmouth Junctions for several reasons. In particular, it was not convinced that Guilford intended to delay interchanges. Also, Canadian National's "ratemaking flexibility" gave it "sufficient competitive leverage to adequately combat any possible diversions of traffic." *Id.* at 352.

As for Lamoille Valley's request to buy track from the Boston & Maine, the ICC agreed that the diversion of much of Lamoille Valley's overhead traffic to the Boston & Maine would be a "devastating" financial blow to Lamoille Valley. *Id.* at 353. Nevertheless, it rejected Lamoille Valley's request because Lamoille Valley's service was not "essential" -- shippers could use truck transportation instead. While truck transportation was more expensive than rail transportation, it was not so expensive that shippers would be "forced out of business." *Id.*

E. Issues Presented

Lamoille Valley, supported by intervenors [**20] Eastern Magnesia Talc Co. (a shipper that uses the Lamotte Valley) and State of Vermont, claims that the ICC's test for whether a rail line provides "essential services" -- will shippers go out of business if the line shuts down -- is too strict and does not comport with the statutory directive that the ICC consider "adequacy of transportation to the public." 49 U.S.C. § 11,344(b)(1)(A). Lamotte Valley also claims that the Commission [*305] erred in not requiring Timothy Mellon, the sole owner of Guilford, to join the merger application and in failing to consider the interests of Lamotte Valley employees who may lose their jobs as a result of the merger.

¹⁰ Canadian National's co-petitioners -- Central Vermont Railway, Grand Trunk Western Railroad, and Detroit, Toledo & Ironton Railroad -- are wholly-owned subsidiaries of Canadian National. We use the name "Canadian National" to refer to any and all of these railroads.

¹¹ Canadian Pacific, the other principal competitor of the Boston & Maine, also sought protective conditions before the ICC and petitioned this court for review, but later made its separate peace with Guilford and withdrew its petition for review.

Canadian National joins Lamoille Valley in arguing that the ICC's essential services test is too strict. It also charges that the Commission misanalyzed both Guilford's incentive to delay interchanges at Danville and Yarmouth Junctions and the effect of such an action on Canadian National's willingness to remain in competition with the Boston & Maine. Finally, Canadian National argues that the expedited procedural schedule used by the ICC in considering the merger was a "rule" within the meaning of [**21] the Administrative Procedure Act (APA), [5 U.S.C. §§ 551\(4\), 553](#), and was improperly issued without notice and comment.

Providence & Worcester joins Lamoille Valley in objecting to the ICC's failure to require Timothy Mellon to join the control application. In addition, it objects to the Commission's finding that the Boston & Maine would be financially viable after the merger. Finally, Providence & Worcester raises several procedural objections: the ICC improperly failed to exercise jurisdiction over Guilford's issuance of securities to Timothy Mellon in connection with the merger; the ICC erred in approving Guilford's acquisition of the Vermont & Massachusetts Co. (which owns a single 56-mile long rail line leased by the Boston & Maine under a 999-year lease) without requiring a formal control application; and the ICC allowed Guilford prematurely to control the Boston & Maine.¹²

[**22] Intervenors Guilford and Trustees of the Boston & Maine support the ICC's decision.

In part II of this opinion, we defer, under principles of equitable abstention, to the reorganization court's finding that the merged Boston & Maine will be financially viable, and conclude that the ICC properly approved the merger as a whole. In part III, we find that the ICC's "essential services" test for determining when protective conditions may be needed, *on its face*, complies with the statute. Nevertheless, we find that the test, *as applied* to Lamoille Valley, is too strict. In part IV, we find that the ICC failed adequately to explain why Guilford would not downgrade service at Danville and Yarmouth Junctions and that the Commission placed undue weight on Canadian National's system-wide revenues in assessing Canadian National's willingness to provide service to Maine. In part V, we conclude that the ICC properly declined to take into account the interests of Lamoille Valley's employees in continued employment.

Part VI deals with the procedural issues. We conclude that the ICC's failure to require Timothy Mellon to join the merger application, if error, is not prejudicial in this [**23] case. We further conclude that the expedited procedural schedule used by the ICC is exempt from the APA's notice and comment requirements as a "rule[] of agency . . . procedure," [5 U.S.C. § 553\(b\)\(A\)](#), and that Providence & Worcester's various procedural objections are without merit. Part VII is a conclusion.

II. THE FINANCIAL VIABILITY OF THE BOSTON & MAINE

HN11 [+] The ICC has a statutory responsibility to decide both whether the merger of the Maine Central with the Boston & Maine is [*306] "consistent with the public interest" under the Interstate Commerce Act, 49 U.S.C. § 11,344(c), and whether the reorganization of the Boston & Maine is "compatible with the public interest" under Bankruptcy Act § 77(d), 11 U.S.C. § 205(d) (1976) (current version at [11 U.S.C. § 1172](#)). As part of its "public interest" determination under the Bankruptcy Act, the Commission found that the merged Boston & Maine would be financially viable. *Boston & Maine Merger*, 366 I.C.C. at 310-13. Finding [**24] that the other requirements of Bankruptcy Act § 77 were also satisfied, the Commission certified the reorganization plan to the reorganization court. *Id.* at 318. The reorganization court agreed that the merged Boston & Maine would be viable and approved

¹² The Boston & Maine Trustees argue that Providence & Worcester's alleged injury from the merger -- downgrading of the Boston & Maine's service connecting with the Providence & Worcester -- is too speculative to satisfy the "injury in fact" requirement for standing. See [Control Data Corp. v. Baldridge](#), 210 U.S. App. D.C. 170, 655 F.2d 283, 288-89 (D.D. Cir. 1981), cert. denied, 454 U.S. 881, 70 L. Ed. 2d 190, 102 S. Ct. 363 (1981) (3-part test for standing under the APA). We agree that the asserted injury is less than certain to occur. We note, however, that the ICC must have thought Providence & Worcester's objections were substantial enough to warrant addressing them on the merits. We shall do likewise. We defer to the ICC's expert judgment that there was a real possibility of harm to Providence & Worcester from an unconditioned merger. (An agency's assessment that the probability of injury from the agency's action is too low to confer standing would present a different case that we need not address here.)

the plan. *In re Boston & Maine Corp.*, 46 Bankr. 930, mem. op. at 33-42 (D. Mass. opinion issued Feb. 23, 1983), appeal filed, No. 83-1086 (1st Cir. Feb. 3, 1983).

In considering whether the merger was "consistent with the public interest" under Interstate Commerce Act § 11,344(c), the ICC saw "no need to repeat" its analysis of the viability of the reorganization plan. Relying on that analysis, the Commission again found that the merged Boston & Maine would be financially viable. *Boston & Maine Merger*, 366 I.C.C. at 339.

Providence & Worcester claims that the ICC wrongly decided that the reorganized and merged Boston & Maine would be financially viable.¹³ The ICC and the Boston & Maine Trustees respond that we lack jurisdiction to review the Commission's finding of viability because review of that finding lies exclusively in the reorganization court.¹⁴ We agree with [**25] this response, though we would characterize the issue as one of equitable abstention rather than lack of jurisdiction.

The *New Haven Inclusion Cases*, 399 U.S. 392, 419-30, 26 L. Ed. 2d 691, 90 S. Ct. 2054 (1970), involved a situation similar to this one. The ICC had approved the merger of the bankrupt New Haven Railroad with the Penn Central Railroad. The parties appealed the Commission's valuation of the New Haven's assets both to a three-judge district court with jurisdiction to review the ICC's approval of the merger and to the reorganization court charged with reviewing the New Haven's reorganization plan. The two courts reached conflicting valuations. The Supreme Court held that the three-judge district court, although it had jurisdiction "in a technical sense," *id. at 427*, should have "stayed its hand" and [**26] permitted the reorganization court to decide the valuation question, *id. at 428*.

We think abstention is likewise called for here. To be sure, in the *New Haven Inclusion Cases*, valuation was the sole issue still to be decided, so that the two courts were considering "identical issues." *Id. at 428*. Here, in contrast, we must decide numerous issues under the Interstate Commerce Act that were not and could not have been presented to the reorganization court. But the policy considerations that led the Court to order abstention in the *New Haven Inclusion Cases* also counsel abstention here.

First, the standard for determining financial viability is the same under the Bankruptcy Act and the Interstate Commerce Act. Thus, there is "no danger that application of [Bankruptcy Act § 77] would yield results different from those to be produced by [Interstate Commerce Act § 11,344(c)]." *Id. at 424*. Second, for this court to decide an issue that the reorganization court must also decide "would tend greatly to foment conflicts between coordinate courts and compel creditors, in the protection of their interests, to ride the circuit, [**27] demonstrating the basis of their positions in successive courts." *Id. at 427* (quoting *In re New York, N.H. & H.R. Co.*, 26 F. Supp. 18, 23 (D. Conn.), aff'd sub nom. *Palmer v. Warren*, 108 F.2d 164 (2d Cir. 1939), aff'd, 310 U.S. 132, 84 L. Ed. 1118, 60 S. Ct. 865 (1940)).

[*307] Third, Providence & Worcester has already had a full opportunity to present its arguments to the reorganization court, which rejected them. Thus, it cannot complain of unfairness because we do not give it a second bite at the apple. Cf. *id. 399 U.S. at 428 n.57* ("At no time has anyone questioned Penn Central's status as a party litigant in the reorganization court or challenged its right to make a full presentation of its case there. . . .").¹⁵

[**28] Finally, the major policy reason counseling against abstention -- "the importance of an expedited determination of the merits," *id. at 424* -- is not a factor in this case since the reorganization court has already issued its decision.

¹³ Providence & Worcester Brief at 42-47; Providence & Worcester Reply Brief at 19-24.

¹⁴ ICC Brief at 87 & n.59; Boston & Maine Trustees Brief at 37-40.

¹⁵ The reorganization court found that Providence & Worcester lacked standing to object to the plan of reorganization. *In re Boston & Maine Corp.*, *supra* note 9, mem. op. at 34. Nevertheless, the court went on to reject Providence & Worcester's claim on the merits. *Id. at 34-42*.

For the foregoing reasons, we defer to the reorganization court's conclusion that the ICC properly found that the merged Boston & Maine would be financially viable. The parties raise no other objection to the substantive basis for the ICC's approval of the merger as a whole, and we find in part VI *infra* no basis for reversing the Commission on procedural grounds. We therefore affirm the Commission's decision that the merger is "consistent with the public interest." 49 U.S.C. § 11,344(c).

III. LAMOILLE VALLEY'S REQUEST FOR PROTECTIVE CONDITIONS

A. Standard of Review

HN12[¹] The standard of review for the ICC's decision is well established. The Commission's interpretation of its governing statute, like that of any regulatory agency, is "entitled to deference." *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 70 L. Ed. 2d 23, 102 S. Ct. 38 (1981). [**29] We must accept the Commission's interpretation if it is "sufficiently reasonable," even if it is not "the only reasonable one or even the reading the court would have reached" on its own. *Id. at 39*; see *National Wildlife Federation v. Gorsuch*, 224 U.S. App. D.C. 41, 693 F.2d 156, 166-71 (D.C. Cir. 1982).

HN13[¹] The ICC's substantive conclusions are subject to review under the "substantial evidence" test of the Administrative Procedure Act, [5 U.S.C. § 706\(2\) \(E\)](#). See *Illinois Central Railroad v. Norfolk & Western Railway*, 385 U.S. 57, 66, 17 L. Ed. 2d 162, 87 S. Ct. 255 (1966). Under that test, the Commission's factual findings must be supported by enough evidence "to justify . . . a refusal to direct a verdict" the other way in a case tried to a jury. *Id.* We also expect that when the facts are uncertain, the agency will "so state and go on to identify the considerations [it] found persuasive." *Industrial Union Department, AFL-CIO v. Hodgson*, 162 U.S. App. D.C. 331, 499 F.2d 467, 476 (D.C. Cir. 1974). [**30] Moreover, the Commission must "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 S. Ct. 2246, 76 L. Ed. 2d 437, 51 U.S.L.W. 4678, 4683 (1983); see *Sierra Club v. Costle*, 211 U.S. App. D.C. 336, 657 F.2d 298, 323 (D.C. Cir. 1981).

Having assured ourselves that the agency has fully considered an issue and given reasons for its conclusions, we have only limited power to second-guess those reasons. "We **HN14**[¹] can and do insist that the agency's reasons and policy choices do 'not deviate from or ignore the ascertainable legislative intent.' " *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 227 U.S. App. D.C. 201, 705 F.2d 506, 520 (D.C. Cir. 1983) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, 91 S. Ct. 2233, 29 L. Ed. 2d 701 (1971)). Beyond that, [**31] however, "it is not for the court to strike down conclusions that are reasonably drawn from the evidence and findings in the case." *Illinois Central*, 385 U.S. at 69; see [¹⁰⁸] *Seaboard Coast Line Railroad v. United States*, 599 F.2d 650, 652 (5th Cir. 1979).

B. The ICC's Decision

The Lamoille Valley operates a single 98-mile-long east-west line between St. Johnsbury, Vt. in the east (where it connects with the Maine Central) and Swanton, Vt. in the west (where it connects with the Canadian National). It depends for financial viability on "overhead" traffic which it carries from the Maine Central to the Canadian National or vice-versa. The merger of the Maine Central with the Boston & Maine gives Guilford an incentive to divert traffic from the Maine Central/Lamoille Valley/Canadian National line to the competing Maine Central/Boston & Maine line. 16

[**32] Guilford estimated that its diversion efforts would reduce Lamoille Valley's gross revenues by about \$ 180,000, based on 1980 traffic data. See *Boston & Maine Merger* app. [C, 366 I.C.C. at 370](#). Lamoille Valley

¹⁶ Guilford's subsequent acquisition of the Delaware & Hudson, which we approve today in *Central Vt. Ry. v. ICC*, 229 U.S. App. D.C. 53, 711 F.2d 331 (D.C. Cir. 1983), extends the Boston & Maine's east-west route further west and thus increases Guilford's incentive to divert traffic from the Maine Central/Lamoille Valley/Canadian National route to the Maine Central/Boston & Maine/Delaware & Hudson route.

challenged Guilford's assumptions and counterestimated traffic diversion of as much as \$ 300,000.¹⁷ The ICC found flaws in Guilford's analysis and concluded that Guilford's diversion estimates -- both for the Lamoille Valley and for other carriers -- "are understated and can be considered as bare minimum estimates of traffic and revenue diversions." *Id. at 372.*

For the Lamoille Valley, the ICC found it unnecessary to make its own estimate of traffic diversion. It concluded that "even using [Guilford's] figures, which we have found to be minimum estimates, [Lamoille Valley] stands to lose . . . over [**33] 15 percent of its 1980 gross revenue. Such a financial blow would be devastating to [Lamoille Valley]." *Id. at 353.*

Despite this bleak outlook, the ICC denied Lamoille Valley's request for protective conditions because Lamoille Valley's services were not "essential." Lamoille Valley's overhead service was not essential "since a number of other connections to the Canadian routes exist." *Id. at 354.* Moreover, trucks could substitute for Lamoille Valley's local service. While truck service would undeniably cost more, shippers sometimes used trucks even now and no shippers would be "forced out of business" if they had to rely exclusively on trucks:

Even assuming that . . . there would be a cessation of operations, we cannot conclude that essential services would be affected. It appears from the evidence presented by shippers . . . that they can be served by motor carriers. All three supporting shippers . . . are either presently being served in part, or have been served previously, by truck. . . . While motor carrier service is more costly, it is a reasonably adequate substitute for [rail] service. None of the supporting shippers has [**34] indicated that it would be forced out of business if [Lamoille Valley] discontinued service.⁴³

Id. at 353.

Relying on this passage, Lamoille Valley asserts that the Commission used a "business termination" test to determine if Lamoille Valley's local service was "essential," and that this test does not comply with the statutory directive that the ICC consider "adequacy" of transportation. 49 U.S.C. § 11,344(b) (1) (A).¹⁸ Lamoille Valley also claims that the ICC failed to analyze the reduction in competition for east-west traffic from the Lamoille Valley going out of business. ICC counsel replies that the Commission, in finding that Lamoille Valley's [*309] services were not "essential," relied solely on the fact that the shippers were now or recently had been served by truck. Counsel asserts that the Commission has "never adopted or recommended" a business termination test and that the Commission's reference to shippers being "forced out of business" [**35] was mere dictum.¹⁹ As for possible reduction in competition from the Lamoille Valley going out of business, the Commission evaluated it and found it to be negligible.

¹⁷ See Verified Statement of Edward Lewis, General Manager of Lamoille Valley Railroad, at 12 (Jan. 6, 1982), reprinted in Joint Appendix (J.A.) at 1690, 1701.

⁴³. . . Eastern Magnesia Talc Company notes that costs of motor carrier transportation are "prohibitively expensive," but does not add that operations would be terminated.

¹⁸ Lamoille Valley Brief at 8-30; Lamoille Valley Reply Brief at 1-9.

¹⁹ ICC Brief at 46-47. ICC counsel also asserts that the Commission "was unconvinced that the potential revenue diversions . . . would put [Lamoille Valley] out of business." *Id. at 42.* Counsel relies on the ICC's speculation whether "the State of Vermont would walk away from its substantial investment in [Lamoille Valley]" and whether the Lamoille Valley's "excessive dependence on revenue from overhead traffic" might indicate "unrealistically low" rates for local traffic, in which case the Lamoille Valley could raise its local rates to offset lost revenues from overhead traffic. *Boston & Maine Merger*, 366 I.C.C. at 353-54.

We think that these comments by the ICC, read in context, are dicta. Moreover, the Commission's speculations are not, so far as we can tell, based on any evidence in the record. Thus, if we believed that this line of reasoning was critical to the ICC's decision, we would remand to the Commission for lack of substantial evidence to support its conclusion that the Lamoille Valley would continue operating.

[**36] C. *The Essential Services Test*

The ICC's policy statement on railroad mergers explains that [HN15](#) there are "two potential results from consolidations which would ill serve the public -- reduction of competition and harm to essential services." [49 C.F.R. § 1180.1\(c\) \(2\) \(1982\)](#). [HN16](#) The Commission defines "essential services" as:

A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available.

Id. [§ 1180.1\(c\) \(2\) \(ii\).](#) [HN17](#) The ICC treats the existence of harm to competition or to essential services as a *threshold* test for when conditions *may* be needed to reduce the adverse effects of a merger. It will never impose protective conditions unless a merger will cause significant reduction in competition or harm to essential services. If a merger will reduce competition or harm essential services, the Commission [\[**37\]](#) will decide whether conditions are desirable by balancing the costs and benefits of imposing conditions. This subsection considers the ICC's use of conditions to protect essential services; subsection D considers the ICC's use of conditions to preserve competition.

In general, the ICC's use of the "essential services" test as a threshold test for when protective conditions deserve further consideration is unobjectionable. Leaving aside the requirement -- not at issue in this case ²⁰ -- of a "sufficient public need," the ICC defines an "essential service" as one for which an "adequate alternative . . . is not available." This definition simply restates the statutory requirement that the ICC consider "adequacy of transportation to the public." 49 U.S.C. § 11,344(b) (1) (A). ²¹ Accord [Brotherhood of Maintenance of Way Employees v. ICC](#), 698 F.2d 315, 319 n.14 (7th Cir. 1983) ("Essential services are basically those the deprivation of which would result in inadequate service to the public."); cf. [Missouri-Kansas-Texas Railroad v. United States](#), 632 F.2d 392, 400-04 (5th Cir. 1980) (approving the ICC's use of an [\[**38\]](#) earlier definition of "essential services"), cert. denied, 451 U.S. 1017, 101 S. Ct. 3004, 69 L. Ed. 2d 388 (1981).

[**39] It remains to consider whether the ICC properly applied the essential services test to Lamoille Valley. The ICC gave three reasons for concluding that there were adequate alternatives to Lamoille Valley's rail service. First, all three shippers who testified in favor of Lamoille Valley's request for protective conditions "are either presently being served in part, or have been served previously, by truck." Furthermore, one shipper, E.T. & H.K. Ide Co., "has access to [Canadian Pacific] rail in St. Johnsbury, [Vt.]" Finally, no shipper claimed that "it would be forced out of business if [Lamoille Valley] discontinued service." *Boston & Maine Merger*, 366 I.C.C. at 353.

1. *Current or Past Truck Service*

The Commission's first reason for believing that Lamoille Valley's service is not essential has some probative force. It is plausible that a shipper formerly served by truck can again use trucks and that a shipper now served partially by truck can adequately be served entirely by truck. We must still determine, however, whether the record supports

²⁰ Guilford asserts that Lamoille Valley failed to show a "sufficient public need" for its service. Guilford Brief at 14-18. The ICC, however, did not refer in its decision to the "sufficient public need" requirement. Thus, the meaning of that phrase is not at issue in this case, and we express no view on how the Commission may permissibly interpret it.

²¹ The ICC also explained the close connection between the statutory standard of "adequacy of transportation to the public" and the essential services test in its decision in this case. See *Boston & Maine Merger*, 366 I.C.C. at 348 ("the issue of whether conditions should be applied in a consolidation . . . goes essentially to the question of whether the transaction will result in a lessening of the adequacy of transportation to the public").

The ICC has repeated this statement in almost all of its recent merger decisions. See Union Pac. Corp. -- Control -- [Missouri Pac. Corp.](#), 366 I.C.C. 459, 562 (1982), appeal filed sub nom. [Southern Pac. Transp. Co. v. ICC](#), 237 U.S. App. D.C. 99, 736 F.2d 708 (D.C. Cir. 1983); *Delaware & Hudson Merger*, *supra* note 1, 366 I.C.C. at 412; Norfolk S. Corp. -- Control -- [Norfolk & W. Ry.](#), 366 I.C.C. 171, 235 (1982); CSX Corp. -- Control -- [Chessie Sys.](#), 363 I.C.C. 518, 577 (1980), aff'd sub nom. [Brotherhood of Maintenance of Way Employees v. ICC](#), 698 F.2d 315 (7th Cir. 1983); St. Louis Sw. Ry. -- Purchase (Portion) -- [Chicago, Rock Island & Pac. R.R.](#), 363 I.C.C. 320, 380 (1980).

the Commission's belief that the individual shippers now served by the Lamoille Valley can be adequately served [**40] by truck.

We pass quickly over the one shipper, E.T. & H.K. Ide Co., which has access to Canadian Pacific's rail service, for that service is surely an adequate substitute for Lamoille Valley's service. For a second shipper, Lamoille Grain, the record shows that the price difference between rail and truck service is small. Indeed, as recently as 1980, Lamoille Grain switched from rail to truck because truck rates were slightly lower. It switched back only after Lamoille Valley reduced its rates to make them competitive with truck rates.²² Thus, Lamoille Grain can be served adequately by truck.

The third shipper, Eastern Magnesia Talc Co., presents a much harder case. It operates a talc mine from which it ships talc by truck to some nearby locations and by rail (usually 110-ton hopper cars) to more distant locations. Eastern Magnesia Talc Explain to the ICC that the cost of "loading [**41] to truck, hauling to a railhead, unloading, . . . and loading to railroad cars" would be "prohibitively expensive" and would effectively prevent it from serving distant locations.²³

In light of Eastern Magnesia Talc's uncontradicted statement about the need for rail service for a substantial part of its business, the Commission could not reasonably conclude that because Eastern Magnesia Talc uses trucks for part of its business, trucks are an adequate substitute for rail for the remainder of its business. We turn therefore to the Commission's alternate reason for concluding that Eastern Magnesia Talc could switch to truck service -- that Eastern Magnesia Talc had [**42] not asserted that it would be "forced out of business" if it loses rail service.

2. Business Termination

As an initial matter, and despite Commission counsel's denial, it seems clear to us that the ICC is indeed using a "business termination" test to determine whether a substitute for rail service is "adequate." The ICC's explanation, though terse, is unambiguous:

[*311] While motor carrier service is more costly, it is a reasonably adequate substitute for [rail] service. None of the supporting shippers has indicated that it would be forced out of business if [Lamoille Valley] discontinued service.

Boston & Maine Merger, 366 I.C.C. at 353 (footnote omitted). Similarly, in approving Guilford's acquisition of the Delaware & Hudson, the ICC explained that the north-south service provided by Canadian National was not essential because, in part:

Nowhere in the record has it been shown that any of [its] customers would go out of business if [Canadian National's] rail service would be terminated.

Delaware & Hudson Merger, *supra* note 1, 366 I.C.C. at 420. The ICC has used similar phraseology [**43] in several recent cases approving abandonment of rail service. See, e.g., *Missouri Pacific Railroad -- Abandonment -- Between Port Barre & Jefferson Island*, Docket No. AB-3 (Sub-No. 27), slip op. at 5 (July 21, 1982) (not printed) (protesting shipper did "not contend that the loss of rail service would put it out of business").²⁴

²² See Verified Statement of Kenneth Gilman, co-owner of Lamoille Grain Co., at 1 (Jan. 7, 1982), J.A. at 1718, 1718.

²³ Verified Statement of J. Howard Shafer, General Manager, Eastern Magnesia Talc co., at 2 (Jan. 8, 1982), J.A. at 1720, 1721. Eastern Magnesia Talc's asserted need for rail service is given added credibility by its purchase in 1977 of a 26% interest in the Lamoille Valley. See Lamoille Valley Brief at ii; Eastern Magnesia Talc Brief at 3.

²⁴ See also Illinois Cent. Gulf R.R. -- Abandonment -- Between Milepost 0.0 at Cherokee & Milepost 96.47 at Sioux Falls, Docket No. AB-43 (Sub-No. 47), slip op. at 22 (Jan. 18, 1983) (not printed) ("Calumet [a shipper] admits that it will continue to survive if abandonment is authorized."); Louisville & Nashville R.R. -- Abandonment -- In Fannin County, Docket No. AB-2 (Sub-No. 38), slip op. at 7 (Sept. 10, 1982) (not printed) ("Abandonment of the Murphy Branch would not leave [shippers] entirely without an alternative means of distributing their products. . . . Motor carriage . . . is not so inadequate as to burden shippers with

[**44] We can find no justification in the statute for use of a "business termination" test to determine whether alternative service is adequate, and indeed neither the ICC nor Guilford offers any.²⁵ The legislative history does not explain what Congress meant when it instructed the ICC to consider "adequacy of transportation to the public."²⁶ Thus, we must give the word "adequate" its ordinary meaning.

[**45] A refusal to consider protective conditions unless alternative service is so expensive that shippers will be forced out of business does not comport with the statutory directive to take into account "adequacy" of transportation. The term "adequate," as the Supreme Court noted long ago in a similar context, is "a relative expression." *Atlantic Coast Line Railroad v. Wharton*, 207 U.S. 328, 335, 52 L. Ed. 230, 28 S. Ct. 121 (1907). For a shipper, loss of a service that it currently uses generally portends some decrease in profit, which can be anywhere from minor to devastating. If the additional cost involved in using an alternative service is small, the ICC need not be concerned. At the other extreme, if the added cost is so grave as to force bankruptcy, the alternate service is clearly inadequate, at least for that shipper. Somewhere between these two extremes, we pass from adequate to inadequate service. Within reason, the Commission has discretion to draw the dividing line as it sees fit. The business termination test, however, is too far to one extreme to be a reasonable definition of "adequacy."

In seeking on remand to draw a better line, the Commission [**46] should inquire into how much more costly a proposed alternative is and whether loss of existing service will cause substantial harm to the local economy or to shippers who now use that service. With regard to individual shippers, if a shipper can use alternate service and still earn a fair return on capital, sufficient to generally maintain current operations and justify reinvestment of earnings, the [*312] alternate service would seem adequate. The same is true if the shipper can switch production to another plant without serious harm to the local economy. On the other hand, if a shipper cannot earn a fair return, or can do so only by sharply curtailing operations, the Commission probably ought to inquire further into the desirability of protective conditions. It is worth stressing that the essential services test is not a test for *imposing* conditions, but a test for when it is worthwhile to *consider* doing so. The ICC may do well, in close cases, to err on the side of reaching the merits of the underlying question whether protective conditions are in the public interest.

Sometimes, the profitability of individual shippers may be hard to assess, or a railroad may [**47] serve a large number of small shippers, insignificant individually but important in aggregate. The Commission may then want to consider whether most shippers in a particular industry rely on rail service. If not, that suggests that alternate transportation is probably an adequate substitute for shippers in that industry. If most shippers do rely on rail service, then alternate service is probably not an adequate substitute.

The Commission will also need to assess the importance of individual shippers. If the major shipper or shippers on a rail line can switch to truck, the Commission can reasonably find that truck service is adequate even if a few minor shippers cannot switch. Conversely, alternate service may be inadequate if a major shipper whose facility is important to the local economy cannot switch, even if most shippers can use the alternate service. Again, we urge the Commission, in cases of doubt, to proceed beyond the threshold "essential services" stage of its inquiry.

We note that our interpretation of "adequacy" of alternative transportation as meaning more than just not going out of business is consistent with past ICC interpretations. While there is no useful [**48] case law involving protective conditions for mergers (until recently, the ICC imposed a set of standard conditions on virtually every rail merger²⁷ [**50]), abandonment cases provide a close analogy.²⁸ The abandonment cases do not define "adequacy," but

²⁵insurmountable transportation problems.") (emphasis added), *rev'd sub nom. Georgia Pub. Serv. Comm'n v. United States*, 704 F.2d 538 (11th Cir. 1983).

²⁶Guilford, like ICC counsel, denies that the Commission is using a business termination test. See Guilford Brief at 16-17.

²⁷The Transportation Act of 1940, Pub. L. No. 76-785, sec. 7, § 5(2)(c)(1), 54 Stat. 898, 906, added the requirement that the ICC consider the effect of a merger "upon adequate transportation service to the public." This requirement has been carried forward without substantive change in the current law. The relevant committee reports do not explain what Congress meant by "adequate transportation." See H.R. Rep. No. 1217, 76th Cong., 1st Sess. 12 (1939); H.R. Rep. No. 2832 (Conf. Rep.), 76th Cong., 3d Sess. 68-69 (1940).

they do show that the ICC, in determining the public need for rail service, has inquired into the relative costs of rail and truck service. For example, in *Northwestern Pacific Railroad Abandonment (Portion) Sausalito Branch*, 312 I.C.C. 783, 789 (1962), the Commission found that abandonment was not warranted even though most of the shippers objecting to the abandonment "use motortrucks for part of their shipments." The Commission noted that a distiller "would be handicapped by the narrowing of the area in which it could purchase raw materials"; a dealer in heavy diesel engines would incur "added expense" in shipping disassembled [*313] engines by truck and assembling them at destination; and a sailboat manufacturer would incur "40 to 50 percent higher [costs]" in shipping sailboats by truck. *Id.* The Commission did not insist that the affected shippers claim they would be forced out of business by loss of rail [**49] service.²⁹

[**51] Recent court decisions are in accord. See [*Georgia Public Service Commission v. United States*, 704 F.2d 538, 545 \(11th Cir. 1983\)](#) (reversing ICC approval of a rail abandonment):

The uncontested testimony . . . is that . . . the "additional" transportation costs [of truck service] would be prohibitive. . . . If the phrase "alternative [transportation]" is to have any meaning it must be interpreted to include transportation both logically and economically feasible.

See also [*Indiana Sugars, Inc. v. ICC*, 694 F.2d 1098, 1101 \(7th Cir. 1982\)](#) (abandonment would "inflict serious hardships" on sugar company that depended on rail for much of its inbound traffic).

3. Conclusion

We conclude that the ICC misconstrued its governing statute and failed to justify its belief that Eastern Magnesia Talc can be served adequately by trucks. Therefore, we remand to the ICC to reconsider Eastern Magnesia Talc's ability to switch to trucks. If Eastern Magnesia Talc cannot switch, the Commission will also need to consider two questions this opinion does not address -- whether the needs of a single shipper make Lamoille Valley's service [**52] essential and, if so, whether the protective conditions sought by Lamoille Valley are in the public interest.³⁰ [**53] We order as follows: As discussed in part II *supra*, the merger as a whole is approved, but the

²⁷ These protective conditions required a merging carrier to keep open and maintain current service on all existing joint routes with competing carriers. They were called " DT&I Conditions" after the case in which they were first standardized. *Detroit, Toledo & Ironton R.R. Control*, 275 I.C.C. 455, 492-93 (1950), aff'd sub nom. [*New York, C. & St. L.R. Co. v. United States*, 95 F. Supp. 811 \(N.D. Ohio 1951\)](#) (3-judge court). The Commission imposed the DT&I Conditions on all mergers until 1979, when it declined to impose conditions in *Norfolk & W. Ry. -- Control* -- [*Detroit, Toledo & Ironton R.R.*, 360 I.C.C. 498, 526-27 \(1979\)](#), aff'd in part & remanded in part sub nom. [*Norfolk & W. Ry. v. United States*, 639 F.2d 1096 \(4th Cir. 1981\)](#). The ICC has since concluded that the DT&I Conditions "are anticompetitive and contrary to the public interest." [*Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings*, 366 I.C.C. 112, 112 \(1982\)](#), appeal filed sub nom. [*Detroit, Toledo & Ironton R.R. v. United States*, 725 F.2d 47 \(6th Cir. 1982\)](#).

²⁸ Lamoille Valley also cites a number of cases involving proposed *additional* service which suggest that a minor improvement in quality of service is enough to make existing service inadequate. E.g., [*Pennsylvania R.R. v. United States*, 323 U.S. 588, 591-93, 89 L. Ed. 478, 65 S. Ct. 543 \(1945\)](#); [*Denver & Rio Grande W.R.R. v. Union Pac. R.R.*, 351 U.S. 321, 333-34, 100 L. Ed. 1220, 76 S. Ct. 982 \(1956\)](#). We find these cases of little precedential value. The Commission can reasonably use one standard of adequacy when considering whether to authorize new entry into a market and a different standard in considering whether to allow market forces to dictate the loss of all rail service to an area.

²⁹ See also [*Baltimore & Ohio R.R. Abandonment, Landenburg Branch*, 354 I.C.C. 67, 72 \(1977\)](#) (disapproving abandonment because of the "serious, adverse effects" on shippers; one major shipper would have to spend a substantial annual sum to ship by truck to the nearest railroad); *Norfolk S. Ry. Abandonment*, 282 I.C.C. 622, 625 (1952) (denying abandonment and noting that although affected peach growers could use trucks, "peaches shipped by rail are salable longer . . . and they reach more distant markets").

³⁰ The Commission did not reach the question whether the conditions requested by Lamoille Valley are in the public interest, but we have grave doubts whether they are. Essentially, Lamoille Valley has asked the Commission to award it a new and profitable route so that it can use the profits to subsidize losses on its existing route. That request appears to violate [HN18](#) [↑] the

ICC shall expeditiously consider whether it is in the public interest to impose protective conditions in order to preserve the Lamoille Valley's service.³¹

D. Anticompetitive Effect

HN19 In **[**54]** reviewing a merger, the ICC must consider not only adequacy of transportation but also "whether the proposed **[*314]** transaction would have an adverse effect on competition among rail carriers in the affected region." 49 U.S.C. § 11,344(b) (1) (E). The ICC found that the Maine Central and the Boston & Maine "do not operate any parallel lines, but meet end-to-end." *Boston & Maine Merger*, 366 I.C.C. at 341. Therefore, the merger would not "directly reduce" competition, except for a minor impact on shippers in Portland, Maine (where the two rail systems meet). *Id.* The Commission found that, on the contrary, by strengthening the Boston & Maine, the merger would enhance competition for east-west traffic between the Boston & Maine route and the currently dominant Canadian National and Canadian Pacific routes. *Id.* at 340-41.

The Commission recognized that "an end-to-end consolidation may allow the [combined] system to divert traffic from remaining competitors and thereby foreclose their opportunity to compete in the marketplace." *Id.* at 341 n.35. It concluded, however, that the possible demise of the **[**55]** Lamoille Valley would have "negligible" competitive impact because "a number of other connections to the Canadian routes exist." *Id.* at 354.

Lamoille Valley asserts that the Maine Central does in fact compete with the Boston & Maine for east-west traffic.³² We agree. Traffic from Maine can travel west over four routes: (1) over the Canadian National (which connects with the Maine Central at Danville and Yarmouth Junctions, Maine) to Montreal and points west; (2) over the Maine Central's Mountain Division line to St. Johnsbury, Vt., and from there over the Lamoille Valley to the Canadian National to Montreal and points west; (3) over the Maine Central's Mountain Division line to St. Johnsbury and from there over the Canadian Pacific to Montreal and points west; and (4) over the Boston & Maine to Albany and points west. Thus, the Maine Central's Mountain Division line competes with the Boston & Maine's east-west line.

[56]** At present, the Maine Central has an incentive to route traffic over its own long haul (routes 2 and 3), in preference to the Canadian National route or the Boston & Maine route. After the merger, Guilford will prefer to route traffic to its new long haul -- the Boston & Maine route -- in preference to the other three routes. This traffic shift will lead to the Boston & Maine gaining revenue (\$ 3.2 million annually according to Guilford's traffic study) while the Maine Central loses revenue (\$ 1.9 million annually according to Guilford's study) due to decreased traffic

Commission's policy against "subsidiz[ing] carriers who are no longer able to compete efficiently in the marketplace." [49 C.F.R. § 1180.1\(d\)\(1\) \(1982\)](#) (quoted in full in note 8 *supra*). We cannot say that this policy is unreasonable in light of the congressional directive in the Staggers Rail Act, 49 U.S.C. § 10,101a(5), to "foster sound economic conditions in transportation." *Accord Brotherhood of Maintenance of Way Employees v. ICC*, [698 F.2d 315, 319 \(7th Cir. 1983\)](#) ("establishment of the 'procompetitive' policy disfavoring [protective] conditions falls squarely within the discretion of the Commission in exercising its regulatory expertise").

Nevertheless, it is not our place to decide what the ICC will do. Moreover, the ICC has the authority to impose conditions other than those initially suggested by Lamoille Valley. See notes 54-55 *infra* and accompanying text.

³¹ In light of this disposition, we do not reach Lamoille Valley's claim that even if the ICC may use a "business termination" test to measure the adequacy of alternate service, such a test is a major departure from prior policy for which the Commission failed to give a reasoned explanation. See [Missouri-Kan.-Tex. R.R. v. United States](#), [632 F.2d 392, 403 \(5th Cir. 1980\)](#), cert. denied, [451 U.S. 1017, 101 S. Ct. 3004, 69 L. Ed. 2d 388 \(1981\)](#). We likewise do not reach Lamoille Valley's claim that the Commission did not give Lamoille Valley advance notice of the new test. See [Norfolk & W. Ry. v. United States](#), [639 F.2d 1096, 1099 \(4th Cir. 1981\)](#). Finally, we do not need to reach Lamoille Valley's challenge to the adequacy of Guilford's study of traffic diversion in light of the Commission's conclusion that, even using Guilford's diversion estimates, Lamoille Valley would suffer "devastating" revenue losses.

³² Lamoille Valley Brief at 41-44; Lamoille Valley Reply Brief at 9-13.

over its Mountain Division line. See *Boston & Maine Merger* app. *C, 366 I.C.C. at 370*. We must therefore reject the ICC's statement that the Maine Central and the Boston & Maine do not compete with each other.³³

[**57] Nevertheless, we believe that the record supports the ICC's belief that the "primary competitive impacts of the [merger] are favorable." *Id.* at 340. The east-west route from Maine to the Midwest is over 1000 miles long. Currently, the Canadian National and the Canadian Pacific are the dominant carriers. The Boston & Maine's more circuitous route provides minimal competition, especially given the Boston & Maine's sorry finances and the Maine Central's incentive to route traffic away from the Boston & Maine and onto its own Mountain Division line and thence to the Canadian carriers. The merger, the ICC found, will permit the Boston & Maine to compete effectively over a large portion of this route. For that benefit, decreased competition over the short distance traversed by [*315] the Maine Central's Mountain Division line is a small price to pay.³⁴

[**58] As for reduction in competition due to the demise of the Lamoille Valley, we note that a large number of competing carriers on a particular route is not an end in and of itself. Rather, competition is valuable because it promotes efficient service. We find reasonable the ICC's belief that the remaining competition among the Canadian National, the Canadian Pacific, and the Boston & Maine will provide sufficient stimulus for efficient operation of rail lines.

IV. CANADIAN NATIONAL'S REQUEST FOR PROTECTIVE CONDITIONS

A. *The ICC's Decision*

Canadian National carries freight from Danville and Yarmouth Junctions, Maine (where it connects with the Maine Central) west to Montreal and Chicago. The joint Maine Central/Canadian National line is the fastest route between Maine and Chicago.

The Canadian National's time advantage depends on close coordination of schedules and speedy interchange with the Maine Central at Danville and Yarmouth Junctions. Canadian National expressed concern to the ICC that after the merger, Guilford would refuse to cooperate with Canadian National on scheduling and interchanges, thus increasing transit time over the Maine Central/Canadian National route. [**59] This would lessen the attractiveness of that route and permit Guilford to divert more traffic to the currently slower Boston & Maine route. Canadian National also claimed that reduced traffic would force it to cut expenses by running fewer trains and reducing track maintenance, which would further increase transit time, which would lead to additional diversion of traffic to the Boston & Maine, which would force Canadian National to reduce service further, and so on in a vicious cycle that ultimately would lead Canadian National to abandon its Grand Trunk Eastern line between Maine and Montreal.³⁵

³³ The ICC's assertion that the Maine Central and the Boston & Maine do not operate any "parallel lines" may be true in a narrow geometric sense, since the Maine Central's Mountain Division line (which carries traffic northwest) and the Boston & Maine's east-west line (which carries traffic southwest and then west) diverge at a 90 deg. angle. The significant question, however, is whether the two lines compete for the same traffic, not whether they appear parallel on a map.

³⁴ There is also a problem with Lamoille Valley's requested relief. We do not see, and Lamoille Valley has not explained, how Lamoille Valley's purchase of some Boston & Maine track will cure the loss of competition between the Maine Central and the Boston & Maine. The Commission "will not impose" conditions on a merger because of anticompetitive effects unless the conditions "will ameliorate or eliminate the harmful effects." *Union Pacific -- Control -- Missouri Pacific, supra note 21, 366 I.C.C. at 565*. Thus, whatever the competitive harm from the Maine Central/Boston & Maine merger, Lamoille Valley would not seem to be entitled to the relief it seeks.

³⁵ In addition to its east-west service, Canadian National operates joint north-south service with the Boston & Maine from Montreal to New York. Canadian National was concerned that Guilford would concentrate its efforts on east-west traffic and allow its north-south service to deteriorate. It therefore requested trackage rights over the Boston & Maine's portion of the north-south line. The ICC denied this request as based on "unsubstantiated fears" of reduced service. *Boston & Maine Merger*, 366 I.C.C. at 352.

It is unclear whether Canadian National presses this request on appeal. It mentions the issue, see Canadian National Brief at 14-15, but advances no reasons why the ICC's decision is wrong. Assuming that the issue is before us, we conclude, for the

[**60] Guilford's traffic study, which assumed no increase in interchange time at Danville and Yarmouth Junctions, predicted that diversion of east-west traffic to the Boston & Maine would cost Canadian National \$ 2 million in annual revenues. Canadian National counterestimated diversion losses of \$ 8.1 million per year if Guilford did not downgrade the Danville and Yarmouth interchanges and \$ 12.5 million if Guilford did downgrade the interchanges.

Canadian National asked the ICC to require Guilford to maintain "present operating arrangements, schedules of service, [and] blocking and handling of freight traffic interchanged at [Danville and Yarmouth] [*316] junctions." *Boston & Maine Merger* app. [B, 366 I.C.C. at 365](#). It claimed that fast service to Chicago is "essential" to shippers and that these conditions were needed both to prserve that service and to preserve competition for east-west traffic between it and the Boston & Maine.³⁶

[**61] In response, the ICC gave several reasons for believing that Canadian National's service would not be adversely affected by the merger. It did not reach the question whether that service is essential, nor did it discuss whether loss of the Canadian National's Grand Trunk Eastern line would significantly reduce competition for east-west traffic.

First, the ICC explained that Canadian National would not have to abandon its Grand Trunk Eastern line because even Canadian National's "worst-case scenario" of \$ 12.5 million diversion "represent[s] a mere fraction of 1 percent of CN's 1980 gross freight revenue." *Id.* at 352.³⁷ Second, there was "no indication in the record that [Guilford] has any intention of downgrading this interchange relationship." *Id.* Third, Guilford would not have an incentive to downgrade "since substantial traffic through these interchanges is nondivertible." *Id.* Finally, Canadian National "possesses sufficient competitive leverage to adequately combat any possible diversions of traffic" by virtue of its "single-line system between [Maine and the midwest] and the ratemaking flexibility inherent in such a system." *Id.*

[**62] We have substantial difficulties with each of these arguments. Cumulatively, the weaknesses in the ICC's arguments lead us to remand to the Commission to reconsider whether Canadian National's service will be adversely affected by the merger and, if so, whether the public interest would be advanced by restricting Guilford's ability to downgrade its interchanges with Canadian National.

B. The Limited Relevance of Systemwide Revenues

reasons given in response to a similar claim in [Central Vermont Railway v. ICC, supra note 1, 711 F.2d at 300](#), that any possible deterioration will not affect essential services.

Deterioration of the Boston & Maine's north-south service is also an essential component of Providence & Worcester's explanation of why it needs protective conditions. Since downgrading will not affect essential services, we affirm the Commission's denial of Providence & Worcester's request for conditions.

³⁶ Guilford's subsequent acquisition of the Delaware & Hudson, which extends the Boston & Maine's east-west route further west, increases Guilford's incentive to divert traffic from the Canadian National to the Boston & Maine/Delaware & Hudson line. Canadian National accordingly repeated its request for conditions in the Delaware & Hudson merger decision. See *Delaware & Hudson Merger*, *supra* note 1, 366 I.C.C. at 419. The ICC denied the request, relying on the reasons it gave in its *Boston & Maine* decision. Our analysis of the Commission's reasoning applies equally to both decisions, and is incorporated by reference in the companion case to this one reviewing the Delaware & Hudson merger. See [Central Vermont Railway v. ICC, supra note 1, 229 U.S. App. D.C. 53, 711 F.2d 331, slip op at 6-7](#).

³⁷ The ICC used similar reasoning to reject Canadian Pacific's request for protective conditions. See *Boston & Maine Merger*, 366 I.C.C. at 350 (even under Canadian Pacific's "worst-case scenario concerning diversions . . . , revenue lost . . . would be less than one-half percent of its gross revenues"). See also *Union Pacific -- Control -- Missouri Pacific*, *supra* note 21, 366 I.C.C. at 546 (threshold step in analyzing whether a merger will harm essential services is determining "gross revenue impact on non-included carriers"); *Norfolk Southern -- Control -- Norfolk & Western*, *supra* note 21, 366 I.C.C. at 213 (diversion estimate "represents only about seven-tenths of 1 percent of [the competing carrier's] gross revenue and will not threaten any essential services"); *Burlington N., Inc. -- Control & Merger -- St. Louis-S.F. Ry.*, 360 I.C.C. 784, 952 ("Where a carrier can sustain and absorb losses from traffic diversion, protective conditions are not warranted.") (footnote omitted), aff'd sub nom. *Missouri-Kan.-Tex. R.R. v. United States*, 632 F.2d 392 (5th Cir. 1980), cert. denied, 451 U.S. 1017, 101 S. Ct. 3004, 69 L. Ed. 2d 388 (1981).

We consider first the ICC's belief that essential services would not be affected because the diversions from the Canadian National to the Boston & Maine represent a fraction of 1% of Canadian National's gross revenues and thus, presumably, Canadian National could underwrite any losses on its Grand Trunk Eastern line. We fail to see the relevance of Canadian National's systemwide revenues.

First, if Guilford downgrades interchanges at Danville and Yarmouth Junctions, shippers will lose the benefits of "the best transit time between Maine and the Midwest." *Boston & Maine Merger*, 366 I.C.C. at 352. Canadian National's ability to absorb [*317] the resulting revenue loss will not change that fact.

Second, the ICC's emphasis [**63] on Canadian National's financial strength and neglect of the profitability of the Grand Trunk Eastern line ignores Canadian National's incentive to maximize profits by shedding money-losing operations. Nothing in the record supports the implausible proposition that Canadian National will indefinitely subsidize losses on its Grand Trunk Eastern line. On the contrary, undisputed testimony from Canadian National's President establishes that Canadian National treats its branches and subsidiaries as independent "profit centers" and will not subsidize a losing branch line.³⁸

Third, the ICC itself, as a policy matter, opposes on efficiency grounds the subsidizing of money-losing lines. [HN20](#)[] For example, the Commission will not "under any circumstances" require one carrier to indemnify another carrier for losses due to traffic [**64] diversion, because "this transfer of funds would, in effect, be a massive cross-subsidization . . . of inefficient operations of another railroad." *Burlington Northern -- Control -- St. Louis-S.F.*, *supra* note 37, 360 I.C.C. at 952-53.³⁹ [**65] Similarly, in abandonment proceedings, the Commission analyzes primarily the profitability of the line sought to be abandoned and gives little weight to the profitability of the parent railroad. See, e.g., *Illinois Central Gulf Railroad Abandonment Between Herscher & Barnes*, 363 I.C.C. 690, 703 (1980) ("Unprofitable operations . . . burden [the carrier] and interstate commerce . . . [and the carrier] should not be required to continue [such] operations . . . , regardless of whether it is financially capable of doing so. . . ."), aff'd sub nom. *Bloomer Shippers Association v. ICC*, 679 F.2d 668 (7th Cir. 1982).⁴⁰ The ICC, to be true to this policy, should not expect Canadian National to operate an inefficient, money-losing line.

In sum, the ICC's belief that Canadian National's overall profitability would permit Canadian National to preserve existing service on its Grand Trunk Eastern line ignores Guilford's unilateral ability to downgrade interchange service, is unsupported by evidence in the record, and is contrary to Commission policy.

This is not to say that Canadian National's Grand Trunk Eastern line will be unprofitable once the Maine Central merges with the Boston & Maine. Canadian National asserts that the Grand Trunk Eastern line will sustain heavy losses as a result of diversion of traffic to the Boston & Maine,⁴¹ [**66] but Guilford disputes this.⁴² On remand, the ICC will have an opportunity to decide this factual question.⁴³

³⁸ Verified Statement of Ronald Lawless, President, CN Rail, at 6 (Jan. 6, 1982), J.A. at 2196, 2201.

³⁹ See also [49 C.F.R. § 1180.1\(d\) \(1\) \(1982\)](#) (explaining the ICC's policy against indemnification) (quoted in note 8 *supra*).

⁴⁰ See also *Abandonment of Rail Lines -- Use of Opportunity Costs*, 360 I.C.C. 571, 577 (1979) (requiring a carrier to operate marginally profitable lines "is highly questionable as a matter of national transportation policy"), aff'd sub nom. *Farmland Indus. v. United States*, 642 F.2d 208 (7th Cir. 1981).

⁴¹ See Verified Statement of Ronald Lawless, *supra* note 38, at 10, J.A. at 2205.

⁴² See Guilford Brief at 11 n.10 (Canadian National allocates revenues "so that traffic which originates in the United States and traverses CN in Canada is profitable in Canada but unprofitable in the United States.") (citing Hearing Transcript, Feb. 11, 1982, at 951-52, J.A. at 726-27 (testimony of Ronald Lawless, President, CN Rail)).

⁴³ In deciding this issue, the ICC may also need to resolve the wide discrepancy between Guilford's \$ 2 million traffic diversion estimate and Canadian National's \$ 8 million estimate (\$ 12.5 million if interchange service is downgraded). Canadian National may then wish to renew its claim that Guilford's traffic study is so seriously flawed as not to constitute "substantial evidence" to support the Commission's findings. We do not reach that issue here.

C. *Guilford's Intent to Maintain Present Service*

A second major factor leading the ICC to conclude that the merger would not affect Canadian National's service was that the record gave "no indication" that Guilford [^{*}318] intended to downgrade service at the Danville and Yarmouth interchanges. [^{**67}] 366 I.C.C. at 352. We think this factor is entitled to little if any weight.

First, the record shows only that Guilford has no *present* intent to downgrade interchange service. Guilford made no promises concerning the future. Thus, Guilford's owner, Mr. Mellon, when asked if he would "give Guilford's assurance" that it would preserve service at Danville and Yarmouth Junctions, gave an equivocal answer -- "if the economic circumstances are somewhat what they are today." ⁴⁴ Moreover, Guilford opposed Canadian National's request for conditions, thus reserving for itself the right to decrease service in the future.

HN21[^F] Second, as the Commission itself has recently recognized, self-serving statements by a merging railroad's officers are entitled to little credence. See *Norfolk & Western -- Control -- Detroit, Toledo & Ironton, supra* [^{**68}] note 27, 360 I.C.C. at 512 (promise by two competing railroads to operate independently a third competing line is "self-serving and must be examined closely. . . . It is difficult to expect sacrificial behavior from profit seeking corporations into the indefinite future."). Guilford will, we expect, seek to maximize profits. If it can profitably downgrade interchanges with Canadian National, Guilford will have strong incentives to do so, notwithstanding its current disclaimers. Thus, Guilford's actual financial incentives, not its professed intent, must be the dominant concern. We consider those incentives next.

D. *Guilford's Incentives to Downgrade Interchange Service*

The ICC's third reason for rejecting protective conditions at Danville and Yarmouth Junctions was that "it would not appear to be to [Guilford's] benefit for such deterioration [of interchange service] to take place, since substantial traffic through those interchanges is nondiveritable." *Boston & Maine Merger*, 366 I.C.C. at 352. ⁴⁵ We think that the Commission failed to analyze properly Guilford's incentives to downgrade interchange service.

[^{**69}] 1. *Guilford's Incentives in Antitrust Theory*

The Maine Central is the only railroad providing east-west service to the Maine paper industry. Moreover, Canadian National claims, and the Commission does not dispute, that most of the Maine Central's traffic is captive to rail -- trucks are not a significant source of competition. ⁴⁶ Thus, the Maine Central has market power over rail traffic to and from Maine. As a theoretical matter, then, the Maine Central may be able to increase profits by altering its interchange service.

The merger of the Maine Central with the Boston & Maine is, in antitrust terminology, a "vertical" merger. Ordinarily, a vertically integrated monopolist has no incentive to use its monopoly power over one level of production (rail service in Maine) to increase profits at another level (rail service from Maine to the midwest). As the leading treatise puts it, "there is but one maximum monopoly profit to be gained" from a monopoly of [^{**70}] one level of production, and that profit may be gained directly at the monopolized level (here, rail service in Maine) through appropriate pricing. 3 P. Areeda & D. Turner, *Antitrust Law* § 725b (1978). There is an exception to this rule, however, for a regulated monopolist, which may be able to obtain from a second level of production "the monopoly profits which effective regulation of the franchised monopoly precludes." *Id.* Para. 726e (footnote omitted). ⁴⁷

⁴⁴ Hearing Transcript, Jan. 4, 1982, at 271, J.A. at 282 (testimony of Timothy Mellon).

⁴⁵ Elsewhere in its opinion, the Commission gave a similar explanation: "the volume of traffic through the Danville and Yarmouth interchanges will remain too high and profitable for [Guilford] to risk downgrading service there." *Boston & Maine Merger*, 366 I.C.C. at 342.

⁴⁶ See Canadian National Brief at 13.

⁴⁷ See also *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973) (Otter Tail Power illegally used its dominance over wholesale power transmission to "foreclose potential [competitors in] the retail area from

[**71] [*319] The Maine Central is, of course, a regulated monopolist. It is barred by the ICC from charging a monopoly price for rail service to Maine,⁴⁸ but may be able to use its control over service at Danville and Yarmouth Junctions to shift its potential monopoly profit to the Boston & Maine. Indeed, the ICC itself has recently recognized the risk of such conduct. See *Union Pacific -- Control -- Missouri Pacific*, *supra* note 21, 366 I.C.C. at 529:

[In an end-to-end merger], the consolidated system may profit by limiting the "downstream" competition [from connecting carriers] and routing traffic over its own lines from origin to destination. . . . This vertical foreclosure effect will occur, if at all, at the gateways served commonly by the consolidating carriers.

We do not know whether Guilford will *in fact* profit by downgrading [**72] interchange service, but the risk is substantial. Indeed, Areeda and Turner believe that the probability that a vertically integrated, regulated monopolist will abuse its market power is "peculiarly high." *Id.* Para. 726e, at 218. They would forbid vertical integration by a regulated monopolist except in cases where regulatory authorities "can more or less easily exercise the power to prohibit refusals to sell and to specify the price and other terms of sale." *Id.* Para. 726e, at 219 (footnote omitted). In this case, the ICC permitted vertical integration but declined to exercise its power to control the "terms of sale" between the Maine Central and the Canadian National. The question is whether that decision was reasonable.

2. *Guilford's Actual Incentives*

We do not think that the Commission gave Guilford's possible incentives to downgrade interchange service the scrutiny they deserve. As we understand its terse explanation, the Commission's conclusion that Guilford has no incentive to downgrade rests on two premises, the first explicit, the second implicit. First, Guilford will continue to transfer substantial amounts of traffic to Canadian National at Danville [**73] and Yarmouth Junctions. Second, if Guilford downgrades interchange service, it will earn less profit on nondiverisible traffic.

The first premise is undisputed in the record, though Guilford and Canadian National disagree on how much traffic will be diverted.⁴⁹ [**74] There is no record evidence regarding the second premise. The premise is plausible, if only because reduced service will lead some shippers to switch to trucks or produce fewer goods. But the magnitude of this effect is uncertain and may well be small. Little traffic will be lost to trucks because, for most of the Maine Central's shippers, trucks are not a feasible alternative to rail. And the record is silent on how much business Maine producers will lose to competitors elsewhere in the country if they lose fast service to the midwest.
50

The Commission not only failed to quantify Guilford's costs from downgrading interchange service at Danville and Yarmouth Junctions, it also ignored the benefits to [*320] Guilford from increased diversion. The Commission does not dispute that some additional diversion will occur. We can only speculate as to the amount of diversion and how profitable the diverted traffic will be to Guilford.

Without quantifying the costs or even discussing the benefits to Guilford from downgrading interchange service, the ICC could not rationally conclude that Guilford will not have an incentive to downgrade. On remand, the Commission must ascertain more carefully where Guilford's incentives actually lie.

obtaining electric power"); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912) (railway terminal company reorganized to prevent it from abusing its monopoly over rail traffic into St. Louis); *Chesapeake & Ohio Ry. v. United States*, 704 F.2d 373, 377 (7th Cir. 1983) ("regulatory distortions . . . might make the closing of efficient through routes profitable conduct for [a railroad] when in an unregulated market it would be commercial suicide").

⁴⁸ See 49 U.S.C. §§ 10,101a(6), 10,709 (ICC must limit rates charged by "market dominant" carriers).

⁴⁹ Canadian National estimates diversion losses of almost half of the traffic currently carried over the Grand Trunk Eastern line -- 11,600 cars out of a current total of 25,700 cars per year. See Verified Statement of James Metsos, System Manager, CN Rail, Jan. 7, 1982, at 29, 38, J.A. at 2240, 2268, 2277.

⁵⁰ In *Union Pacific -- Control -- Missouri Pacific*, *supra* note 21, 366 I.C.C. at 528-29 & n.71, the Commission discussed the role of such "source competition" in limiting the anticompetitive effects of a railroad merger but placed little weight on this factor.

We do not suggest that the Commission will be able to predict Guilford's future behavior with absolute accuracy. [**75] Rather, Guilford's incentives or disincentives to downgrade will be "primarily a question of probabilities, and thus peculiarly subject to the expert experience, discretion, and judgment of the Commission." [Missouri-Kansas-Texas Railroad v. ICC, 632 F.2d 392, 406 \(5th Cir. 1980\)](#), cert. denied, 451 U.S. 1017, 101 S. Ct. 3004, 69 L. Ed. 2d 388 (1981). But our deference to its ultimate choice does not relieve the Commission of the duty to explain, based on substantial evidence in the record, whether Guilford will or will not have an incentive to downgrade interchange service.

E. Canadian National's Competitive Leverage

The ICC's final reason for believing that Guilford would not downgrade interchange service was Canadian National's power to take effective opposing steps. The Commission explained:

[Canadian National (CN)] possesses sufficient competitive leverage to adequately combat any possible diversions of traffic. The CN-[Maine Central] connection still affords shippers the best transit time between Maine and the Midwest. By virtue of operating a single-line system between these two regions of the country, and the ratemaking [**76] flexibility inherent in such a system, CN is able to assert a great deal of influence in the routing of traffic.

Boston & Maine Merger, 366 I.C.C. at 352. This reasoning is none too clear, but we understand the Commission to suggest two sources of Canadian National's "competitive leverage." First, Canadian National's route is the fastest. Second, Canadian National's long haul over a single system gives it "ratemaking flexibility."

We fail to understand the first claim. That Canadian National can potentially provide the fastest route to the midwest will not do it much good if Guilford unilaterally destroys that advantage. As for "ratemaking flexibility," we are not sure what the Commission means by the term, but we can see two possibilities. First, Canadian National can recoup lost traffic by cutting its prices to shippers. Second, Canadian National can pay Guilford to maintain current interchange service by giving Guilford a larger share of the total Maine-to-midwest freight charge.

Price cuts to shippers, however, will not restore the Canadian National's current fast, efficient service to the midwest. Moreover, price cuts offer scant promise of returning [**77] the Grand Trunk Eastern to profitability. In the long run, if the Grand Trunk Eastern loses money, Canadian National will presumably close it down.

Canadian National may temporarily preserve fast service by giving Guilford a larger share of joint revenues. Such payments, however, can only reduce the Grand Trunk Eastern's profitability, which in the long run is essential to service of any kind, let alone fast service.⁵¹ We conclude, therefore, that the Commission unreasonably relied [*321] on Canadian National's "competitive leverage" to preserve existing service.

[**78] F. Potential Harm from Protective Conditions

Having considered the possible need to preserve interchange service at Danville and Yarmouth Junctions,⁵² [**80] we turn briefly to the possible harm from imposing protective conditions. Canadian National's requested conditions, as described by the ICC, were:

⁵¹ Giving Guilford a larger share of joint revenues may not even preserve fast service in the short run. As the Commission recently recognized in its *Rulemaking Concerning Traffic Protective Conditions*, *supra* note 27, 366 I.C.C. at 125-26, a competing carrier who participates in an efficient joint route (*i.e.*, Canadian National) may be unable to pay enough to persuade the other participating carrier (*i.e.*, Guilford) to prefer a joint route over the other carrier's less efficient single-line route. The record is silent on whether Canadian National can offer enough to persuade Guilford to maintain current interchange service.

⁵² Technically, we have addressed, as did the Commission, only the probability that protective conditions will be needed and not the amount of public benefit from preserving Canadian National's service. There is little doubt, however, that the amount of benefit is substantial. There are now three competing railroads in the Maine-to-midwest corridor: Guilford, Canadian National, and Canadian Pacific. If Canadian National withdraws from the competition because of losses on its Grand Trunk Eastern line, only two competitors will be left. The ICC has recently held in reviewing another merger that loss of one of three existing

[Maine Central] shall preserve and continue at a minimum its practices existing on October 31, 1981 in connection with handling freight traffic over the routes with the Grand Trunk Eastern and at the interchange points at Danville Junction and Yarmouth Junction, ME. Changes in present operating arrangements, schedules of service, blocking and handling of freight traffic interchanged at these junctions shall be made only with the concurrence of Canadian National Railway.

Boston & Maine Merger app. [B, 366 I.C.C. at 365](#). The ICC explained that these conditions were relatively "narrow in scope" and would have little effect on competition, but would reduce Guilford's ability to improve service on its own system:

They do not appear to affect rates or diversions [sic], but rather freeze existing practices with respect to operating arrangements, [\[**79\]](#) schedules, and the blocking and handling of freight moving over Danville and Yarmouth Junctions in Maine. While the competitive effect of these conditions is not clear, imposition of these conditions would at least reduce [Guilford's] flexibility in improving the service capabilities on its own system.

Id. at 352. ⁵³

Canadian National urges that its proposed veto over changes in operating arrangements would not "freeze existing practices." Canadian National points out that if it used its veto, Guilford could appeal to the Commission, which could grant relief from the condition in a proper case. See *Southern Pacific Co. -- Merger -- Pacific Electric Railway*, [354 I.C.C. 100, 109-10 \(1977\)](#). We see little force to this argument. Guilford would still be burdened by the delay involved in an appeal to the ICC. Thus, as a practical matter, Canadian National's veto would substantially reduce Guilford's flexibility.

On the other hand, the ICC is not restricted [\[**81\]](#) to choosing between Canadian National's requested conditions and no conditions at all.⁵⁴ On the contrary, [HN22](#) if the Commission [\[*322\]](#) believes that an unconditioned merger would harm the public interest but finds a proposed condition inappropriate, its duty to advance the public interest requires it to devise appropriate conditions, if such conditions can be developed with reasonable effort. See *Baltimore & Ohio Railroad v. United States*, [386 U.S. 372, 430, 18 L. Ed. 2d 159, 87 S. Ct. 1100 \(1967\)](#) (Brennan, J., concurring) ("the ICC is not the prisoner of the parties' submissions" and must "weigh alternatives and make its choice according to its judgment how best to achieve [Congress' policy] goals") (footnotes omitted); *Atlantic Coast Line R. Co. v. United States*, [48 F.2d 239, 244 \(W.D.S.C. 1931\)](#) (3-judge court) ("It is not only the right but the duty of the commission to impose such conditions as will make the acquisition in the public interest. . . ."), aff'd, [284 U.S.](#)

competitors is "a substantial lessening of competition." *Union Pacific -- Control -- Missouri Pacific*, *supra* note 21, at 531. We do not see why a different result would obtain here.

Moreover, Canadian National's route is more efficient -- in time, energy use, and switching costs -- than the Boston & Maine route. Unless the difference in efficiency is minor, the public interest supports preserving the more efficient route. See *United States v. Lowden*, [308 U.S. 225, 230, 84 L. Ed. 208, 60 S. Ct. 248 \(1939\)](#) ("the term public interest . . . 'has direct relation to adequacy of transportation service [and] to its essential conditions of economy and efficiency'") (quoting *Texas v. United States*, [292 U.S. 522, 531, 78 L. Ed. 1402, 54 S. Ct. 819 \(1934\)](#)); *Chesapeake & Ohio Ry. v. United States*, [704 F.2d 373, 377 \(7th Cir. 1983\)](#) ("If the closed routes . . . are more efficient than the alternative routes that remain open, the [closings] are not in the public interest.").

⁵³ Canadian National objects that it did request rate conditions. Canadian National Brief at 67-68. We do not address the possible need for rate conditions at this time. Our discussion is limited, as was the Commission's, to Canadian National's less anticompetitive request for protection against service changes. On remand, Canadian National may renew its request for rate conditions and appeal from an adverse decision by the Commission.

⁵⁴ See *New York Cent. Sec. Corp. v. United States*, [287 U.S. 12, 28, 53 S. Ct. 45, 77 L. Ed. 138 \(1932\)](#) (the Commission is "not limited to conditions proposed or favored by the carriers"); Illinois Cent. Gulf R.R. -- Acquisition -- Gulf, Mobile & Ohio R.R., [338 I.C.C. 805, 844-45 \(1971\)](#), aff'd sub nom. *Missouri Pac. R.R. v. United States*, [346 F. Supp. 1193 \(E.D. Mo. 1972\)](#) (3-judge court), and also aff'd sub nom. *Kansas City S. Ry. v. United States*, [346 F. Supp. 1211 \(W.D. Mo. 1972\)](#) (3-judge court), both decisions aff'd mem., [409 U.S. 1094, 93 S. Ct. 903, 34 L. Ed. 2d 679 \(1973\)](#).

288, 52 S. Ct. 171, 76 L. Ed. 298 (1932). See also Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620-21 (2d Cir. 1965), **[**82]** cert. denied, 384 U.S. 941, 16 L. Ed. 2d 540, 86 S. Ct. 1462 (1966).⁵⁵

[83]** The ICC can probably design conditions that will prevent significant deterioration in transit time on the Maine Central/Canadian National route without seriously burdening Guilford. At a minimum, the Commission can require Guilford to give Canadian National advance notice of service changes. It could then permit Guilford to make the changes after an expedited showing to the Commission that the changes will not disrupt joint service with the Canadian National. Alternatively, it could permit the changes unless Canadian National shows that the changes will disrupt its service to the midwest. If appropriate, the Commission can limit the duration of any conditions it imposes.⁵⁶ Other possibilities may also occur to the Commission.

G. Conclusion

All four of the **[**84]** ICC's reasons for finding no need to impose protective conditions are seriously flawed. Cumulatively, they show failure by the Commission to "consider all of the relevant factors and demonstrate a reasonable connection between the facts on the record and the resulting policy choice." Sierra Club v. Costle, 211 U.S. App. D.C. 336, 657 F.2d 298, 323 (D.C. Cir. 1981) (footnote omitted). We therefore remand to the Commission to reconsider the public benefit from protective conditions, taking into account the factors identified in this opinion.⁵⁷

[85] [^323]** We recognize the complexity of this endeavor. In all likelihood, the probability that Guilford will downgrade interchange service will be greater than zero and less than 100%. The magnitude of public harm from downgrading will be uncertain as well. From these two uncertainties, the Commission will have to compute a rough, perhaps unquantified estimate of expected public benefit from protective conditions, and weigh that benefit against the equally speculative cost of restricting Guilford's future flexibility.

Once that balancing has been done, we will not lightly disturb the Commission's ultimate conclusion. On the record before us, however, the Commission has both ignored relevant factors and reached conclusions unsupported by

⁵⁵ Congress has at times noted its belief that the ICC should take an active role in structuring transactions to advance the public interest. See S. Rep. No. 499, 94th Cong., 1st Sess. 19 (1975), 1976 U.S. Code Cong. & Ad. News at 32-33 (criticizing the ICC's passive role in merger proceedings); H.R. Doc. No. 678, 78th Cong., 2d Sess. 53 (1944) (ICC "is not intended to be a passive arbiter but the 'guardian of the general public interest', with a duty to see that this interest is at all times effectively protected") (footnote omitted).

⁵⁶ See *Burlington Northern -- Control -- St. Louis-S.F., supra note 37, 360 I.C.C. at 957* (imposing traffic protective conditions for two years to give carriers "time to adjust to the new competitive climate").

⁵⁷ In light of this disposition, we do not reach Lamoille Valley's claim that the ICC imposed an undue burden of proof on railroads seeking protective conditions. It is implicit in our analysis, however, that HN23[↑] if the Commission imposes too heavy a burden on competing railroads to prove the need for protective conditions, a reviewing court may find that the Commission has neither met its affirmative duty to determine whether the unconditioned merger is consistent with the public interest nor developed substantial evidence to support its conclusions. Cf. ICC v. J-T Transp. Co., 368 U.S. 81, 89-90, 82 S. Ct. 204, 7 L. Ed. 2d 147 (1961):

Had the Commission, having drawn out and crystallized the [] competing interests [of railroads and shippers], attempted to judge them with as much delicacy as the prospective nature of the inquiry permits, we should have been cautious about disturbing its conclusion.

But . . . we are under no compulsion to accept its reading where, as here, we are convinced that it has loaded one of the scales. . . . By assigning to the applicants the burden of proving the inadequacy of existing services, the Commission [improperly] favored the interests [of competing carriers] at the expense of the shippers'

substantial evidence in the record. It has not, in short, exercised that modicum of care that would permit us to approve its decision as "reasonable."⁵⁸

[[**86] V. LABOR PROTECTIVE CONDITIONS

[HN24](#) In reviewing a railroad merger, the ICC must consider, as part of its public interest determination, "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. § 11,344(b) (1) (D). Moreover, *id.* § 11,347 requires the ICC to protect displaced employees:

When a rail carrier is involved in a transaction for which approval is sought under [§ 11,344], the Interstate Commerce Commission shall require the carrier to provide a fair arrangement . . . [for] employees who are affected by the transaction. . . . Notwithstanding this [Act], the arrangement may be made by the rail carrier and the authorized representative of its employees.

The Commission provided suitable arrangements for Maine Central and Boston & Maine employees. It did not consider the interests of, nor provide protection for, employees of competing railroads who may lose their jobs as a result of traffic diversions. See *Boston & Maine Merger*, 366 I.C.C. at 344. Lamotte Valley asserts that this was error. [[**87] [HN25](#)] We affirm the Commission's interpretation of §§ 11,344(b) (4) and 11,347 as requiring it to protect only employees of the merging railroads and not employees of other railroads.

First, the ICC's interpretation of the language of § 11,347 is sensible. The second sentence of § 11,347 provides that "the arrangement may be made by *the rail carrier* and the authorized representative of *its* employees." (Emphasis added.) The phrase "the rail carrier" presumably refers back to the preceding sentence and thus includes only "a rail carrier . . . involved in the transaction." But an arrangement between "a rail carrier involved in the transaction" and "its employees" will not protect employees of other carriers. Thus, Congress must not have contemplated protecting employees of nonapplicant railroads. As for § 11,344(b) (4), it was first enacted at the same time as § 11,347, and the two sections should be construed *in pari materia*.

The legislative history of § 11,347 strongly supports this interpretation. See [Missouri-Kansas-Texas Railroad v. United States](#), 632 F.2d 392, 411-12 (5th Cir. 1980) [[**88]] (reviewing the legislative history), aff'd *Burlington Northern -- Control -- St. Louis-S.F.*, *supra* note 37, 360 I.C.C. at 948-50, cert. denied, 451 U.S. 1017, 101 S. Ct. 3004, 69 L. Ed. 2d 388 (1981).⁵⁹

Second, while there may be policy reasons for treating all railroad employees alike regardless of their employer, the Commission's interpretation is supported by considerations of practicality and administrative [*324] economy. As the Commission explained in *Burlington Northern*, 360 I.C.C. at 949-50:

It is difficult enough to determine which employees of a railroad involved in the transaction have been adversely affected by that transaction. To require a determination that employees of another competing carrier have also been affected by a merger [[**89]] . . . would place an impossible burden on the party required to rebut the allegation.

Third, the Commission has consistently interpreted § 11,347, since its original enactment in 1940, to exclude employees of non-applicant railroads.⁶⁰ [[**90]] That consistent interpretation is entitled to deference, especially

⁵⁸ We see no need to provide any protection for Canadian National pending the ICC's reconsideration. Guilford is unlikely to downgrade interchange service while the Commission is still considering the need for protective conditions.

⁵⁹ See generally [New York Dock Ry. v. United States](#), 609 F.2d 83, 86-90 (2d Cir. 1979) (reviewing at length the development of § 11,347 and predecessor provisions).

⁶⁰ See [Missouri-Kansas-Texas Railroad v. United States](#), 632 F.2d at 411 n.44 (citing ICC cases); see also *CSX -- Control -- Chessie System*, *supra* note 21, 363 I.C.C. at 590-91.

since Congress implicitly approved that interpretation in revising and reenacting § 11,347 in 1976.⁶¹ See [NLRB v. Bell Aerospace Co., 416 U.S. 267, 275, 40 L. Ed. 2d 134, 94 S. Ct. 1757 \(1974\)](#) (additional deference to an agency's statutory interpretation is due "where Congress has reenacted the statute without pertinent change") (footnote omitted).

Finally, other courts that have addressed this issue have consistently approved the Commission's interpretation, including the only court to consider the issue since the 1976 amendments to the Interstate Commerce Act. See [Missouri-Kansas-Texas Railroad v. United States, 632 F.2d 392, 411-12 \(5th Cir. 1980\)](#) (a thorough opinion on which our own analysis relies heavily), cert. denied [**91] , 451 U.S. 1017, 101 S. Ct. 3004, 69 L. Ed. 2d 388 (1981); [Florida East Coast Railway v. United States, 259 F. Supp. 993, 1019 \(M.D. Fla. 1966\)](#) (3-judge court), aff'd mem. in part and appeal dismissed in relevant part as moot, 386 U.S. 544, 87 S. Ct. 1299, 18 L. Ed. 2d 285 (1967); [Railway Labor Executives' Association v. United States \(RLEA 2d\), 226 F. Supp. 521, 524-25 \(E.D. Va.\)](#) (3-judge court), vacated and remanded per curiam, [379 U.S. 199, 85 S. Ct. 307, 13 L. Ed. 2d 338 \(1964\)](#).⁶²

[**92] VI. PROCEDURAL ISSUES

A. Must Mr. Mellon Join the Merger Application?

Guilford sought ICC permission to acquire the Boston & Maine under 49 U.S.C. § 11,343(a) (5), which [HN26](#)[↑] requires ICC approval for:

acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

Id. § 11,343(b), in turn, provides:

A person may carry out a transaction referred to in subsection (a) . . . only [*325] with the approval and authorization of the Commission.

Section 11,343(a) (5) certainly covers Guilford, as a "person" who "controls any number of carriers" (Guilford already controlled the Maine Central) and seeks control of another carrier (the Boston & Maine). It also covers Timothy Mellon, the sole owner of Guilford, who also "controls" the Maine Central (through Guilford) and seeks to control the Boston & Maine.⁶³

Pennsylvania R.R. -- Merger -- [New York Cent. R.R., 347 I.C.C. 536, 546 \(1974\)](#), cited by Lamoille Valley, is not to the contrary, despite the ICC's use of certain broad language. The Commission there construed the predecessor to § 11,347 to cover employees of wholly-owned subsidiaries of the merging railroads. It had no occasion to address the status of employees of independent railroads.

⁶¹ The 4R Act, *supra* note 5, § 402(a), 90 [Stat. at 62](#), added the requirement that labor protective conditions be "no less protective of the interests of employees than those heretofore imposed pursuant to this [section]." Section 402(a) was a last-minute addition to the statute, and there is no legislative history dealing with it. See [New York Dock Ry. v. United States, 609 F.2d 83, 93 \(2d Cir. 1979\)](#). This provision was rephrased to its present form without substantive change in the 1978 recodification of the Interstate Commerce Act. See 49 U.S.C. note preceding § 10, [101](#) (no substantive change intended); *id.* § 11,347 revision note (explaining wording changes).

⁶² But see [Soo Line R.R. v. United States, 280 F. Supp. 907, 921-24 \(D. Minn. 1968\)](#) (3-judge court); [United Transp. Union, Local Lodge No. 693-E v. Burlington N., Inc., 319 F. Supp. 451, 453-54 \(D. Minn. 1970\)](#) (following *Soo Line*).

[Railway Labor Executives' Ass'n v. United States \(RLEA 1st\), 216 F. Supp. 101 \(E.D. Va. 1963\)](#) (3-judge court), cited by Lamoille Valley, is distinguishable. It involved a joint facility run by a merging railroad and a non-merging railroad. The court held that employees working at the facility, who were nominally employees of the non-merging railroad but in fact worked for both railroads, were entitled to protection. See *id. at 103*. A year later, the same court, including two of the three judges that decided *RLEA 1st*, upheld the ICC's refusal generally to protect employees of non-merging railroads in *RLEA 2d*.

⁶³ [HN27](#)[↑] The broad definition of control in 49 U.S.C. § 10, [102\(7\)](#) includes indirect control such as that enjoyed by Mr. Mellon:

[**93] The ICC, however, did not require Mr. Mellon to join the control application. The Commission explained that joinder would serve no useful purpose because it already had all the information it needed:

The only issue raised by any of the parties over Mr. Mellon's presence as an applicant concerns an asserted need for disclosure of his personal finances. We agree with the Administrative Law Judge, however, that Mr. Mellon's personal finances have nothing to do with this transaction. Nor has there been any suggestions of past impropriety on Mr. Mellon's part or the hint of any likelihood of future abuses. Thus, requiring Mr. Mellon to join as an applicant would be a meaningless gesture that would not advance the statute's purpose of assuring that the Commission has available to it all information relevant to its determination of the consistency of the proposed transaction with the public interest. . . .

Boston & Maine Merger, 366 I.C.C. at 325. The Commission conceded that "a literal reading of [49 U.S.C. 11343](#) and some precedent" suggested that joinder was mandatory, *id.* at 324, but the Commission believed [**94] the statute gave it discretion not to insist on pointless joinder.⁶⁴

Lamoille Valley and Providence & Worcester assert that the joinder provisions are mandatory, not discretionary, and that unless Mr. Mellon joins the control application, the ICC has no authority to approve the merger.

We are not convinced that the ICC has correctly interpreted § 11,343. The section speaks in mandatory language -- a person may acquire control of two or more carriers "only" with the ICC's approval.⁶⁵ [**96] Moreover, the Commission has for 40 years, until its sudden reversal of position in this case, consistently construed § 11,343 as mandatory. The Commission's interpretation was early upheld in [United States v. Marshall Transport Co., 322 U.S. 31, 88 L. Ed. 1110, 64 S. Ct. 899 \(1944\)](#). [**95] In *Marshall Transport*, a division of the ICC had approved the purchase of one carrier by a second carrier that was controlled, in turn, by a non-carrier. The full Commission reversed for failure of the non-carrier to join the application. The Supreme Court affirmed the ICC's view that the Commission was "without authority" to approve the transaction. *Id. at 42*. Similar reasoning would suggest that Mr. Mellon must join Guilford's application here.⁶⁶

As a policy matter, the Commission's distaste for pointless joinder has obvious appeal. [*326] On the other hand, it is hard to see why joinder would cause much harm.⁶⁷ Also, mandatory joinder would ensure that the parties fully

"control" . . . includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means.

⁶⁴ ICC Chairman Taylor, concurring, believed that § 11,343 required joinder, but agreed that "this issue has no effect on the merits" because Mr. Mellon's personal finances were not relevant to the Commission's decision. *Boston & Maine Merger*, 366 I.C.C. at 358 (Taylor, Chmn., concurring).

⁶⁵ The predecessor to § 11,343, 49 U.S.C. § 5(5) (1976) (which § 11,343 "restates without substantive change"; see 49 U.S.C. note preceding § 10, [101](#)) is even more explicit:

It shall be unlawful for any person, except . . . [with the approval and authorization of the Commission], to accomplish or effectuate . . . the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever.

⁶⁶ It is possible to distinguish *Marshall Transport* as not involving an explicit ICC finding that joinder would serve no useful purpose. The ICC, however, fails in its broader attempt to distinguish *Marshall Transport* as merely affirming the Commission's discretionary power to require appropriate persons to join a control application. *Marshall Transport* addresses both whether the Commission *may* require Union to join the control application, see [322 U.S. at 36-40](#), and whether the Commission *must* do so, see *id. at 40-42*. The Court's affirmative answer to the second issue was necessary to its decision because the full Commission had overruled its own division on that basis.

⁶⁷ It appears that Mr. Mellon did not join the control application in order not to disclose his personal finances. See *Boston & Maine Merger*, 366 I.C.C. at 325. As noted in text, however, Mr. Mellon could have asked the Commission to exempt him from its jurisdiction under 49 U.S.C. § 10, [505\(a\)](#). Moreover, he may not have had to answer questions about his finances even if he

inform the ICC of the actual chain of control of a carrier. Moreover, the financial status of the ultimate owner will often be relevant [**97] to a control application. A financially weak owner may drain funds from a carrier to pay other bills or lack the capital needed to expand to serve new areas.

A full resolution of this question would require close scrutiny of the legislative history plus consideration of the troublesome question of how much deference, if any, courts should give to an agency's interpretation of [**98] its governing statute when that interpretation overrules a longstanding contrary interpretation. Fortunately, we need not attempt that task here. Had the ICC required Mr. Mellon to join Guilford's control application, he presumably would have applied for waiver under 49 U.S.C. § 10,[505\(a\)](#), which provides:

[HN28](#)[] In a matter related to a rail carrier . . . subject to . . . this [Act], the Commission *shall* exempt a person . . . when the Commission finds that the application of a provision of this [Act] --

- (1) is not necessary to carry out the transportation policy of [49 U.S.C. § 10,101a]; and
- (2) . . . is not needed to protect shippers from the abuse of market power.

(Emphasis added.)

In light of the ICC's findings that it had no questions to ask of Mr. Mellon and that joinder would be a "meaningless gesture," the Commission would have had to grant waiver under § 10,[505\(a\)](#). Thus, the Commission's failure to require joinder, if error, is not "prejudicial error," see [5 U.S.C. § 706](#) (last clause), [**99] and is not grounds for reversing the Commission's decision. *Accord Delaware & Hudson Merger*, *supra* note 1, 366 I.C.C. at 424-25 (Simmons, Comm'r, concurring).⁶⁸

B. *The Expedited Procedural Schedule*

As background for Canadian National's challenge to the ICC's accelerated timetable for considering the merger of the Maine Central and the Boston & Maine, we review the steps leading up to Guilford's filing of its application. Guilford tentatively agreed to buy the Boston & Maine on April 15, 1981 and formally [**100] agreed to the transaction on July 8, 1981. An amended plan of reorganization reflecting the agreement was filed with the ICC on July 15.

Several weeks later, on August 13, 1981, Congress passed [HN29](#)[] the Northeast Rail Service Act of 1981 (NERSA).⁶⁹ NERSA § 1164(a), [45 U.S.C. § 1112\(a\)](#), requires the ICC to decide any merger application involving a bankrupt Northeast railroad within 180 days:

In any [merger] proceeding . . . involving a [Northeast] railroad . . . which was in a bankruptcy proceeding . . . on November 4, 1979, the Commission shall, [*327] with or without a hearing, issue a final decision within a period not to exceed 180 days after receipt of an application. . . .

Congress specifically intended this provision to ensure speedy consideration of Guilford's proposal to acquire the Boston & Maine.⁷⁰

remained as an applicant. See 366 I.C.C. at 325 n.22 ("even if Mr. Mellon were to join as an applicant, he would only be required to file an affidavit stating that he joins in [Guilford's] application").

⁶⁸ The ICC's possible lack of "authority" to approve the merger without joinder of Mr. Mellon does not foreclose a finding of harmless error because that lack is "not strictly jurisdictional in the sense that if the Commission wrongly decides that [Mr. Mellon does not need to join the application], the Commission loses jurisdiction over [Guilford]." [Allegany Corp. v. Breswick & Co.](#), 353 U.S. 151, 171-72, 1 L. Ed. 2d 726, 77 S. Ct. 763 (1957).

⁶⁹ Pub. L. No. 97-35, §§ 1131-1169, 95 Stat. 357, 643-87 (codified in scattered sections of 45 U.S.C.).

⁷⁰ NERSA § 1164(a) was directed at Guilford's proposal to acquire the Boston & Maine and *id.* § 1164(b), [45 U.S.C. § 1112\(b\)](#) (which requires a decision within 180 days on a merger involving a non-bankrupt Northeast carrier that has received certain federal loans), was directed at Guilford's proposal to acquire the Delaware & Hudson. The Conference Committee explained:

[**101] The next day, August 14, 1981, Guilford notified the ICC of its intent to file a control application and requested waiver of the customary 3-month waiting period between notice of intent to file and actual filing. See [49 C.F.R. § 1180.4\(b\) \(1\) \(1982\)](#) (prefiling notice period); *id.* [§ 1180.4\(f\)](#) (waiver provision). The ICC granted the waiver on September 11, 1981. It explained that waiver would further Congress' intent, expressed in NERSA § 1164, that the Commission speedily consider the merger, and that interested parties would not be prejudiced because they should have been aware "for some time" of the proposed merger. The ICC further explained that because it had to issue a decision on the merger within 180 days, it could not follow the usual 31-month procedural schedule in [49 C.F.R. § 1180.4 \(1982\)](#). It promised to issue an "expedited procedural schedule" after receiving the application.⁷¹ [**102] Guilford filed its application on October 28, 1981, and one week later, on November 4, 1981, the ICC issued the promised 180-day schedule. The schedule gave competing railroads 60 days (instead of the usual 90) to file responsive applications.⁷²

Canadian National alleges that the ICC's actions left it without enough time properly to prepare a responsive application. It argues that the ICC abused its discretion in waiving the 3-month prefiling notice period and that the expedited procedural schedule was a "rule" within the meaning of the APA, [5 U.S.C. §§ 551\(4\), 553](#), and was improperly issued without notice and comment.

At a practical level, we think that the ICC did an admirable job in compressing its procedures into a minimum time without undue prejudice to the parties. Canadian National makes only one concrete suggestion on what the Commission should have done differently -- the Commission should have required an extended prefiling notice period to compensate for the accelerated 180-day post-filing schedule mandated by Congress. That suggestion -- though perhaps technically consistent with NERSA § 1164 -- runs directly counter to Congress' intent that the merger be [**103] considered quickly.

Turning to Canadian National's legal argument, we find no abuse of discretion in the Commission's decision to compress the proceedings slightly by waiving the 3-month prefiling notice period. The Commission's explanation for its action is reasonable and consistent with congressional intent. We can ask no more. We also hold that the procedural schedule was exempt from notice and comment requirements as a "rule[] of agency procedure." [5 U.S.C. § 553\(b\) \(A\).](#)⁷³

[*328] It is clear, at the outset, that [HN30](#) [↑] the procedural schedule is a "rule," as defined broadly in [5 U.S.C. § 551](#) [**104] [\(4\)](#) to include not only substantive rules but also:

the whole or a part of an agency statement of general or particular applicability and future effect . . . describing the organization, procedure, or practice requirements of an agency.

[HN31](#) [↑] The APA's notice and comment requirements apply, however, only to substantive rules and not to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.* [§ 553\(b\) \(A\)](#). It is hard to characterize the agency statement at issue here as anything other than a rule of "procedure."

This [bill] provides an expedited review and decision process for the application to acquire the D & H Railroad. The expedited procedures are necessary given the present cash position of the carrier A similar provision is included . . . for the Boston & Maine Railroad.

127 Cong. Rec. S9056, S9066 (daily ed. July 31, 1981) (explanatory statement of the conferees).

⁷¹ Guilford Transp. Indus. -- Control -- Boston & Maine Corp., Finance Docket No. 29,720 (Sub-No. 1), at 2 (Sept. 11, 1981) (not printed); see *Boston & Maine Merger*, 366 I.C.C. at 329 (explaining the Commission's reasoning in more detail and noting that Guilford's plans had received "considerable media attention" well before it submitted its prefiling notice).

⁷² Guilford Transp. Indus. -- Control -- Boston & Maine Corp., Finance Docket No. 29,720 (Sub-No. 1) (Nov. 4, 1981) (not printed), J.A. at 1.

⁷³ In light of this conclusion, we do not reach the question whether the ICC had "good cause" under the APA, [5 U.S.C. § 553\(b\) \(B\)](#), to dispense with notice and comment.

That is not quite the end of the inquiry, for [HN32](#)[↑] all procedural rules affect substantive rights to greater or lesser degree. Our cases recognize that when an agency rule "jeopardizes the rights and interests of parties . . . , it must be subject to public comment," even if the rule can in some sense be called "procedural." [*Batterton v. Marshall, 208 U.S. App. D.C. 321, 648 F.2d 694, 708 \(D.C. Cir. 1980\)*](#) [\[**105\]](#) (footnote omitted). The issue is one of degree -- whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.

In applying this general principle to this case, we begin by noting that the time schedule at issue here is definitely at the procedural end of a spectrum running from "procedural" to "substantive." Thus, we put to one side cases like *Batterton* where a rule has definite substantive consequences but can arguably be called either "procedural" or "substantive," and a court must decide which it is.⁷⁴ When a rule prescribes a timetable for asserting substantive rights, we think the proper question is whether the time allotted is so short as to foreclose effective opportunity to make one's case on the merits. This standard allows an agency ample discretion to structure its proceedings as it sees fit. However, when an agency abuses that discretion by creating extreme procedural hurdles that foreclose fair consideration of the underlying controversy, a court, by remanding for notice and comment, can ensure that the agency explores the substantive consequences of its "procedural" rule.

[\[**106\]](#) We do not think that Canadian National's ability to file a responsive application was substantially abridged by the Commission's procedural schedule. The ICC was constrained by Congress to reach a decision within 180 days. It gave competing railroads 75 days to file a responsive application (60 days plus a two-week extension). This allotment -- almost half of the 180 days that Congress gave the ICC to reach a decision, and only a bit less than the 90 days allowed in a normal 31-month merger proceeding -- was more than sufficient to permit Canadian National to develop its response. *Accord Ranger v. FCC, 111 U.S. App. D.C. 44, 294 F.2d 240, 244 (D.C. Cir. 1961)* (30-day time limit for filing competing license application); *Pennsylvania v. United States, 361 F. Supp. 208, 220-22 (M.D. Pa.)* (3-judge court) (accelerated railroad abandonment procedures), aff'd mem., 414 U.S. 1017, 94 S. Ct. 440, 38 L. Ed. 2d 310 (1973).⁷⁵

[\[**107\] \[*329\]](#) C. ICC Jurisdiction over Holding Company Securities

To buy the Maine Central and later the Boston & Maine, Timothy Mellon created a holding company -- Guilford -- and had Guilford issue stock and bonds to him in return for the cash to make the purchases with. He neither sought nor obtained ICC approval for these transactions.

[HN33](#)[↑] Under 49 U.S.C. § 11,[301\(b\) \(1\)](#), a "carrier" -- defined in *id.* § 11,[301\(a\) \(1\)](#) to include "a corporation organized to provide transportation by rail" -- must obtain ICC approval before issuing securities, and unapproved

⁷⁴ In such cases, courts inquire into how serious the substantive consequences are. See *Batterton, 648 F.2d at 708* (agency's choice of a methodology for calculating unemployment rates affects federal funding levels and thus "trenches on substantial private rights"); *National Ass'n of Home Health Agencies v. Schweiker, 223 U.S. App. D.C. 209, 690 F.2d 932, 949 (D.C. Cir. 1982)* (following *Batterton*), cert. denied, 459 U.S. 1205, 103 S. Ct. 1193, 75 L. Ed. 2d 438 (1983); *Pickus v. United States Bd. of Parole, 165 U.S. App. D.C. 284, 507 F.2d 1107, 1112 (D.C. Cir. 1974)* (parole guidelines have a "substantial effect" on parole decisions), overruled in part on other grounds in *Califano v. Sanders, 430 U.S. 99, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977)*; *Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 482 (2d Cir. 1972)*; *National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90, 96 (D.D.C. 1967)* (3-judge court), aff'd mem., 393 U.S. 18, 89 S. Ct. 49, 21 L. Ed. 2d 19 (1968).

⁷⁵ See also *Hall v. EEOC, 456 F. Supp. 695, 701-02 (N.D. Cal. 1978)*; cf. *Kessler v. FCC, 117 U.S. App. D.C. 130, 326 F.2d 673, 680-81 (D.C. Cir. 1963)* (temporary halt on processing new radio license applications); *Buckeye Cablevision, Inc. v. United States, 438 F.2d 948, 952-53 (6th Cir. 1971)* (freeze on cable TV applications).

For a case where a "procedural" rule did preclude a party from making its case on the merits and thus required notice and comment, see *Brown Express v. United States, 607 F.2d 695, 701-02 (5th Cir. 1979)* (motor carrier seeking temporary 30-day operating authority no longer needs to notify competitors that it is applying for temporary authority) (court relies, however, on a "substantial impact" test, see cases cited in note 74 *supra*).

securities are "void." Providence & Worcester asserts that Guilford, as a holding company created to acquire railroad properties, is a "carrier" subject to § 11,[301](#) and that Guilford's non-approved securities are void. The ICC responds that it lacks jurisdiction to review Guilford's issuance of securities because Guilford is not a "carrier" but merely a holding company that owns carriers.

We uphold the ICC's interpretation of § 11,[301\(b\) \(1\)](#) as not granting it jurisdiction over securities issued [****108**] by a holding company. Although the Commission very early took a view similar to that now espoused by Providence & Worcester, its current interpretation has not changed since 1960.⁷⁶ That long-held interpretation is entitled to substantial deference, and we find it "sufficiently reasonable to be accepted." *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39, 70 L. Ed. 2d 23, 102 S. Ct. 38 (1981).

The language of § 11,[301](#) does not inexorably command either result. But other provisions of the Act show that Congress understood the difference between a "carrier" and a holding company that owns a carrier. In particular, 49 U.S.C. § 11,348 provides that when the ICC approves a merger in which "a person not a carrier" acquires control of two or more carriers, [****109**] "the person is subject, as a carrier, to [§ 11,[301](#)]." ⁷⁷ Thus, if Congress had wanted to include holding companies within the ambit of § 11,[301](#), it knew how to say so. Moreover, the ICC's construction preserves independent force for § 11,348. If § 11,[301](#) covers holding companies that own carriers, § 11,348 would be superfluous.

It is true that the ICC's interpretation permits a carrier to exempt itself from the Commission's securities jurisdiction by inserting a holding company between itself and its stockholders. But the Securities and Exchange Commission will continue to regulate the holding company's issuance of securities to the public. Thus, the primary purpose of § 11,[301](#) [****110**] -- to protect investors, see *Association of American Railroads v. United States*, 195 U.S. App. D.C. 371, 603 F.2d 953, 968-70 (D.C. Cir. 1979) (reviewing legislative history) -- will not be lost. Only the secondary purpose -- to ensure that railroads have sound finances -- is weakened. There is no evidence in the record that this limited loophole has caused significant problems for the Commission in the past.⁷⁸ [****111**] Thus, the apparent flaw in the statutory scheme gives us [***330**] no warrant to reject the ICC's construction of its governing statute.⁷⁹

D. Failure to Apply for Control of the Vermont & Massachusetts Co.

The Vermont & Massachusetts line is a 56-mile segment of the Boston & Maine's main east-west line, nominally owned by the Vermont & Massachusetts Co., but leased to the Boston & Maine under a 999-year lease and thus for all practical purposes owned by the Boston & Maine. The Vermont & Massachusetts Co. owns no other significant property. Prior to the merger, it was owned 37% by the Boston & Maine, 37% by Guilford, 24% by Providence & Worcester, and 2% by others. Thus, Guilford, when it acquired the Boston & Maine, would automatically acquire control of the Vermont & Massachusetts Co. as well.

⁷⁶ See Stock of Atl. Coast Line, 131 I.C.C. 345 (1927), overruled in Woods Indus. -- Control -- United Transps., Inc., 85 M.C.C. 672, 678 (1960).

⁷⁷ See also 49 U.S.C. § 10,[102\(7\)](#) (defining "control" to include "the power to exercise control through . . . a holding or investment company"); *id.* § 11,343(a) (5) (ICC must approve "acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers").

⁷⁸ See *Brotherhood of Ry. Clerks, Consol. Sys. Bd. of Adjustment 46 v. Burlington N., Inc.*, 671 F.2d 1085 (8th Cir. 1982) (affirming the ICC's approval of Burlington Northern's plan to establish a holding company to hold its rail properties; all parties assumed that the holding company would be exempt from ICC supervision under § 11,[301](#)); cf. *United Parcel Serv. v. United States*, 612 F.2d 277 (7th Cir. 1979) (assuming that a holding company that owns a carrier is not itself a carrier), cert. denied, 445 U.S. 971, 100 S. Ct. 1664, 64 L. Ed. 2d 248 (1980).

⁷⁹ We express no view on whether the ICC may in some circumstances assert jurisdiction under § 11,[301](#) over a carrier that seeks to avoid ICC regulation of its securities by setting up a holding company.

Providence & Worcester objects that Guilford failed to file a formal application to control the Vermont & Massachusetts Co. The ICC found that Guilford had made a technical misstep but decided to consider and approve Guilford's [**112] control of the Vermont & Massachusetts Co. on the merits. See *Boston & Maine Merger*, 366 I.C.C. at 347-48, 355. Providence & Worcester was not prejudiced by this course of action. It had actual notice of Guilford's control proposal and indeed submitted its own responsive application to purchase the Vermont & Massachusetts line, which the ICC considered and rejected. Providence & Worcester raises no substantive objections to the ICC's reasoning.

Under these circumstances, we see no harm in the ICC's waiver of a formal application. Taking, as we must, "due account . . . of the rule of prejudicial error," [5 U.S.C. § 706](#) (last clause), we affirm the Commission.

E. Premature Control of the Boston & Maine

Guilford's acquisition agreement with the Boston & Maine gave Guilford limited control over the Boston & Maine's activities -- primarily a veto over major corporate decisions -- pending ICC approval of the transaction. Providence & Worcester asserts that this control was illegal unless and until the Commission approved the acquisition, and that Guilford is therefore unfit to own the Boston & Maine. The ICC responds that Guilford [**113] could not control the Boston & Maine because the Boston & Maine, as a bankrupt, was subject to the ultimate authority of the reorganization court.

We think the parties' dispute over whether Guilford crossed the ill-defined line between control and noncontrol is largely beside the point. [HN34](#)[] Premature control "does not automatically defeat a transaction." *Missouri Pacific Railroad -- Control -- Chicago & Eastern Illinois Railroad*, 327 I.C.C. 279, 322 (1965), aff'd sub nom. [Illinois Central Railroad v. United States](#), 263 F. Supp. 421 (N.D. Ill. 1966) (3-judge court), aff'd mem., [385 U.S. 457](#), 87 S. Ct. 612, 17 L. Ed. 2d 509 (1967). Rather, it is simply a factor in the Commission's overall decision whether a merger is in the public interest. See [Gilbertville Trucking Co. v. United States](#), 371 U.S. 115, 127, 83 S. Ct. 217, 9 L. Ed. 2d 177 (1962).

Here, the Commission found that the agreement was reasonable and entered into in good faith:

The negative covenants of the acquisition agreement are no more than standard [**114] safeguards to ensure that B&M would emerge from reorganization in a position substantially similar to the one it was in at the time of the agreement. It is hardly unreasonable for [Guilford] to obtain contractual assurances that it would get what it bargained for.

Boston & Maine Merger, 366 I.C.C. at 327-28. Whether or not these "standard safeguards" technically violated § 11,343(b)'s requirement that Guilford obtain ICC approval before assuming control of the Boston & Maine -- a question we do not decide -- there is no evidence of the overreaching or bad faith that would justify the [*331] Commission in treating premature control as a major factor in its decision. Thus, the Commission's error, if any, was of no significance.⁸⁰

⁸⁰ We find no merit in Providence & Worcester's remaining procedural quibbles. [HN35](#)[] The ICC has broad discretion in controlling its own calendar. See [Nader v. FCC](#), 172 U.S. App. D.C. 1, 520 F.2d 182, 196 (D.C. Cir. 1975). It did not abuse that discretion in consolidating consideration of the reorganization plan with consideration of the merger proposal. The proceedings were clearly "interdependent." *Boston & Maine Merger*, 366 I.C.C. at 330.

Nor did the Commission abuse its discretion in failing to consolidate Guilford's later-filed application to control the Delaware & Hudson with the instant application. Rather, the Commission simply adhered to its established and reasonable policy that "the proper forum for considering cumulative impacts and crossover effects [due to multiple transactions] is in a later proceeding." [49 C.F.R. § 1180.1\(g\) \(1982\)](#). Moreover, since the Commission was bound to decide the Boston & Maine application within 180 days come hell, high water, or consolidation, consolidation would have left the Commission only 90 days to decide the later-filed Delaware & Hudson application.

[**115] VII. CONCLUSION

The ICC's approval of the Maine Central/Boston & Maine merger as a whole is *affirmed*. We reverse the Commission's decision denying the protective conditions sought by Lamoille Valley and Canadian National, and *remand* to the Commission to reconsider whether protective conditions (not necessarily the ones sought by Lamoille Valley and Canadian National) are needed to preserve competition or adequate transportation. On all remaining issues, the Commission's decision is *affirmed*.

End of Document



Feather v. United Mine Workers

United States Court of Appeals for the Third Circuit

May 9, 1983, Argued ; June 30, 1983, Decided

Nos. 82-5438, 82-5464, 83-5326, 83-5327

Reporter

711 F.2d 530 *; 1983 U.S. App. LEXIS 26179 **; 113 L.R.R.M. 3367; 98 Lab. Cas. (CCH) P10,343; 1983-1 Trade Cas. (CCH) P65,471

CHARLES L. FEATHER t/a FEATHER TRUCKING, THOMAS V. PATTERSON, LAWTON TRUCKING, INC., D. P. ZIMMERMAN, JR., MICHAEL D. ROSE, DAVID B. SMOGYI, DONALD BENYACK, RUTH A. CORDES, Admx. Est. Edward W. Cordes, Jr., EVERETT C. TEETER, JR., t/a Everett C. Teeter Trucking, WILLIAM NILESKI and ROBERT C. ERMIN, Cross-Appellants in Nos. 82-5464 & 83-5327, v. UNITED MINE WORKERS OF AMERICA and DISTRICT 2, UNITED MINE WORKERS OF AMERICA and LOCAL 1600, UNITED MINE WORKERS OF AMERICA, Appellants in Nos. 82-5438 & 83-5326

Prior History: [**1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Core Terms

district court, coal, damages, hauling, hot cargo, prejudgment interest, exempt, unjust enrichment, haulers, contributed, employees, parties, causation, recommendations, negotiations, bargaining, antitrust, picketing, anti trust law, plaintiffs', secondary, losses, award damages, Labor Act, antitrust liability, substantial factor, clearly erroneous, pension fund, present case, calculations

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1 [down arrow] **Appellate Jurisdiction, Final Judgment Rule**

See [28 U.S.C.S. § 1291](#).

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN2 [down arrow] **Entry of Judgments, Multiple Claims & Parties**

See [Fed. R. Civ. P. 54\(b\)](#).

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

711 F.2d 530, *530L 1983 U.S. App. LEXIS 26179, **1

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN3 [down] **Union Violations, Secondary Activities**

Section 8(b)(4) of the National Labor Relations Act, [29 U.S.C.S. § 158\(b\)\(4\)](#), prohibits unions from engaging in "secondary" activities, striking or threatening one employer for the purpose of putting pressure on another employer to accede to union demands.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN4 [down] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

One common type of secondary activity is represented by a "hot cargo" clause. Hot cargo clauses are prohibited by § 8(e) of the National Labor Relations Act, [29 U.S.C.S. § 158\(e\)](#), and the use of strikes or other forms of coercion to obtain such clauses is outlawed by § 8(b)(4)(A), [29 U.S.C.S. § 158\(b\)\(4\)\(A\)](#).

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN5 [down] **Collective Bargaining & Labor Relations, Unfair Labor Practices**

Section 8(b)(4)(B) of the National Labor Relations Act, [29 U.S.C.S. § 158\(b\)\(4\)](#), makes it unlawful to enforce a hot cargo clause already obtained.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN6 [down] **Collective Bargaining & Labor Relations, Unfair Labor Practices**

See [29 U.S.C.S. § 158\(b\)\(4\)](#).

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN7 [down] **Collective Bargaining & Labor Relations, Unfair Labor Practices**

Section 303(a) of the National Labor Relations Act, [29 U.S.C.S. § 187\(a\)](#), makes it unlawful for a labor union to violate § 8(b)(4), [29 U.S.C.S. § 158\(b\)\(4\)](#). When a union strikes, and one purpose of that strike is to obtain or enforce a hot cargo agreement, §§ 8(b)(4) and 303(a) are violated.

711 F.2d 530, *530 U.S. App. LEXIS 26179, **1

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN8 [down] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

It is sufficient to find a violation of § 303(a) of the National Labor Relations Act, [29 U.S.C.S. § 187\(a\)](#), that an objective of a union's picketing, although not necessarily the only objective of the picketing, is to force the employer to cease doing business with another employer.

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN9 [down] **Union Violations, Secondary Activities**

The damage portion of § 303(b) of the National Labor Relations Act, [29 U.S.C.S. § 187\(b\)](#), provides that whoever shall be injured in his business or property by reason of any violation of § 303(a) may sue therefor. As the words "by reason of" make clear, § 303(b), [29 U.S.C.S. § 187\(b\)](#), requires that there be a direct causal nexus between the unlawful secondary activity and the injury suffered by plaintiff. If plaintiff would have been harmed regardless of the § 8(b)(4), [29 U.S.C.S. § 158\(b\)\(4\)](#), violation, then of course there can be no recovery.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN10 [down] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

To receive a damage award under § 303(b) of the National Labor Relations Act, [29 U.S.C.S. § 187\(b\)](#), plaintiffs must demonstrate not that an unlawful hot cargo clause was an object of the concerted activity at issue, but that it was a substantial factor in or materially contributed to the union's decision to call and maintain the concerted activity.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN11 [down] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

To be held liable for the actions of individuals, a union must be shown to have instigated, supported, ratified or encouraged the particular activities in question. Calling a strike is not, by itself, sufficient to make the union responsible for all illegal conduct committed during that strike. In addition, when damages are claimed against an international union, a district, and a local, a plaintiff must make a separate showing of agency for each defendant.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Torts > ... > Types of Damages > Judgment Interest > General Overview

Civil Procedure > Remedies > Judgment Interest > General Overview

HN12 [down] **Judgment Interest, Prejudgment Interest**

In a proceeding involving unliquidated damages, the decision whether to award prejudgment interest is committed to the sound discretion of the district court.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Torts > ... > Types of Damages > Judgment Interest > General Overview

Civil Procedure > Remedies > Judgment Interest > General Overview

HN13 [] **Judgment Interest, Prejudgment Interest**

A district court is to consider four factors in determining whether an award of prejudgment interest is appropriate: (1) Whether claimant has been less than diligent in prosecuting the action; (2) whether defendant has been unjustly enriched; (3) whether an award would be compensatory; and (4) whether countervailing equitable considerations militate against a surcharge.

Contracts Law > Remedies > Restitution

HN14 [] **Remedies, Restitution**

Unjust enrichment has been defined as follows: To the extent the defendant has had the free use of the income-producing ability of the plaintiffs' money without having to pay for it, he has been unjustly enriched. To divest the defendant of this unjustified benefit is not to penalize him, for it has been determined by the trial that it was never rightfully his.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN15 [] **Labor, Nonstatutory Exemptions**

The United States Supreme Court has responded to the conflict between antitrust and labor laws by creating two exemptions from the coverage of the antitrust laws for labor organization activities. The first, the so-called "statutory" exemption, protects the union from liability when it acts alone. The second "non-statutory" exemption is

much less clear, but it generally applies when a union, acting with a non-labor party, seeks to attain goals which are mandatory or permissive subjects of bargaining under the National Labor Relations Act, unless the union acts with a predatory anti-competitive purpose. The Supreme Court has held that the non-statutory exemption does not shield a union when an employer seeks injunctive and declaratory relief for injuries caused by the union's violation of § 8(e) of the National Labor Relations Act, [29 U.S.C.S. § 158\(e\)](#), the hot cargo provisions.

Civil Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

[HN16](#)[] Appeals, Standards of Review

It does not matter that the court of appeals, confronting the facts de novo, might view them in a different light. The court may reverse only if, after reviewing the record, it is left with the definite and firm conviction that a mistake has been committed.

Counsel: Michael Holland, General Counsel, Kurt Kobelt, Harrison Combs, United Mine Workers of America, Washington, District of Columbia, Melvin P. Stein, Lou Ann Phelps, Pittsburgh, Pennsylvania, for Cross-Appellants in Nos. 82-5438 & 83-5326.

Jerald R. Cureton, Fred J. Berg, Pechner, Dorfman, Wolffe, Rounick & Cabot, Philadelphia, Pennsylvania, Paul Hirschfield, Pittsburgh, Pennsylvania, for Cross-Appellants in Nos. 82-5464 & 83-5327.

Judges: Adams and Weis, Circuit Judges and Debevoise, District Judge. *

Opinion by: ADAMS

Opinion

[*532] OPINION OF THE COURT

ADAMS, Circuit Judge.

During the latter part of 1974, the United Mine Workers of America ("UMWA" or "the Union") and the Bituminous Coal Operators Association ("BCOA"), a multi-employer bargaining association of coal producers, renegotiated the National Bituminous Coal Wage Agreement ("NBCWA"). The agreement contained a provision which prohibited coal haulers who were not signatories to the 1974 NBCWA [\[*2\]](#) from transporting coal from BCOA mines. A group of coal haulers brought this action seeking damages under the federal labor and antitrust laws for injuries allegedly caused by that clause. The district court concluded that the Union was liable under section 303 of the National Labor Relations Act, [29 U.S.C. § 187](#), but that the UMWA's conduct fell within the non-statutory labor exemption from the Clayton Act's treble damage provision. [15 U.S.C. § 15](#).

In this appeal, the Union does not question the determination of liability under section 301, but it does advance a number of contentions regarding the damage calculations under that section. The coal haulers have cross-appealed to contest the district court's holding that the Union is exempt from antitrust liability. We will affirm the district court on the antitrust issues and remand for further findings with respect to the damage calculations under section 301.

I.

* Honorable Dickinson R. Debevoise, United States District Court for the District of New Jersey, sitting by designation.

The master collective bargaining agreement that covers unionized mines in Western Pennsylvania is the National Bituminous Coal Wage Agreement. Prior to 1974, the NBCWA did not contain a provision that explicitly defined **[**3]** the work jurisdiction of the UMWA. When the Union began its preparations in 1974 to renegotiate the 1971 NBCWA, due to expire on November 11, 1974, one of its objectives was to eliminate the use of subcontractors to haul coal from the mines in order to ensure that the Union members would perform this task. The UMWA's initial set of contract proposals for its negotiations with the BCOA included a provision that would have banned all such subcontracting. The Union also sought new provisions regarding mine safety, sick leave, supplemental unemployment benefits and an overhaul of the grievance and arbitration procedures.

Formal negotiations with the BCOA began on September 3, 1974. They proceeded slowly because so much of the contract was being renegotiated. Forty-three separate sessions were held and the 1971 contract was ultimately expanded from 56 pages to 129 pages. On November 4, a strike became inevitable: the UMWA's constitution mandates a policy of "No Contract, No Work," and a minimum of eight days is required to conduct a secret ballot vote of the union membership on any proposed contract. The BCOA first agreed to the idea of including a work jurisdiction clause in **[*533] **[**4]**** the agreement of November 9, but rejected the union's proposal of a ban on all subcontracting. As an alternative, the BCOA proposed what ultimately became Article II(g) of the agreement, limiting the subcontracting of coal hauling to "contractors employing members of the UMWA under the [NBCWA]." The district court concluded that this provision violated Section 8(e) of the NLRA because it was a "hot cargo" clause, an agreement between an employer and a union that the employer will cease doing business with a third party. The court also determined that the union's original proposal would not have violated the Labor Act.

When the parties opened their bargaining session on November 11, 1974, the day before the 1971 agreement was to expire, they had reached agreement on only a few points. Issues still unresolved included mine safety, wages, shift differentials, certain fringe benefits, cost of living adjustments, pension contributions and health benefits. Many portions of Article II, the "Scope and Coverage" provisions, also remained unresolved, including Article II(g), the transportation of coal clause.

The UMWA strike against the BCOA mines began at 12:01 a.m. on November 12, 1974, when **[**5]** the 1971 agreement officially expired. A tentative agreement was reached on all issues by the negotiators on the morning of November 13, but the union leadership sought to renegotiate five issues in that agreement before having its members vote on the proposal. Not reconsidered was the clause dealing with the transportation of coal. The BCOA strike ended on December 6, 1974, when the agreement was ratified by the union membership and a final contract signed.

Many mines did not, however, reopen on that date. The coal mine construction companies and the unionized coal hauling companies who were signatories to the expired 1971 NBCWA, but who were not part of the BCOA, had not yet signed a new agreement with the UMWA. The union construction workers picketed the mines to protest the miners' returning to work before the construction contract was settled. Because many mine workers would not cross those picket lines, several BCOA mines did not reopen until December 23, when the construction agreement was signed.

During the time the UMWA was preparing for its negotiations with the BCOA, it also engaged in sporadic discussions with a group of the coal hauling companies that had signed **[**6]** the 1971 NBCWA. This group, the Western Pennsylvania Coal Haulers' Association ("WPCHA"), was seeking a separate contract in 1974, rather than have its members continue as signatories to the NBCWA. The negotiations with the WPCHA were not pursued with great vigor by either side until the BCOA strike ended.

In September 1974, the Union sent the WPCHA a copy of its initial proposals for the 1974 NBCWA that had been submitted to the BCOA. On October 11, 1974, the WPCHA made a counter-proposal concerning drivers' wages. On October 30, the WPCHA requested a 30-day extension of the 1971 NBCWA, which the union rejected. Accordingly, on November 12, when the NBCWA expired, the union struck the WPCHA as well as the BCOA. Because the agreement reached on December 6 covered only BCOA employees, the employees of WPCHA members continued their strike until the end of December. At that time, the Union agreed to extend the 1971 NBCWA for 30 days while negotiations continued. After 30 days, no agreement had been reached, and the strike

resumed. Although the record is not explicit, it appears that the WPCHA members ultimately signed the 1974 NBCWA.

When the BCOA strike ended on December 6, 1974, the [**7] Union began its attempts to enforce Article II(g) of the 1974 NBCWA, the clause limiting coal hauling to companies that agreed to sign the 1974 NBCWA. Pickets were set up at BCOA mines using non-signatory haulers; union officials visited those haulers and informed them that they would not be permitted to haul unless they signed the 1974 NBCWA. Picketing and the visitations continued sporadically until the beginning of April 1975. The [*534] number of coal haulers who signed the NBCWA increased from 39 in the 1971 agreement to 366 in the 1974 agreement.

On July 23, 1976, eleven western Pennsylvania coal haulers filed this action against the international, the district, and the local unions (collectively "UMWA" or "the Union"), seeking damages resulting from the Union's attempts to force them to sign the 1974 NBCWA and to prevent BCOA members from using non-signatory haulers to transport coal. The first count, brought under section 303 of the NLRA, [29 U.S.C. § 187](#), alleged that the Union had violated sections 8(b)(4) and 8(e) of the Labor Act, [29 U.S.C. §§ 158\(b\)\(4\) & \(e\)](#), because Article II(g) of the 1974 NBCWA constituted an unlawful [**8] "hot cargo" clause. Counts II and III charged the Union with violating the federal antitrust laws. The district court certified the case as a class action on September 3, 1977.

The district court conducted a bench trial on the liability issues and, on June 27, 1980, found the Union liable on Count I, but exempt from liability on Counts II and III. The case was then referred to a magistrate to calculate damages for the plaintiffs. After hearings, the magistrate entered proposed findings as to the three plaintiffs involved in this appeal. In her report, she considered the union liable for damages from the date the BCOA strike began. She recommended that damages be awarded to the three plaintiffs and that pre-judgment interest be given to Beunier and Henderson, but not to H&H. The district court adopted the magistrate's recommendations in an order dated June 23, 1982.¹ Both sides appealed from that order.

[**9] Three hauling companies are parties to this appeal: Paul Henderson Trucking ("Henderson"), Ronald Beunier Trucking Company ("Beunier") and H&H Hauling Company, Inc. (" H&H"). Henderson, a signatory to the 1971 NBCWA, hauled coal almost exclusively for a BCOA member mine which was closed by the BCOA strike. Henderson at first refused to sign the 1974 agreement, but changed his mind, allegedly as a result of pressure, and signed the agreement on December 30, 1974. He did not haul coal from November 12 to December 30, 1974.

Beunier was a member of the UMWA, but his trucking company was not a signatory to the 1971 agreement. He hauled coal exclusive from BCOA mines, all of which were idled by the BCOA strike. During January and February, 1975, union representatives disrupted Beunier's hauling business, and threatened that he would not be permitted to haul coal if he did not sign the agreement. On February 24, 1975, Beunier signed the 1974 agreement.

H&H Hauling, a group of companies operated by William and Douglas Hanna, is the final plaintiff involved in this appeal. None of Hanna's companies, employees, or customers were affiliated with the UMWA at any time during these proceedings. [**10] None of H&H's businesses was ever asked to sign the 1974 NBCWA, and none of H&H's employees was asked to join the UMWA. A few days after the start of the BCOA strike, a number of individuals wearing UMWA logos on their clothing appeared at the Hanna garage and asked the Hannas not to haul during that strike. Apparently because of fear of reprisals, the mining companies for whom the Hannas hauled shut down during the BCOA strike.

The UMWA admits that it violated sections 8(b)(4) & (e) of the NLRA by seeking to enforce Article II(g) after the 1974 NBCWA was signed by the Union and the BCOA, at the conclusion of the strike against the BCOA. In this appeal, the Union's primary contention is that the district court erred in the damage phase of the case when it imposed liability on the Union for losses the plaintiffs incurred *during* the BCOA strike. The Union also argues that H&H is not entitled to recover any damages because it failed to show that its injuries were caused by agents of the UMWA and that the conduct, even if attributed to the Union, was not within the scope of the [*535] liability

¹ Judge Knox, who presided over the liability trial, died before the magistrate issued her recommendations. The matter was then assigned to another judge.

judgment. In addition, the UMWA claims that the district court abused its discretion **[**11]** in awarding prejudgment interest to Beunier and Henderson. The plaintiffs' cross-appeal challenges the district court's conclusion that the UMWA is exempt from liability under the antitrust laws.

II

Before turning to the merits of the parties' claims, we must first address a jurisdictional matter. This case was certified as a class action by the district court, and there may be as many as a thousand members of the plaintiff class. The order of the district court from which the parties have appealed awards damages to only three coal haulers. Damages have not yet been calculated for any of the other plaintiffs. Inasmuch as all the claims of all the parties had not been finally adjudicated by the district court's order of June 23, 1982, that order was interlocutory, and thus, under most circumstances, it could not be appealed under [28 U.S.C. § 1291](#).² See [Tilden Financial Corp. v. Palo Tire Service, Inc., 596 F.2d 604, 606 \(3d Cir. 1979\)](#).

[12]** Because the order disposed of all the claims of three of the plaintiffs, the district court could have certified it as final, and thus appealable, as to those parties under [Fed. R. Civ. P. 54\(b\)](#).³ Neither side requested certification, however, and instead filed notices of appeal on the theory that we had jurisdiction directly under [section 1291](#). After all briefs had been filed, but before the date scheduled for disposition of the appeals, the parties were made aware of the jurisdictional defect. On April 27, 1983, at the request of the parties, the district court amended its order of June 23, 1982 to include the findings required for a [Rule 54\(b\)](#) appeal. The parties then filed new notices of appeal.

[13]** Both sets of notices now properly confer jurisdiction on this Court. The later notices, filed within 10 days of the district court's amendment of its previous order, are clearly appealable under [Fed. R. App. P. 4\(a\)](#). The earlier notices, although defective when filed, have been cured by the district court's subsequent certification under [Fed. R. Civ. P. 54\(b\)](#). See [Cape May Greene, Inc. v. Warren, 698 F.2d 179 \(3d Cir. 1983\); Tilden Financial Corp. v. Palo Tire Service, Inc., supra](#).

Having determined that we have jurisdiction over all the appeals before us in this matter, we now proceed to consider the merits of the claims presented.

The Union's first challenge to the damage order is to the inclusion of the period of the BCOA strike, November 12 to December 6, 1974, in the calculation of compensable losses suffered by the plaintiffs. The UMWA maintains that an award of damages for that period is not authorized by the liability opinion which, the Union claims, held it liable only for seeking to enforce the unlawful Article II(g) after the 1974 NBCWA was adopted by the BCOA and the Union. In addition, the UMWA argues that an award covering **[**14]** the BCOA strike is improper **[*536]** because its unlawful conduct did not cause the damages incurred during that time. The Union contends that the magistrate and the district court erred by equating the court's initial finding of liability under section 8(b)(4) with the finding of

² [28 U.S.C. § 1291](#):

HN1 [↑] The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

³ [Rule 54\(b\)](#) provides:

HN2 [↑] (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

causation required before damages may be assessed. We reject the Union's first argument, that the damage award exceeded the scope of the liability determination, but find merit in its claim that the record does not contain an adequate finding of causation as required by section 303. Accordingly, we will remand the matter to the district court for further consideration of that issue.⁴

[**15] Section 8(b)(4) [HN3↑](#) of the Labor Act prohibits unions from engaging in "secondary" activities -- striking or threatening one employer for the purpose of putting pressure on another employer to accede to union demands.

⁵ [**16] [HN4↑](#) One common type of secondary activity is represented by the "hot cargo" clause. Hot cargo clauses are prohibited by section 8(e) of the Labor Act, and the use of strikes or other forms of coercion to obtain such clauses is outlawed by section 8(b)(4)(A). ⁶ Section 8(b)(4)(B) [HN5↑](#) makes it unlawful to enforce a hot cargo clause already obtained.⁷

In the present case, the Union argues that the district court's first opinion found the UMWA liable only under section 8(b)(4)(B) for *enforcing* Article II(g) once the 1974 NBCWA went into effect between the BCOA and the Union. Since that provision could not have been enforced before the parties agreed to it, and since there was no explicit finding that the Union violated section 8(b)(4)(A) by seeking an agreement with the BCOA to include Article II(g) in the contract, the UMWA contends that the period of damage liability commenced no earlier than December 6, 1974, when the NBCWA was adopted. To support this position, the Union relies on portions of the liability opinion discussing the Union's conduct after December 6 and the district court's specific references to section 8(b)(4)(B).

The Union's argument fails to take into account the district court's ultimate conclusion [**17] of law with regard to the secondary boycott issues. The district court held [[*537](#)] that the Labor Act was violated by the UMWA's "striking to force *coal mine companies* and coal haulers to sign the agreement. . . ." [494 F. Supp. 701 at 720](#)

⁴ The district court initially referred this case to the magistrate only for a determination of damages. Although causation may more properly be considered an aspect of liability rather than damages, the parties stated at oral argument that they had placed this question before the magistrate and indicated their willingness to allow her to resolve that issue on remand. Thus, the district court may, if it so wishes, return the entire case to the magistrate for her initial recommendations.

⁵ Section 8(b)(4) provides in part:

[HN6↑](#) (b) It shall be an unfair labor practice for a labor organization or its agents --

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (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 --

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section [[29 U.S.C. § 158\(e\)](#)];

(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 ;

* * *

[29 U.S.C. § 158\(b\)\(4\)](#).

⁶ Subsection (A) contains other prohibitions as well. See text of section 8(b)(4)(A), *supra* note 5.

⁷ Subsection (B) contains other prohibitions as well. See text of section 8(b)(4)(B), *supra* note 5.

(emphasis added). Thus, it must have meant to impose liability under section 8(b)(4) for the period of the BCOA strike. We reach this conclusion even though the district court followed this holding with a citation to section 8(b)(4)(B), the enforcement provision, and not to section 8(b)(4)(A), the clause governing attempts to obtain hot cargo agreements. The district court apparently did not distinguish between the two provisions, and understood section 8(b)(4)(B) to cover "[a] strike to force an employer to sign an agreement which contains a hot cargo clause in violation of section 8(e)." [494 F. Supp. at 710](#). Since the import of the decision by the district court is clearly that the Union's conduct both during and after the BCOA strike constituted unlawful secondary activity, we will not invalidate that determination merely because of a failure to cite all the relevant subsections of the Act.

Our affirmation [\[**18\]](#) of the Union's section 8(b)(4) liability for the period of the BCOA strike does not mandate a conclusion that the plaintiffs are entitled to recover damages under section 303 for all losses that might be attributable to that strike, regardless of causation. Section 303(a) [HN7](#)[↑] makes it unlawful for a labor union to violate section 8(b)(4), [29 U.S.C. § 187\(a\)](#). See [Local 20, Teamsters Union v. Morton](#), [377 U.S. 252, 12 L. Ed. 2d 280, 84 S. Ct. 1253 \(1964\)](#). When a union strikes, and one purpose of that strike is to obtain or enforce a hot cargo agreement, sections 8(b)(4) and 303(a) are violated. [National Labor Relations Board v. Denver Building & Construction Trades Council](#), [341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284 \(1951\)](#). In a companion case to [Denver Bldg. Trades, International Brotherhood of Elec. Workers v. National Labor Relations Board](#), [341 U.S. 694, 95 L. Ed. 1299, 71 S. Ct. 954 \(1951\)](#), the Court stressed that [HN8](#)[↑] "it was [\[**19\]](#) sufficient that *an objective* of the picketing, although *not necessarily the only* objective of the picketing, was to force [the employer] to . . . cease doing business with [another employer]." [341 U.S. at 700](#). In the case before us, Article II(g) of the 1974 NBCWA was a hot cargo clause, and one of the objectives of the BCOA strike was to seek agreement on that clause. Therefore, by engaging in that strike, the UMWA violated section 303(a).

[HN9](#)[↑] The damage portion of section 303, subsection (b), provides that "[w]hoever shall be injured in his business or property by reason [of] any violation of subsection (a) of this section may sue therefor. . . ." [29 U.S.C. § 187\(b\)](#). As the words "by reason of" make clear, section 303(b) requires that there be a direct causal nexus between the unlawful secondary activity and the injury suffered by the plaintiff. See [Frito-Lay, Inc. v. Local Union No. 137, Int'l Brotherhood of Teamsters](#), [623 F.2d 1354](#) (9th Cir.), cert. denied, [449 U.S. 1013, 66 L. Ed. 2d 472, 101 S. Ct. 571 \(1980\)](#); [\[**20\] Mead v. Retail Clerks Int'l Assn.](#), [523 F.2d 1371 \(9th Cir. 1975\)](#); [Riverside Coal Co. v. United Mine Workers of America](#), [410 F.2d 267 \(6th Cir. 1969\)](#); cert. denied, [396 U.S. 846, 90 S. Ct. 89, 24 L. Ed. 2d 95 \(1969\)](#). Cf. [Brunswick Corp. v. Pueblo Bowl-O-Mat](#), [429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#) (construing antitrust damage provision containing "by reason of" requirement of [15 U.S.C. § 15](#)); [Zenith Radio Corp. v. Hazeltine Research, Inc.](#), [395 U.S. 100, 23 L. Ed. 2d 129, 89 S. Ct. 1562 \(1969\)](#) (antitrust causation); [Albrecht v. Herald Co.](#), [452 F.2d 124 \(8th Cir. 1971\)](#), on remand from [390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 \(1968\)](#) (antitrust causation). If the plaintiff would have been harmed regardless of the section 8(b)(4) violation, then of course there can be no recovery.

In [Mead v. Retail Clerks, supra](#), the Ninth Circuit reviewed a factual situation very similar to that in the present case and discussed at some length the proper method of applying the causation requirement of section 303(b) to [\[**21\]](#) such a setting. One of the proposals in the collective bargaining agreement being negotiated between the plaintiffs and the defendant union was an illegal hot cargo clause. All the other terms under consideration such as wages, pensions and a [\[*538\]](#) health and welfare plan were lawful. When the parties could not agree on a contract, the union struck. The district court found that one object of the otherwise lawful strike was to obtain the hot cargo agreement and that the strike caused the plaintiffs' injury. From its findings, the court concluded that the plaintiffs were entitled to damages under section 303(b). The trial court made no findings on the relative importance of the union's various bargaining objectives in bringing about the strike.

The Ninth Circuit reversed, holding that section 303 permits recovery only if the unlawful conduct itself "materially contributed" to or was a "substantial factor" in bringing about the injury.⁸ [523 F.2d at 1376](#). To allow recovery under

⁸ The court stated that illegal conduct was not a "substantial factor" or "material contribut[ion]" to a strike where "[the lawful] objectives, standing alone, would have caused the strike, but the unlawful objective, standing alone, would not. [Restatement](#)

the district court's standard, it concluded, would conflict with the Supreme Court's command that section 303 be used to penalize the union only for illegal secondary activities, and [**22] not for lawful primary conduct. See [523 F.2d at 1378](#), citing [United Mine Workers of America v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 \(1966\)](#) and [Local 20, Teamsters Union v. Morton, 377 U.S. 252, 12 L. Ed. 2d 280, 84 S. Ct. 1253 \(1964\)](#).⁹ By requiring the employer to show that the union's violation of section 303(a) was a substantial factor in causing the injury, the court preserved the employer's right to compensation for losses proximately caused by the union's unfair labor practice, without jeopardizing the union's right to engage in lawful primary picketing.

[**23] We believe that the Ninth Circuit has correctly interpreted the causation requirement in section 303(b). [HN10](#)¹⁰ To receive a damage award under that provision, the plaintiffs in this case must demonstrate not that the unlawful hot cargo cause was *an object* of the BCOA strike, but that it was a *substantial factor* in or *materially contributed* to the Union's decision to call and maintain that strike.¹⁰ The mere fact that the agreement the Union sought to obtain by striking contained a hot cargo clause is not enough, without more, to support a finding that the clause was a substantial factor.

The prior opinions in this case have not resolved this issue. The district [**24] court's liability opinion is confined to a discussion of sections 8(b)(4) and 303(a). It contains no determination of the proximate cause issue presented by the section 303(b) damage claim. Although the recommendation of the magistrate does state that she found the clause to be a substantial cause of the strike, that finding is based on her conclusion that the district court's liability opinion compelled such a result.

Because, as previously explained, the liability opinion did not address the problem, that opinion cannot control the resolution of that issue. Consequently, we believe that the district court, or the magistrate, must be given an opportunity to consider the matter *de novo* and to take whatever additional evidence is necessary to determine whether the hot cargo clause materially contributed to the decisions to call or maintain the BCOA strike. For that reason, the issue will be remanded.

IV

The Union advances three arguments why H&H should not have been awarded damages for the losses it claims to have suffered. First, there was not sufficient evidence to show that the injury to H&H [[*539](#)] was caused by the Union. Second, even if it could be shown that [**25] the UMWA was responsible, the conduct involved was not the type of activity covered by the district court's liability opinion. Third, the Union claims that H&H did not prove its damages with reasonable certainty. We conclude that there is merit in the Union's first contention. Because it appears that the proper test for determining union agency may not have been applied, the matter will be remanded so that a fuller factual determination can be made.

During the BCOA strike, H&H was visited by men wearing UMWA logos and told to cease operations while the strike continued. In addition, there may have been sporadic picketing at the companies to and from which H&H hauled. These companies did close for portions of the strike. The Union argued before the magistrate that H&H had failed to prove that the persons who threatened the Hannas were agents of the UMWA and that the Union could therefore not be held responsible for their conduct. The magistrate determined that agency was established by the fact that the Union had authorized the strike. This determination was apparently adopted by the district court in its damage order.

(*Second*) of Torts § 432; W. Prosser, Law of Torts § 41 at 238-40 (4th ed. 1971); 2 F. Harper & F. James, Torts § 20.3, at 1121-23 (1956)." [523 F.2d at 1379](#).

⁹ In *Gibbs*, the Court interpreted *Morton* as permitting "recovery under § 303 of damages suffered during a strike characterized by proscribed secondary activity only to the extent that the damages claimed were the proximate result of such activity; damages for associated primary strike activity could not be recovered." [383 U.S. at 731 n.17](#).

¹⁰ If the strike is found to have occurred in distinct phases, with separate causes for the different periods of the work stoppage, the hot cargo clause must be determined to be a substantial factor for each period in which damages are awarded.

[**26] [HN11](#) To be held liable for the actions of individuals, a union must be shown to have "instigated, supported, ratified or encouraged" the particular activities in question. [*Kerry Coal Co. v. United Mine Workers of America, 637 F.2d 957, 963*](#) (3d Cir.), cert. denied, 454 U.S. 823, 70 L. Ed. 2d 95, 102 S. Ct. 109 (1981). See [*Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212, 62 L. Ed. 2d 394, 100 S. Ct. 410*](#) (1979). Calling a strike is not, by itself, sufficient to make the Union responsible for all illegal conduct committed during that strike. See [*Kerry Coal, supra*](#). In addition, when damages are claimed against an international union, a district, and a local, the plaintiff must make a separate showing of agency for each defendant. In the present case, there was no finding that any level of the UMWA authorized or in any way supported the individuals who threatened the Hannas. Thus, none of the Union entities, on this record, may be held responsible for that conduct. Accordingly, the matter will be remanded so that the issue of agency can be determined under the standards set forth in *Kerry Coal* and [**27] *Carbon Fuel*.

The Union also claims that the magistrate erred in determining that the injury suffered by H&H was of the type covered by the liability opinion. It maintains that any attempt to shut down H&H was unrelated to the Union's efforts to obtain and enforce the hot cargo agreement, because H&H did not haul from BCOA mines. The magistrate found, however, that H&H lost business because the strike prevented it from hauling coal. If, on remand, the magistrate ascertains that the hot cargo clause was a substantial factor causing the strike, H&H is entitled to recover for losses attributable to the strike. Of course, injury caused by the threats made at the H&H garage is compensable only if the magistrate finds both agency and causation.

The magistrate awarded damage to H&H for losses suffered between November 1974 and April 1975, finding that the BCOA and WPCHA strikes and the other efforts to enforce Article II(g) caused the six month decline in H&H's business. The Union argues that the award of damages after December 6, 1974 is clearly erroneous as too speculative because no direct pressure was put on H&H after that date. We disagree. It was not clearly erroneous for [**28] the magistrate to hold the UMWA liable for those damages during the period of its admittedly unlawful activity. The evidence was sufficient to support the determination that the entire downturn was attributable to the strike. See generally [*Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 263-65, 90 L. Ed. 652, 66 S. Ct. 574 \(1946\)*](#); [*Van Dyk Research Corp. v. Xerox Corp., 631 F.2d 251 \(3d Cir. 1980\)*](#), cert. denied, 452 U.S. 905, 69 L. Ed. 2d 405, 101 S. Ct. 3029 (1981). If, on remand, the magistrate were to determine the agency and substantial cause issues in favor of H&H, [*540] damages could be awarded to H&H for this period.

V

[HN12](#) In a proceeding involving unliquidated damages, such as the present case, the decision whether to award prejudgment interest is committed to the sound discretion of the district court. See [*Lodges 743 & 1746, Intl. Assn. of Machinists v. United Aircraft, 534 F.2d 422, 445-47 \(2d Cir. 1975\)*](#), cert. denied, 429 U.S. 825, 97 S. Ct. 79, 50 L. Ed. 2d 87 (1976); [*Thomas v. Duralite Co., 524 F.2d 577, 589 \(3d Cir. 1975\)*](#); [**29] [*Eazor Express, Inc. v. International Brotherhood of Teamsters, 520 F.2d 951, 973 \(3d Cir. 1975\)*](#), cert. denied, 424 U.S. 935, 47 L. Ed. 2d 342, 96 S. Ct. 1149 (1976); [*Nedd v. United Mine Workers of America, 488 F. Supp. 1208 \(M.D. Pa. 1980\)*](#). Prejudgment interest was awarded to Beunier and Henderson, but not to H&H. Both sides challenge aspects of those determinations on the ground that the district court abused its discretion. The Union disputes the award to Beunier and Henderson; the plaintiffs complain of the denial of such an award to H&H.

As the magistrate correctly noted, [HN13](#) a district court is to consider four factors in determining whether an award of prejudgment interest is appropriate:

- (1) whether the claimant has been less than diligent in prosecuting the action;
- (2) whether the defendant has been unjustly enriched;
- (3) whether an award would be compensatory; and
- (4) whether countervailing equitable considerations militate against a surcharge.

[*Nedd v. United Mine Workers of America, supra, 488 F. Supp. at 1219-20*](#). [**30] The magistrate found that the plaintiffs had been diligent, and that there would be some compensatory value in an award of prejudgment interest, but that such value was offset by the equitable consideration that the Union was unable "to foresee the illegality of [its] 1974 negotiations." Recommendation of Special Master on Damage Claim of H&H Hauling Co., C.A. No. 76-

955 at 9 (Feb. 18, 1982), Appx. at 679-80a. See also Recommendation of Special Master on Damage Claim of Paul Henderson Trucking, C.A. No. 76-955 at 12-17 (Feb. 18, 1982), Appx. at 665-70a. The magistrate determined that the Union had been unjustly enriched at the expense of Beunier and Henderson, because their employees paid dues to the Union and the companies themselves contributed to the UMWA Pension Fund. For this reason, Beunier and Henderson were awarded prejudgment interest. Because the UMWA received no monetary enrichment from H&H during the liability period, H&H was found not to be entitled to prejudgment interest.

The Union claims that it was not unjustly enriched at the expense of Beunier and Henderson because it did not have the use of their money during the liability period, since the pension payments [**31] went to the Fund, and the dues came from employees rather than the plaintiffs. See *Nedd, supra*; Restatement (Second) Contracts § 370 comment (a). **HN14**¹¹ Unjust enrichment has been defined as follows:

To the extent defendant has had the free use of the income-producing ability of plaintiffs' money without having to pay for it, he has been unjustly enriched. To divest defendant of this unjustified benefit is not to penalize him, for it has been determined by the trial that it was never rightfully his.

Recent Developments -- Prejudgment Interest as Damages: New Application of an Old Theory, 15 Stan. L. Rev. 107, 109 (1962), cited in *Nedd, supra*. After reviewing the two elements upon which the magistrate based her recommendation, we conclude that they do not meet the requirements of unjust enrichment. Accordingly, that portion of the damage award will be reversed.

The first item identified by the magistrate was the money which the plaintiffs contributed to the Pension Fund as part of their obligations under 1974 NBCWA. This Court has held, however, that the [**32] Union and the Pension Fund are two separate entities. See *Nedd v. United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977), cert. denied, 434 U.S. 1013, 54 L. Ed. 2d 757, 98 S. Ct. 727 (1978). A union has neither the right nor the authority to control the spending and investment of pension fund contributions. *Nedd, supra*. Since the UMWA did not have the use of that money, it cannot be said to have been unjustly enriched by the plaintiffs' contributions to the Fund.

In addition to the pension contributions, the magistrate found that the UMWA was also unjustly enriched by the dues it collected from the employees of Beunier and Henderson. Most of those employees appear to have been members of the Union before their employers signed the 1974 NBCWA. Inasmuch as there was no showing that these employees would have resigned from the Union in 1974, the Union would have received those dues payments regardless of its illegal conduct. More importantly, the money was not paid by the plaintiffs. Nor was it money the plaintiffs would otherwise have been able or entitled to use. Thus, the union did not receive any benefit at the plaintiffs' [**33] expense.¹¹ In fact, any benefit the UMWA received from the dues was conferred by its members, not by the plaintiffs.¹²

Neither the dues payments nor the Pension Fund contributions unjustly enriched the UMWA at the plaintiffs' expense. In her recommendations, the magistrate determined that, absent unjust enrichment, prejudgment interest would not be appropriate in [**34] this case. Because of that conclusion, it is unnecessary for us to remand the matter for further consideration. Instead, we will reverse the award of prejudgment interest to Beunier and Henderson.

H&H argues that it is entitled to prejudgment interest because "the Union was unjustly enriched . . . by enhancing its successful (albeit illegal) organizing efforts elsewhere in the coal fields." *Appellees' Brief* at 35. This type of speculative, intangible benefit is not within the definition of unjust enrichment that we have adopted. Thus, it could not have been an abuse of discretion for the district court to refuse to award prejudgment interest to H&H.

¹¹ The Restatement (Second) of Contracts addresses this aspect of unjust enrichment in its discussion of restitution. "The benefit must have been conferred by the party claiming restitution. It is not enough that it was simply derived from the breach." *Section 370 comment (a)*.

¹² Ronald Beunier was himself a member of the UMWA and so the Union did receive \$ 12/month directly from that plaintiff. The liability period ran no more than six months, however, and we consider the \$ 72 received by the UMWA during that time to be a *de minimis* amount in the context of this case. It cannot, therefore, justify a finding of unjust enrichment.

VI

Plaintiffs claim that the district court erred in concluding that the Union was exempt from antitrust liability for its illegal conduct. They maintain that they should be entitled to collect treble damages for the injury they suffered as a result of Article II(g). After reviewing the district court's liability opinion, we conclude that the proper legal standard was applied and that the factual findings were not clearly erroneous. Accordingly, the judgment of the district court on this issue will be affirmed.

The intersection [**35] of the labor and antitrust laws is one of the more difficult areas of federal jurisprudence. As one of the leading commentators has explained:

From the outset, the difficulty in applying the antitrust concept to organized labor has been that the two are intrinsically incompatible. The antitrust laws are designed to promote competition, and unions, avowedly and unabashedly, are designed to limit it. According to classical trade union theory, the objective is the elimination of wage competition among all employees doing the same job in the same industry. Logically extended, the policy against restraint of trade must condemn the very existence of labor organizations, since their minimum aim has always been the suppression of any [*542] inclination on the part of working people to offer their services to employers at different prices.

St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 604 (1976) (footnote omitted). [HN15](#)¹⁵ The Supreme Court has responded to this conflict by creating two exemptions from the coverage of the antitrust [**36] laws for labor organization activities. The first, the so-called "statutory" exemption, protects the union from liability when it acts alone. See *Allen Bradley v. Local 3 IBEW*, 325 U.S. 797, [65 S. Ct. 1533, 89 L. Ed. 1939 \(1945\)](#); *United States v. Hutcheson*, [312 U.S. 219, 85 L. Ed. 788, 61 S. Ct. 463 \(1941\)](#). The second "non-statutory," exemption is much less clear, but it generally applies when a union, acting with a non-labor party, seeks to attain goals which are mandatory or permissive subjects of bargaining under the National Labor Relations Act,¹³ unless the Union acts with a predatory anti-competitive purpose. See *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, [421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 \(1975\)](#); *United Mine Workers of America v. Pennington*, [381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#). In *Connell*, the Supreme Court held that the non-statutory exemption did not shield a union when an employer sought injunctive and declaratory relief for injuries caused by the union's violation of section 8(e) of the Labor Act, the hot cargo provisions.

[**37] This Court was presented with the question of the proper application of *Connell* to antitrust damage suits in *Consolidated Express, Inc. v. N.Y. Shipping Assn.*, [602 F.2d 494 \(3d Cir. 1979\)](#), vacated and remanded on other grounds, 448 U.S. 902, 100 S. Ct. 3040, 65 L. Ed. 2d 1131 (1980), modified, [641 F.2d 90 \(3d Cir. 1981\)](#) (*Conex*). The *Conex* court distinguished suits seeking monetary recovery from those asking only injunctive relief on the ground that the former, because of their cost, have a greater tendency to chill lawful union activity. The court concluded that a broader exemption from antitrust liability was justified in damage actions and held that an antitrust plaintiff would establish a *prima facie* case under section 4 of the Clayton Act by showing that he had been injured in his business or property by "a collective bargaining agreement, or conduct taken pursuant to it, [which] has been shown to be illegal under federal labor law." *Conex* at 521. The Union defendant could, however, rebut the *prima facie* case by proving "first, that at the time [it] acted, . . . [it] could not reasonably have foreseen [**38] that the subject matter of the agreement being challenged would be held to be unlawful under § 8(b)(4) or § 8(e)." The union "must also demonstrate that the contract provisions and steps taken to implement them were 'intimately related' to the object of collective bargaining thought at the time to be legitimate, and went no further in imposing restraints in the secondary market than was reasonably necessary to accomplish it." *Conex* at 521. If the Union could persuade the district court of these facts, declared *Conex*, then it would be entitled to the non-statutory exemption from damage liability under section 4 of the Clayton Act.

¹³ Mandatory subjects of bargaining are "wages, hours and other terms and conditions of employment." [29 U.S.C. § 158\(d\)](#), National Labor Relations Act § 8(d). The parties are required to discuss these issues in negotiations. All other lawful areas of negotiation are considered permissive subjects; on these topics, the parties may bargain, but they cannot be compelled to do so. See *National Labor Relations Board v. Borg-Warner Corp.*, [356 U.S. 342, 349, 78 S. Ct. 718, 2 L. Ed. 2d 823 \(1958\)](#).

In the present case, the district court correctly analyzed the antitrust issue by applying the *Conex* test and, after extensive factual analysis, determined that the UMWA had successfully rebutted the plaintiffs' *prima facie* case and was therefore exempt from antitrust liability. The plaintiffs, pointing to facts in the record that would support a contrary result, argue that the court's findings on foreseeability and the "reasonably necessary" scope of Article II(g) are clearly erroneous. That, however, is not the test which we apply when **[**39]** reviewing factual findings . **HN16**¹⁶ It does not matter that this Court, confronting the facts *de novo*, might **[*543]** view them in a different light. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969). We may reverse only if, after reviewing the record, we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948). Our examination of the evidence adduced in this case has not produced any such conviction. At best, the testimony shows that more than one set of factual conclusions could have been drawn by the district court. Consequently, we cannot say that the facts it found were clearly erroneous. The judgment of the district court that the UMWA was exempt from antitrust liability for damages will be affirmed.

VII

The damage awards will be vacated and this case remanded to the district court for further findings consistent with this opinion on the issue **[**40]** of causation during the BCOA strike and a determination of the agency question presented in the magistrate's recommendations relating to H&H. The award of prejudgment interest will be reversed. In all other respects the district court's judgment will be affirmed.

End of Document

FTC v. Manufacturers Hanover Consumer Services, Inc.

United States District Court for the Eastern District of Pennsylvania

June 30, 1983

Misc. No. 81-363

Reporter

567 F. Supp. 992 *; 1983 U.S. Dist. LEXIS 15825 **; 1983-2 Trade Cas. (CCH) P65,508

FEDERAL TRADE COMMISSION v. MANUFACTURERS HANOVER CONSUMER SERVICES, INC., CREDICO FINANCIAL, INC., GENERAL FINANCE CORPORATION, DOMESTIC FINANCE CORPORATION, BARCLAYSAMERICAN CORPORATION, POSTAL FINANCE CO.

Core Terms

insurance business, Finance, investigated, insured, credit insurance, spreading, subpoena, credit transaction, consumer

LexisNexis® Headnotes

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > General Overview

HN1 [down arrow] **US Federal Trade Commission Actions, Investigations**

A Federal Trade Commission investigation is within the scope of its statutory authority unless the subject matter is part of the business of insurance. If it is not, then the McCarron-Ferguson Act does not protect the activity from regulation, and therefore from investigation, by the FTC. The United States Supreme Court has articulated three criteria to be used in determining whether an activity is part of the business of insurance: first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Investigations > General Overview

HN2 [down arrow] **US Federal Trade Commission Actions, Investigations**

Where possible to characterize a practice either broadly so that the activity appears to be part of the relationship between the insurer and the insured, or narrowly so that it appears otherwise, the latter path should be followed.

Counsel: **[**1]** Federal Trade Commission, by: Leslie Rice Melman, Esq., Federal Trade Commission, Washington, District of Columbia.

Domestic Finance Corp., by: Cecelia F. Wambold, Esq., Duane, Morris & Heckscher, Philadelphia, Pennsylvania, Joseph W. Gelb, Esq., Weil, Gotshal & Manges, New York, New York.

General Finance Corp., Barclaysamerican Corp. & Postal Finance Co. by: Alfred W. Putnam, Jr., Esq., Drinker, Biddle & Reath, Philadelphia, Pennsylvania, Robert J. Lepri, Esq., McDermott, Will & Emery, Chicago, Illinois.

Manufacturers Hanover Consumer Service, Inc., by: Edward F. Mannio, Esq., Philadelphia, Pennsylvania.

Credico Financial, Inc., by: Edward C. Toole, Jr., Esq., Clark, Ladner, Fortenbaugh & Young, Philadelphia, Pennsylvania, Elizabeth Head, Esq., H. Jo Schneider, Kaye, Scholer, Fierman, Hays & Handler, New York, New York.

Judges: Norma L. Shapiro, J.

Opinion by: SHAPIRO

Opinion

[*993] MEMORANDUM and ORDER

NORMA L. SHAPIRO, J.

This proceeding arises from a nationwide investigation by the Federal Trade Commission ("FTC") into certain credit practices. The investigation and litigation it instigated were described as follows by District Judge Charles Schwartz, Jr., United States District [**2] Court for the Eastern District of Louisiana:

This proceeding was invoked by the Federal Trade Commission (Commission) pursuant to Section 20 of the Federal Trade Commission Act, [15 U.S.C. 57b-1](#) for an order compelling respondents to comply with civil investigative demands (CIDs) issued by the Commission during the course of an investigation to determine whether respondents may be or may have been engaged in unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, [15 U.S.C. 45\(a\)\(2\)](#). Specifically, the purpose of the investigation is to determine whether finance companies, automobile dealerships or others may be engaged in unfair or deceptive acts or practices in connection with arranging for or consummating of a consumer credit transaction, including misrepresenting, directly or by implication, that the purchase of credit insurance is a prerequisite to the extension of credit.

Respondents have failed to provide the requested documents on the ground that the Commission's inquiry is an unlawful attempt to investigate and regulate the 'business of insurance' which is protected by the McCarran-Ferguson Act, [15 U.S.C. § 1012\(b\)](#) (McCarran [**3] Act) from review by the Federal Trade Commission.

[FTC v. Dixie Finance Co., 695 F.2d 926](#) (5th Cir. 1983; Appendix A (footnotes omitted)).

An action was filed in this district by the FTC petitioning for enforcement of the CIDs against Manufacturers Hanover Consumer Services, Inc., Credico Financial, Inc., General Finance Corporation, Domestic Finance Corporation, BarclaysAmerican Corporation and Postal Finance Co. ("enforcement action" petition). Hanover and Domestic also brought actions seeking equitable relief from the FTC investigation ("extra-enforcement" action). A prior opinion in these consolidated actions granted the FTC's motion in the extra-enforcement action [*994] and denied motions for summary judgment therein without prejudice to the rights of defendants to resist in this enforcement action. Therefore, at this time defendant Credico's motion for declaratory judgment in the enforcement action and the FTC petition for enforcement remain outstanding. For the reasons that follow, Credico's motion for declaratory judgment in its favor is denied but an order enforcing the FTC petition will be deferred pending a hearing now scheduled.

The investigation [**4] does not transgress the McCarran-Ferguson Act, [15 U.S.C. § 1012\(b\)](#) (the "Act"), as the activity the FTC seeks to investigate is not part of the "business of insurance." While the investigation pursuant to which the subpoena was issued is within the power of the FTC, the court will defer ordering its enforcement as

issued until a hearing on whether the subpoena duces tecum should be enforced as issued or modified as overbroad and burdensome.

HN1[] The FTC investigation is within the scope of its statutory authority unless the subject matter is part of the "business of insurance." If it is not, then the Act does not protect the activity from regulation, and therefore from investigation, by the FTC.¹ The Supreme Court has established criteria for this determination in two recent cases, *Group Life & Health Insurance v. Royal Drug Co.*, 440 U.S. 205, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979) and *Union Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982).² The *Pireno* majority articulated three criteria to be used in determining whether an activity is part of the "business of insurance":

. . . *first*, whether the practice has the effect of transferring [**5] or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

73 L. Ed. 2d at 656. Applying these three criteria to the facts of the present case leads to a conclusion that the activity in question is not the business of insurance.

[**6] The first criterion is whether the practice is to spread the risk. The answer to this inquiry depends largely upon how one defines the "practice." If one defines the practice as the sale of credit insurance in connection with the sale of financed automobiles, then this practice clearly spreads risk. Many automobile purchasers pay a small premium so that the automobile purchasers unable to make finance payments and subject to loss by repossession and judgment lien are not forced to bear the entire personal risk -- a classic example of underwriting. See generally, *Royal Drug, supra*; *SEC v. Nat. Sec. Ins.*, 393 U.S. 453, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969). At the same time, the finance company benefits by the elimination of credit risk to it at the expense of the debtor who pays for this [*995] credit insurance as a part of the cost of credit. If one considers this as a credit practice, see, *Dixie Finance, supra*, then there is no risk spreading. Even if this court were to determine that there is a form of risk spreading, that would not require a finding that the activity being investigated is the business of insurance. Risk spreading is an indispensable element, [**7] *Royal Drug, supra*, 440 U.S. at 212, but its presence is not determinative. *Pireno, supra*, 73 L. Ed. 2d at 656. Both the other criteria strongly suggest that this activity is not the business of insurance.

The second criteria is whether the practice is an integral part of the policy relationship between the insurer and the insured. This issue was the focus of the *Dixie Finance* decision, which held that the practice was credit related and not an integral part of the insurer/insured relationship. (Appendix A at 1979). Where a policyholder relationship is intertwined with other activities, the decision is to be made by focusing on "the gravamen of the complaint." *SEC, supra*, 393 U.S. at 462. When the *Dixie Finance* court focused on this aspect it found that:

The specification set out by the Commission in its CIDs do not intrude on the insurer-insured relationship; they seek to determine only whether respondents may be making false or misleading misrepresentations to prospective borrowers that credit insurance is a prerequisite to the extension of consumer credit. The

¹ See, *Union Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647, 659 n.9 (1982); see generally, *Dixie Finance, supra*.

² Both *Royal Drug* and *Pireno* are antitrust cases, as have been most cases discussing the "business of insurance" exemption. It is possible that more leniency should be inferred in applying the "business of insurance" exemption to non-antitrust cases, as the courts have held that antitrust exemptions must be narrowly construed; *Royal Drug, supra*, 440 U.S. at 231; see also, *Schwartz v. Commonwealth Land Title Co.*, 374 F. Supp. 564, 573 (E.D.Pa. 1974), while no like requirement exists for applications of the "business of insurance" to cases such as this one. However, the statutory language of 15 U.S.C. § 1012(b) (the Act) does not distinguish the two situations, and it has been recognized that the law has a wider scope than antitrust. *Cochran v. Paco*, 606 F.2d 460, 463 (5th Cir. 1979). Therefore, the Supreme Court criteria developed in the antitrust cases will be applied here, keeping in mind that the tests were developed in a slightly different context. But see, *Thompson v. NYL Ins. Co.*, 644 F.2d 439 (5th Cir. 1981) (TILA case applying different standards but keeping *Royal Drug* in mind); *Cochran, supra*, 606 F.2d at 463 (TILA case "borrowing" from the antitrust jurisprudence).

Commission is not concerned with the 'reliability, interpretation and enforcement' of the **[**8]** insurance contract.

Appendix A to *Dixie Finance* at 1979 (emphasis added). Cf., [SEC, supra](#) (looking at the aim of a statute to determine its effect on the business of insurance). In this case the petition of the FTC asks for authority "to determine whether certain unnamed finance companies, car dealerships and others may be engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act ([15 U.S.C. § 45](#)) in connection with the arranging for or consummating consumer credit transactions, including but not limited to misrepresenting directly or by implication that the purchase of credit insurance is a prerequisite to the extension of credit." Complaint, para. 11. Although the complaint does mention insurance, the gravamen is on the credit transactions. The fact that insurance is mentioned does not make the complaint, or the transactions to be investigated, primarily concerned with the business of insurance. [HN2↑](#) Where possible to characterize the practice either broadly so that the activity appears to be part of the relationship between the insurer and the insured, or narrowly so that it appears otherwise, the latter path should **[**9]** be followed. See, [St. Bernard Hospital v. Hospital Service Assn. of New Orleans, Inc., 618 F.2d 1140 \(5th Cir. 1980\)](#); cf., *Royal Drug* (the wholly separate nature of the two agreements not changed by a reference to one in the contract of the other).

A final practical consideration mitigates against characterizing the relationship to be investigated as between insurer and insured instead of between creditor and debtor or seller and buyer. If insurance sales in relation to these credit transactions remove them from the purview of FTC investigation and regulation, then any transaction would be removed from FTC investigation and regulatory authority merely by selling insurance as part of the transaction whether or not on credit. For instance, a refrigerator sale could be removed from CPSC review by selling the customer refrigerator insurance at the time of the sale. Congress did not intend such a result.

The third *Pireno* criteria is whether the practice is limited to entities within the insurance industry. The practice to be investigated here is not, regardless of how it is characterized. Although the automobile salesperson may be both the credit representative and insurance **[**10]** salesperson, the sale and credit transaction may be independent **[*996]** of any credit insurance. But there is no way that there can be credit insurance without an extension of credit and no way to extend credit for an automobile purchase without the sale of an automobile. Wherefore, it would seem that the insurance depends on the financing transaction but the credit transaction is or may be independent of the insurance, which is, of course, what the investigation seeks to determine.

The *Pireno* criteria must be applied in terms of their genesis in determining exemption from antitrust laws; their application may be somewhat different in determining exemption from regulation of consumer credit transactions. The *Pireno* majority argued that Section 2(b) of the Act "was intended primarily to protect *intra*-industry cooperation in the underwriting of risks." [Pireno, supra, 73 L. Ed. 2d at 658-59](#), citing, [Royal Drug, supra, 440 U.S. at 221](#) (emphasis added by *Pireno* Court). Congress was concerned that if insurance companies were subject to federal **antitrust law**, it would be impossible to pool actuarial data and set rates for policies. See generally, *Pireno* **[**11]**. Allowing the FTC to investigate whether the purchase of credit insurance has been involuntary rather than voluntary in the credit transactions complained of here will not affect the ability of the industry to set rates for insurance offered or sold.

In addition, if the practice sought to be investigated is characterized as the business of insurance because insurance is somehow involved, the insurance industry would be able to expand its McCarran Act protection to new activities by combining diverse activities with the sale of insurance; e.g., mortgage insurance for commercial buildings, health insurance for corporate executives, etc. The courts should guard against this possibility. [Hahn v. Oregon Physicians Service, 689 F.2d 840, 1982-2 CCH Trade Cases para. 64,970, n.2 \(9th Cir. 1982\)](#).

Two of the *Pireno* criteria clearly suggest this investigation is not of the business of insurance and the third can perhaps be viewed either way. Our application of the *Pireno* criteria results in a determination that the activity to be investigated to determine the need for regulation is not the business of insurance but the terms and conditions of

provision of credit. See, [**12] [*Nurse Midwifery Assoc. v. Hibbett*, 549 F. Supp. 1185, 1982-83](#) CCH Trade Cases para. 65,040 (M.D. Tenn. 1982).³

The court holds that the investigation is within the power of the FTC, that is, that the investigation has a legitimate purpose and the inquiry is relevant to that purpose. There remains the issue of whether the subpoena duces tecum is overbroad and burdensome which may not have been adequately addressed. The court will hear the parties on whether the subpoenas are overbroad or unnecessarily burdensome before enforcing them as issued.

ORDER

AND NOW, this 30th day of June, 1983, upon consideration of the outstanding motions in this matter, and for the reasons set forth in the foregoing Memorandum, [**13] it is ORDERED that:

1. Defendant Credico Financial Inc.'s motion for declaratory judgment in its favor is DENIED; the Federal Trade Commission is not precluded by the McCarran-Ferguson Act, [15 U.S.C. § 1012\(b\)](#), from investigating the activity in connection with which it issued the subject subpoena duces tecum.
2. A hearing will be held on August 5, 1983 at 2:00 p.m., in Courtroom 10-A, United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, at which time [*997] the parties will be heard on whether the Federal Trade Commission's subpoena duces tecum should be enforced as issued or modified.

End of Document

³ *Nurse Midwifery* is one of the few cases to apply the *Pireno* standards *per se*; the first criterion was found to be a close question, the second and third criteria suggested that the activity was not the business of insurance; it was held that the activity was not the business of insurance.

Indus. Siderurgica v. Thyssen Steel Caribbean

Supreme Court of Puerto Rico

June 30, 1983, Decided

No. O-82-795

Reporter

114 D.P.R. 548; 1983 PR Sup. LEXIS 136

INDUSTRIAL SIDERURGICA, INC., Plaintiff and Respondent, v. THYSSEN STEEL CARIBBEAN, INC., FLORIDA STEEL CORPORATION; B. S. LIVINGSTON & CO., INC., Defendants and Petitioner the second.

Notice: OFFICIAL TRANSLATION

Prior History: PETITION FOR CERTIORARI to review a DECISION of Melvin A. Padilla Feliciano, Judge (San Juan), denying a motion to dismiss for alleged lack of personal jurisdiction over the defendant. The writ is issued and the decision appealed is affirmed. Certiorari.

Disposition: For the foregoing reasons, the resolution appealed from shall be affirmed.

Core Terms

Steel, minimum contact, nonresident, courts, personam, due process of law, business transaction, provisions, sales, transaction of business, due process clause, substantial income, present case, trial court, antitrust, destined, limits

Headnotes/Summary

Headnotes

1. MONOPOLIES - MONOPOLIES AND OTHER COMBINATIONS RESTRICTING COMMERCE - JURISDICTION - IN GENERAL. Article 13B of the Monopoly Act of Puerto Rico contains a particular long arm provision applicable to cases arising under its provisions so that courts may assume jurisdiction in personam over a defendant. Two requirements must be met under said provision: defendant's conduct constituting a violation of the law and the substantial income derived from our market.
2. ID. - ID. - ID. The mere allegation that acts have been committed in violation of the Monopoly Act does not suffice to give a court jurisdiction in personam under art. 13B of the Monopoly Act of Puerto Rico. If this were the case, the purpose outlined in the due process of law clause, of avoiding that a defendant be forced to defend his case in a faraway and inconvenient forum to which he has no ties, relation or contacts, would be defeated.
3. RULES OF CIVIL PROCEDURE - PLEADINGS AND MOTIONS - PLEADINGS ALLOWED - MOTION TO DISMISS - IN GENERAL. When a party files a motion to dismiss alleging lack of jurisdiction over its person; the court should not rest on the sufficiency of plaintiff's allegations and deny the defendant's petition without a hearing. It should at least require plaintiff to show that it has sufficient evidence to establish the necessary elements to confer jurisdiction in personam over the defendant and, thus, guarantee the latter's right to due process of law.

Indus. Siderurgica v. Thyssen Steel Caribbean, 114 D.P.R. 548

4. ID. - COMMENCEMENT OF ACTION - PROCESS - SUBSTITUTE PROCESS - IN GENERAL. Conspiracy to violate the Monopoly Act of Puerto Rico is not just constituted by transacting business pursuant to Rule 4.7(a) (1) of the Rules of Civil Procedure, for purposes of conferring jurisdiction in personam to the court; due process of law requires something more.

5. ID. - ID. - ID. - ID. - ID. The test of Rule 4.7(a) (1), with regard to whether a corporation is doing business within the local jurisdiction, is a practical, nontechnical business test.

6. ID. - ID. - ID. - ID. - ID. The defendant need not carry out the business transactions referred to in Rule 4.7(a) (1) of Civil Procedure directly in person or through an agent; they could be carried out indirectly through third persons, without the need of establishing between these third persons and the foreign defendant a relationship which could create an agency.

7. ID. - ID. - ID. - ID. - ID. The modern trend is to broaden the jurisdiction of State courts over nonresident persons up to the point allowed by the Constitution.

8. CONSTITUTIONAL LAW - DUE PROCESS OF LAW - IN GENERAL. The due process clause of the United States Constitution limits the power of the states and of Puerto Rico to render judgments against nonresidents. When judgment is rendered in violation of said clause the same does not merit full faith and credit in any other state.

9. ID. - ID. - ID. Due process of law requires that the defendant be adequately notified of the claim against his person, that he be afforded the opportunity to be heard before his rights in the action are definitively adjudicated, and that defendant be subject to the jurisdiction in personam of the state or local court.

10. RULES OF CIVIL PROCEDURE - COMMENCEMENT OF ACTION - PROCESS - SUBSTITUTE PROCESS - MINIMUM CONTACTS. In order to subject a defendant to a judgment in personam, due process of law only requires that if he is not present in the jurisdiction, that he have certain minimum contacts with it, so that the suit does not offend traditional notions of fair play and substantial justice.

11. ID. - ID. - ID. - ID. A. H. Thomas Co. v. Superior Court, 98:864 (1970), outlines the three rules used to determine the jurisdiction in personam over a nonresident or nondomiciled person as follows: (1) the nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three. (2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a "substantial minimum contact." And (3) having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of "fair play" and "substantial justice." If this test is fulfilled, there exists a "substantial minimum contact" between the forum and the defendant. The reasonableness or subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of forum non conveniens.

12. ID. - ID. - ID. - ID. - ID. In determining if the exercise of the state court jurisdiction is consistent with due process of law, the inquiry must focus on the relationship existing among the defendant, the forum, and the litigation.

Counsel: For Florida Steel Corporation, petitioner: Carlos Colón Marchand.

For Industrial Siderúrgica, Inc., respondent: Julio M. Rodrigues, of Fiddler, González & Rodríguez, and Orlin P. Gohle for Thyssen Steel Caribbean, Inc. Zadette Bajandas, of O'Neill & Borges, for B. S. Livingston & Co. Héctor Saldaña Egozcue, of Ortiz Murias & Saldaña.

Judges: MR. JUSTICE IRIZARRY YUNQUE delivered the opinion of the Court. Mr. Chief Justice Trías Monge took no part in this decision. Mr. Justice Negrón García disqualifyed himself.

Opinion by: IRIZARRY YUNQUE

Opinion

San Juan, Puerto Rico, June 30, 1983

Florida Steel Corporation appeals to this Court from a resolution of the Superior Court which dismissed its petition seeking the dismissal of a claim filed against it for alleged damages based on a violation of the antitrust provisions of the Monopoly Act. It contends that the court lacks jurisdiction over its person because it is a foreign corporation not covered by art. 13B of said Act and by Rule 4.7 of the Rules of Civil Procedure. It is our decision that, regardless of the cited art. 13B, plaintiff has shown that there is evidence tending to establish that Florida Steel carried out business transactions in Puerto Rico, thus, there are grounds to exercise jurisdiction over the same pursuant to Rule 4.7(a)(1) of the Rules of Civil Procedure, without violating the applicable constitutional provisions concerning due process of law.

I

The complaint herein contends that Industrial Siderúrgica, Inc., organized and existing under the laws of Puerto Rico, is engaged in the business of selling reinforcing steel in and outside Puerto Rico; that defendants Florida Steel Corp. and B. S. Livingston & Co., Inc. are the manufacturer and middleman, respectively, of reinforcing steel, that supply this material to the other defendant, Thyssen Steel Caribbean, Inc., a domestic corporation; and that the latter in turn sells [its product] in and outside Puerto Rico; that through special concessions made by Florida Steel and Livingston to Thyssen, and through mutual agreements and combinations among them, they, with malice aforethought, conspired against the plaintiff to destroy their competitor and eliminate it from the local market, in violation of Act No. 77 of June 25, 1964 (*10 L.P.R.A. §§ 257-276*); and that said actions caused plaintiff damages which it assessed in five million dollars.

Florida Steel moved for the dismissal of the complaint claiming lack of jurisdiction in personam. It contended that it is incorporated in the state of Florida, where it has its principal offices; that it has manufacturing centers in Florida, North Carolina, Tennessee, Georgia, Louisiana and South Carolina; but that it has no offices, factories, property, employees, agents or salesmen in Puerto Rico, or has carried out any business transactions in this jurisdiction. It also denied having taken advantage of any privilege in our forum or otherwise having submitted itself to the jurisdiction of our courts. Attached to its petition was a sworn statement given by its vice-president explaining said circumstance.

On its part, Industrial Siderúrgica answered that regardless of the provisions of Rule 4.7 of the Rules of Civil Procedure (concerning the circumstances under which our courts may take jurisdiction over nondomiciled or nonresident defendants in Puerto Rico) the Monopoly Act provides in its art. 13B that Puerto Rican courts may exercise jurisdiction over any person who has violated any of its provisions and who, in addition, draws substantial income from any economic activity in Puerto Rico.

In its motion before the trial court, Industrial Siderúrgica alleged that, from the discovery of evidence regarding Livingston, it appeared that Florida Steel knows that its product is destined for Puerto Rico, since at no time has Livingston taken possession of the steel, rather Florida Steel delivers it directly to Thyssen in Jacksonville, Florida, in order to ship it directly to Puerto Rico. Plaintiff alleged that ten shipments of steel were made in this fashion during the last year and a half. It contended, further, that Florida Steel has at times sold steel bars directly to plaintiff for their elaboration, and that the sales of Florida Steel in Puerto Rico have been substantial. For such reason, it concluded that Florida Steel is engaged in business transactions in Puerto Rico to the point that it is subject to the jurisdiction of our courts.

Indus. Siderurgica v. Thyssen Steel Caribbean, 114 D.P.R. 548

The trial court summarily denied the motion to dismiss filed by Florida Steel, without holding a hearing and without an opportunity to consider the different issues raised in the arguments of the parties. On Florida Steel's request, we issued a writ of certiorari to consider the constitutional question concerning jurisdiction in personam.

Aside from the arguments raised by respondent Industrial Siderúrgica objecting to the petition for dismissal, the latter has produced before us evidence, in support of its positron, obtained during the discovery of evidence that it did not have the opportunity to present before the trial court. Ordinarily we would not consider it. But it is not a matter, at this stage, of passing on its admissibility or probative value; this question will be seen by the trial court on its day. It is a matter of acknowledging the existence of certain evidence that, if true, would constitute sufficient ground to exercise jurisdiction over the person of the defendant, and petitioner herein, Florida Steel. We shall address this point further on.

Said evidence tends to show that in 1977 Florida Steel sent Livingston a letter-contract through which the former told the latter that all its sales of reinforcing steel for Puerto Rico should be made exclusively to Livingston. In exchange, Livingston would buy all the domestic steel (produced in the United States) from Florida Steel. However, Florida Steel reserved the right to sell steel to plaintiff Industrial Siderúrgica. The purpose of this agreement was to "establish and maintain a long-range business relationship . . . that will be beneficial to both parties."¹

The deposition taken from a Livingston official tends to prove that the agreement is still in force and that all the steel sold by Livingston is supplied by Florida Steel. Furthermore, Florida Steel does not deliver the steel directly to Livingston but to Thyssen. On the other hand. Florida Steel marks the steel it sends to Puerto Rico with a metal label indicating that said steel is destined for San Juan.²

¹ The text of the letter is as follows:

"April 6, 1977

B. S. Livingston & Co., Inc.

60 East 42nd Street

New York, N.Y. 10017

Attention: Mr. Alfred Senog

Gentlemen:

This is to confirm that Florida Steel Corporation has agreed that its sales of reinforcing steel bars into Puerto Rico will be exclusively to B. S. Livingston & Co., Inc., except as noted under "EXCEPTION" below". It is understood that in consideration of this exclusive sales agreement B. S. Livingston & Co.. Inc., and/or any of its agents will restrict their purchase of domestically produced reinforcing steel bars for consumption in Puerto Rico to Florida Steel Corporation.

The intent of this agreement is to establish and maintain a long-range business relationship in the Puerto Rican market that will be beneficial to both parties. However, should this intent not be realized, this agreement may be terminated by either party within thirty (30) days upon receipt of written notice.

EXCEPTION: Florida Steel Corporation reserves the right to sell reinforcing steel bars directly to Industrial Siderúrgica, Inc., Bayamón, Puerto Rico, without being in violation of this agreement.

We are looking forward to working with you on your Puerto Rico requirements and sincerely believe that it should prove to be a profitable relationship for both of our firms.

Very truly yours, FLORIDA STEEL CORPORATION

E. L. Wolf ELW: ah"

² The label reads:

"BSL/Order No. 1252 San Juan, Made in U.S.A., No. of Pieces #1/up total gross and net weight."

Moreover, when the price of the steel that Livingston buys to resell to Thyssen is negotiated, officials from the three companies take part in the transaction. The meetings are generally held every three months and are held in Tampa, New York, and San Juan.

In 1980 Florida Steel made five steel shipments to Puerto Rico; four in 1981, and as many in 1982. The yearly shipments represent 23,605 metric tons of reinforcing steel for Puerto Rico in 1980; 24,403 in 1981; and 25,592 in 1982. The value of said annual shipments totalled almost seven million dollars in 1980; almost six and a half million in 1981; and almost six million in 1982. In those three years, Florida Steel received more than nineteen million dollars from its sales of steel in Puerto Rico. Besides, Florida Steel invoices to Livingston state that the merchandise was sent to Thyssen in San Juan, Puerto Rico.

It is in the light of these circumstances that we should pass on the merits of the procedural incident before our consideration.

II

In order to decide the present controversy it is necessary to determine beforehand if there is any statute or rule empowering the Puerto Rican courts to assume jurisdiction in personam over the defendant-petitioner and, if there is, if exercise of said jurisdiction is compatible with the due process clause³

-A-

[1] Our general long arm statute appears in Rule 4.7 of the Rules of Civil Procedure. However, plaintiff has invoked a special law which contains a long arm provision applicable to cases which arise under its provisions. The Monopoly Act of Puerto Rico, which is the law on which plaintiff grounded its claim, establishes the following:

Sec. 13B. Additional jurisdiction

In addition to the provisions on summons prescribed by the Rules on Civil Procedure for the General Court of Justice, jurisdiction on a defendant shall be acquired, whether he is a natural or artificial person, if directly or indirectly he breaks this law and, in addition, draws substantial income from used or consumed goods or services rendered in Puerto Rico and/or receives substantial income within the scope of the economy of Puerto Rico or from any impact or effect in a specific local market.

[2] Under this provision both requirements must be met: a conduct constituting a violation of the law, and the substantial income derived from our market. There is ground in the evidence to establish, *prima facie*, the second requirement, since it tends to demonstrate that Florida Steel obtained more than nineteen million dollars in income, in three years, from its sales to Thyssen in Puerto Rico. This is undoubtedly a substantial income. On the other hand, there is no indication of any evidence concerning the first requirement. The mere allegation that acts have been committed in violation of the Monopoly Act, does not suffice. On this particular, see, *State of West Virginia v. Morton International, Inc., 264 F. Supp. 689, 695 (1967)*. If the here allegation by a person or foreign corporation with regard to a violation of the antitrust provisions of our Monopoly Act were deemed sufficient to give this forum jurisdiction in personam, the purpose outlined in the due process of law clause of avoiding that a defendant be forced to defend his case in a faraway and inconvenient forum to which he has no ties, relation or contacts, would be defeated.

-B-

[3] In part 1 of this opinion we pointed out that the trial court decided the motion to dismiss filed by Florida Steel without a hearing, and without giving the parties an opportunity to show the validity of their arguments. In fact, the court rested on the sufficiency of the allegations to establish jurisdiction over the person of Florida Steel. In so doing, it erred. It should have at least required plaintiff to show that it had sufficient evidence to establish the necessary requirements to confer jurisdiction in personam over the defendant and, thus, guarantee the latter's right to due process of law. The error, however, is inconsequential, because the requirement has been complied with

³ See n. 6, *infra*.

Indus. Siderurgica v. Thyssen Steel Caribbean, 114 D.P.R. 548

before this Court, at least with respect to the application of Rule 4.7 of the Rules of Civil Procedure. Insofar as pertinent to this case, said rule provides:

- (a) Whenever the person to be served is not domiciled in Puerto Rico, the General Court of Justice of Puerto Rico shall take jurisdiction over said person, just as if said person were domiciled in the Commonwealth of Puerto Rico, if the action or claim arises because said person;
- (1) Transacted business in Puerto Rico personally or through an agent. . . .

The term "business transaction" was construed in another context in *Medina v. Tribunal Superior*, 104 D. P. R. 346 (1975).⁴ We had not had the opportunity to interpret it in the context of the present case.

Under the Clayton Act, sec. 12 ([15 U.S.C. § 22](#)), the federal **antitrust law** (which uses the phrase "transact business," similar to the term employed in our Rule 4.7(a)(1)), the theory of conspiracy as constituting the "transaction of business," required for purposes of venue, has been rejected. See, *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 96-97 (1971), aff'd, 461 F.2d 1261 (1972), cert. denied, 409 U.S. 950 (1972). It has been held that mere allegations to the effect that the foreign defendant has conspired with another defendant of the jurisdiction in antitrust practices do not provide, in the absence of minimum contacts, sufficient ground to exercise local jurisdiction. E.g., *Weinstein v. Norman M. Morris Corp.*, 432 F. Supp. 337 (1977); *Bertha Building Corp. v. National Theatres Corp.*, 248 F.2d 833 (1957).

[4] Likewise, we arrive at the same conclusion in the present case: conspiracy to violate the Monopoly Act or Puerto Rico is not just constituted by transacting business pursuant to Rule 4.7(a)(1). Due process of law requires something more.

[5] However, the criterion of Rule 4.7(a)(1), with regard to whether a corporation is doing business within the local jurisdiction is a practical, nontechnical business criterion. Cf. *United States v. Scophony*, 333 U.S. 795, 810 (1948).

[6-7] Although this is not indicated in the text, it is not necessary that the defendant directly transact business in person or through an agent. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). They could be carried out indirectly through third persons without the need of establishing between these third persons and the foreign defendant a relationship which could create an agency. The indirect relationship between the nonresident and the third persons is sufficient to conform to the criterion of Rule 4 when, as in the present case, these are mere links in the chain of a business transaction deliberately designed, or conscientiously used, by the nonresident to obtain an economic benefit in our jurisdiction. This construction is compatible with the modern trend "which in that of broadening the jurisdiction of state courts over nonresident persons . . .," *Medina v. Tribunal Superior*, *supra* at 355, up to the point allowed by the Constitution.⁵

⁴ Therein we stated:

"The term 'transacción', as translated from the English 'transaction' means gestión (negotiation) or trámite (step, measure) Usually said term is used in the English language to indicate that an act has been carried out or a step has been taken on something." (Underscore supplied.) At 354-355. In Spanish, "transacción" has only one "meaning, that given in art. 1709 of the Civil Code. A. Cintrón García, Del Lenguaje entre Abogados," 36 Rev. C. Abo. "P.R. 1033 (1975). But see, *Pueblo v. Braun*, 105 D.P.R. 890, 898, n. 5 (1977) (Irizarry Yunqué, concurring).

⁵ In construing our long arm statute, the First Circuit Court of Appeals of the United States has expressed that Rule 4.7 of the Rules of Civil Procedure attempts to extend the exercise of the *in personam* jurisdiction of the Commonwealth of Puerto Rico to the full extent of its constitutional authority. *Com. of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 668 (1980), cert. denied, 450 U.S. 912 (1981).

We should clarify, however, that an affirmative action which, from a constitutional point of view, represents a minimum contact between a nonresident and our jurisdiction is not *per se* sufficient to authorize our courts to exercise their jurisdiction if said action cannot be framed within any of the circumstances described in Rule 4.7 of the Rules of Civil Procedure. For it to be otherwise it would be necessary to adopt a statute like the California statute which reads:

III

[8-9] The due process clause of the United States Constitution limits the power of the states and of Puerto Rico to render judgments against nonresidents. *Kulko v California Superior Court*, 436 U.S. 84 (1978). When a Judgment is rendered in violation of said clause the same does not merit full faith and credit in any other state. *Pennoyer v. Neff*, 95 U.S. 714 (1877). Due process of law requires that the defendant be adequately notified of the claim against his person and, moreover, that he be afforded the opportunity to be heard, *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), before his rights in the action are definitively adjudicated. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974). Due process of law also requires that the defendant be subject to the jurisdiction in personam of the state or local court. *Internat. Shoe Co. v. Washington*, 326 U.S. 310 (1945). Whether or not the summons served on defendant-petitioner was inadequate is not questioned in the present case, but only the power of Puerto Rican courts to exercise jurisdiction in personam.

[10] The United States Supreme Court has repeatedly held that due process only requires, in order to subject a defendant to a judgment in personam, if he is not present in the jurisdiction, that he have certain minimum contacts with it, so that the suit does not offend "traditional notions of fair play and substantial justice." *Internat. Shoe Co. v. Washington*, *supra* at 316; *World-Wide Volkswagen Corp. v. Woodson*, *supra* at 291.

In its latest reformulation of its case law doctrine, the Court states in *World-Wide Volkswagen Corp., supra*, that the minimum contacts doctrine serves two related but distinguishable purposes: on the one hand, to protect defendant from the burden entailed in litigating in a distant or inconvenient forum, and, on the other hand, to insure that the states, through their courts, do not overstep their limits as sovereign states under one federal system of government.⁶ See, A. Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 Ga. L. Rev. 19 (1980). These two functions are imbued in the "reasonableness" and "fairness" tests. Hence, defendant's contact with the forum should be such that it does not offend traditional notions of fair play and substantial justice. Furthermore, the relationship between the defendant and the forum must be of such nature that it would be reasonable to require the corporation to defend itself from a particular action filed in said forum.

According to *World-Wide Volkswagen Corp., supra at 292*, "[i]mplicit in this emphasis on reasonableness is the understanding that the burden [of the suit] on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute . . . the plaintiff's interest in obtaining convenient and effective relief, . . . at least when that interest is not adequately protected by the plaintiff's power to choose the forum, . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." (Citations omitted.)

Notwithstanding its function of insuring that a person be not forced to litigate in an inconvenient forum, the due process clause has been, since *Pennoyer, supra*, flexibly applied. An analysis of United States Supreme Court decisions since then, shows that the interpretation of its principles have been adjusted to ever-changing

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." *Cal. Code Civ. Proc., sec. 410.10* (West 1973); see, M. Green, *Jurisdictional Reform in California*, 21 Hastings L. J. 1219 (1970).

This norm would, however, be much more difficult to apply, and while Rule 4.7 is left unamended to that effect, the initial query should always be to determine if the conduct attributed to the nonresident defendant is comprised within its provisions. See, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289-290 (1980).

⁶ It is not necessary at this time to place Puerto Rico within the North American federal scheme. For purposes of the discussion at hand, we shall presume that all the restrictions imposed on the states by the due process clause are likewise applicable to Puerto Rico even when the latter has a different and unique status. *Córdova & Simonpietri Ins. v. Chase Manhattan Bank*, 649 F.2d 36, 39-42 (1st Cir. 1981), specifically, and approvingly cited in *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982).

Indus. Siderurgica v. Thyssen Steel Caribbean, 114 D.P.R. 548

circumstances.⁷ See e.g., Note, "Doing Business": Defining State Control Over Foreign Corporations, 32 Vand. L. Rev. 1106 (1979). All the exceptions woven by the case law on account of Pennoyer's, supra, excessive strictness—where special stress was laid on the factor requiring the defendant's presence within the territorial limits as ground for the exercise of personal jurisdiction—were finally done away with through the years. The theories of "presence," first, and "consent," afterwards, used by the courts to adjust the corporate fiction to a changing economy and, likewise, adjust the new technology to the world of communications and transportation that would soon change the relations of space and time, ended with Internat. Shoe Co., supra.

What survived the reformulation of the doctrine in Internat. Shoe Co., supra, i.e., jurisdiction grounded on the attachment of the nonresident defendant's property found within the Territorial limits of the forum in question, was also extinguished in Shaffer 7. Heitner, 433 U.S. 186 (1977), where it was decided that the exercise of jurisdiction by a state court shall be governed by the minimum contacts doctrine and not by distinctions regarding the nature of the action, he it in personam, in rem, or quasi in rem.⁸

Hence, it is evident that the emphasis, then, is not placed on either the presence or consent in order to be sued and, much less, in owning property in the jurisdiction of the state where the action is filed. See, Kamp, op. cit., and Constitutional Law (The Supreme Court, 1979 Term), 94 Harv. L. Rev. 75, 107-116 (1980). The Court itself recognized that "[t]oday many commercial transactions touch two or more States' and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." McGee v. International Life Ins. Co., 355 U.S. 220, 222-223 (1957).

However, the Court has also stated that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [Citation omitted.] Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." Hanson v. Denckla, 357 U.S. 235, 251 (1958).

Thus, the laxness with which in recent years the United States Supreme Court has» addressed the different jurisdictional problems cannot serve as ground to sustain that at present the territorial limits of the states are not pertinent and that they can, in the face of a nationally based economy, render personal and binding judgments concerning persons with whom the state has no contact or relation. But if, on the contrary, the nonresident or nondomiciled defendant has the minimum contacts defined by case law since Internat. Shoe Co., supra, then the judgment rendered is binding and the same would constitute a valid exercise of the state's sovereignty, or in this case Puerto Rico's.

[11] The very decisions of this Court have incorporated the previous principles. Thus, we have refused to exercise our jurisdiction in a case where the plaintiff could not adequately establish the minimum contact necessary between the defendant and our forum. A. H. Thomas Co. v. Superior Court, 98 P.R.R. 864 (1970). In this case, in keeping with federal Supreme Court decisions, we established that even under the minimum contacts doctrine, "it is required that the contact within the forum be the result of a purposeful act on "he part of defendant." (Underscore in the original.) At 869. Therein we summarized the three rules formulated to determine the jurisdiction in personam over a nonresident or nondomiciled person. They read as follows at 870):

- (1) The nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.
- (2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a "substantial minimum contact."

⁷ See the summary on this extreme in Medina v. Tribunal Superior, 104 D.P.R. 346 (1975), especially at 348-354.

⁸ If there were any doubts they cleared up later on in Rush v. Savchuk, 444 U.S. 320 (1980).

Indus. Siderurgica v. Thyssen Steel Caribbean, 114 D.P.R. 548

(3) Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of "fair play" and "substantial justice." If this test is fulfilled, there exists a "substantial minimum contact" between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of forum non conveniens.

Later on, in Medina v. Tribunal Superior, supra, we again had the opportunity to reiterate the previous principles and, based on them, assume jurisdiction over a resident of Miami, Florida, upon determining that he did in fact carry out "business transactions" in Puerto Rico in keeping with the due process clause.⁹

In the light of the foregoing, let us now pass on the merits of the present action.

V

[12] In determining if the exercise of the state court jurisdiction is consistent with due process of law, the inquiry must focus on the relationship existing among the defendant, the forum, and the litigation. Rush v. Savchuk, 444 U.S. 320, 327 (1980); Shaffer v. Heitner, supra at 204.

It is an uncontested fact that defendant Florida Steel has no offices, employees or agents in the Commonwealth of Puerto Rico. The only contact or relationship that it has with our forum is that, according to the evidence presented, it regularly and consequently ships merchandise expressly destined for San Juan. It is not an isolated or fortuitous business transaction.

The contract-letter signed with Livingston in 1977 suggests that its economic activity has been decidedly calculated to engulf the iron and steel market in Puerto Rico. Consequently, defendant had no qualms in labeling the merchandise as destined for the local market. The aforesaid frees us from considering the theory of foreseeability, as discussed in World-Wide Volkswagen Corp., supra, that is, whether Florida Steel foresaw that its products would reach Puerto Rico. Evidence has been brought which indicates that defendant was fully aware of the fact that its product occupied a substantial part of the local market. The sales made by Florida Steel to Livingston and the resale by the latter to Thyssen do not appear to be isolated episodes or the "unilateral activity of those who claim some relationship with a nonresident defendant." Hanson v. Denckla, supra at 253. They are rather affirmative actions with important local repercussions. World-Wide Volkswagen Corp., supra, is clear in its terms: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." At 297-298.

The case of O.S.C. Corporation v. Toshiba America, Inc., 491 F.2d 1064 (1974), cited by the defendant-petitioner, is different from the case at bar. There, it was determined that the California courts could not assume jurisdiction over a Japanese corporation in an antitrust suit in which the California corporation bought from a New York corporation the products manufactured by the Japanese corporation. In said case plaintiff could not establish, as it contended, that the Japanese corporation shipped its cargo directly to the plaintiff in California. In the present case there is evidence that shows that Florida Steel directly ships to Thyssen, that is a domestic corporation, it acknowledges said fact, labels the cited products as destined for San Juan, and had agreed to establish stable commercial ties in our market.

We should keep in mind that, in any case, the due process of law does not require that the commercial activity be carried out directly by the nonresident defendant World-Wide Volkswagen Corp., supra at 295. The minimum contact required by the constitutional clause may arise through intermediaries.

⁹ In Marrero Reyes v. García Ramírez, 105 D.P.R. 90 (1976), we upheld the exercise of our court's jurisdiction in a child custody case wherein the minor resided and was domiciled with her grandparents, the defendants, outside Puerto Rico. We exercised our jurisdiction on the ground that the minor's mother, that is, the plaintiff, was a resident of Puerto Rico. Nonetheless, this decision should be reexamined in the light of what was later decided by the United States Supreme Court in Kulko v. California Superior Court, 436 U.S. 84 (1978), and by our own decision in Perron v. Corretjer, 113 D.P.R. 593 (1982).

Indus. Siderurgica v. Thyssen Steel Caribbean, 114 D.P.R. 548

Finally, the relationship existing between the defendant and the action is clear. The business transactions carried out by the defendant-petitioner are intimately related to the action filed by plaintiff. This deals precisely with the effect that the sales and the prices of the products have had on plaintiff's business.

Since the defendant decided to avail itself of the benefit of doing business in Puerto Rico, the exercise of personal jurisdiction by the General Court of Justice of Puerto Rico over the action under our consideration does not violate the due process of law clause.

Mr. Chief Justice Trías Monge took no part in this decision. Mr. Justice Negrón García disqualified himself.

End of Document

In re Indus. Gas Antitrust Litig.

United States District Court for the Northern District of Illinois, Eastern Division

July 1, 1983

Master File No. 80 C 3479

Reporter

100 F.R.D. 280 *; 1983 U.S. Dist. LEXIS 15716 **; 37 Fed. R. Serv. 2d (Callaghan) 1178; 1983-2 Trade Cas. (CCH) P65,535

In re INDUSTRIAL GAS ANTITRUST LITIGATION (This document relates to all actions)

Subsequent History: **[**1]** Supplemental Opinion October 24, 1983. Supplemental Opinion Amended November 10, 1983. Reported at *100 F.R.D. 280 at 306*.

Core Terms

prices, swap, plaintiffs', customers, damages, class action, defendants', purchasers, liquid, industrial, class member, merchant, bifurcation, conspiracy, questions, individualized, cylinder, overcharge, antitrust, merits, plant, class certification, price schedule, non-collusive, benchmarks, reconsider, viable, phase, transportation, proponent

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN1 Class Actions, Certification of Classes

Fed. R. Civ. P. 23 governs class action certification in the federal courts. All class proponents must first establish compliance with the requirements of Fed. R. Civ. P. 23(a). Accordingly, they must show that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Attorneys > General Overview

HN2 [] Prerequisites for Class Action, Adequacy of Representation

The requirement of "adequate representation" under [Fed. R. Civ. P. 23\(a\)](#) contains two components: (1) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation; and (2) the plaintiff must not have interests antagonistic to those of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN3 [] Prerequisites for Class Action, Predominance

[Fed. R. Civ. P. 23\(b\)\(3\)](#) authorizes class actions when the court finds that 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 (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN4 [] Class Actions, Prerequisites for Class Action

The United States District Court for the Northern District of Illinois adopts the method of analyzing "predomination" questions under [Fed. R. Civ. P. 23\(b\)\(3\)](#) set forth by the United States Court of Appeals for the Seventh Circuit. The court's inquiry into the predominance analysis takes two steps. The first focus is on the substantive elements of the plaintiffs' cause of action, requiring inquiry into the proof necessary for the various elements. Second, after examining the proof necessary, the court inquires into the form that trial on these issues would take. At this point it is also necessary to examine the procedural devices and alternatives available in trying class actions. This discussion interfaces with many aspects of the issue of manageability.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

HN5 [] Clayton Act, Claims

Plaintiffs suing under [§ 4](#) of the Clayton Act, [15 U.S.C.S. § 15](#), must establish three facts in order to recover: (1) that defendants violated the antitrust laws; (2) that the alleged violations caused plaintiffs to suffer some injury to their "business or property;" and (3) that the extent of this injury can be quantified with requisite precision.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Class Members > Named Members

[**HN6**](#) [down] **Class Actions, Prerequisites for Class Action**

In examining the type of proof necessary for the various elements of a plaintiff's cause of action as part of the "predomination" analysis for class actions under [Fed. R. Civ. P. 23\(b\)](#), the court must determine which elements may be tried in "common" fashion. An issue meets this standard when there exists generalized evidence that proves or disproves the element on a simultaneous, class-wide basis. Such proof obviates the need to examine each class member's individual position, and permits the suit to go forward in a truly representative manner.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

[**HN7**](#) [down] **Class Actions, Prerequisites for Class Action**

The class proponent bears the burden of demonstrating compliance with [Fed. R. Civ. P. 23\(b\)\(3\)](#). To the extent such a showing requires a demonstration that certain issues can be handled with generalized proof, the proponent bears the burden with respect to this sub-point as well.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

[**HN8**](#) [down] **Class Actions, Prerequisites for Class Action**

The ultimate determination of whether a proponent has sufficiently discharged its burdens under [Fed. R. Civ. P. 23](#) rests with the court, not the proponent.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

[**HN9**](#) [down] **Prerequisites for Class Action, Typicality**

Evaluation of many of the questions entering into the determination of class action questions is intimately involved with the merits of the claims. The typicality of the representative's claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples. The more complex determinations required in [Fed. R. Civ. P. 23\(b\)\(3\)](#) class actions entail even greater entanglement with the merits.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

[**HN10**](#) [down] **Class Actions, Prerequisites for Class Action**

While the court, in assessing a motion for class certification, must assume that plaintiffs' claim is meritorious in the sense that the defendant's liability ultimately could be established in some fashion, the court need not accept blindly every assertion that a particular common approach has validity. Some inquiry into the latter type of claim is necessary for sound application of [Fed. R. Civ. P. 23\(b\)\(3\)](#), and is not barred by the United States Supreme Court's holdings in this area.

100 F.R.D. 280, *280L^A1983 U.S. Dist. LEXIS 15716, **1

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Trials > Separate Trials

HN11 [blue icon] **Class Actions, Prerequisites for Class Action**

The use of separate trials on individual issues of fact should not be an absolute bar to the use of the class action device. Rather, the court must examine whether any procedural devices can be utilized that would alleviate the burdens of such a trial procedure. A contrary ruling would essentially preclude class treatment whenever separate issues had to be tried. Such an approach has not been accepted since it would deprive [Fed. R. Civ. P. 23\(b\)](#) of its basic policy. Thus, after examining which issues are common, the court must go on to examine exactly how the individualized issues will be tried. The court must assess each proposal that is offered to simplify the process of individualized adjudication. The court need not accept all suggestions that are made, but if it finds at the conclusion of its analysis that various proposals are sufficiently viable, and that the individualized inquiries can thus be handled in a manageable fashion, class certification should be ordered.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN12 [blue icon] **Prerequisites for Class Action, Predominance**

Common questions do not "predominate" in a proposed class action when each plaintiff's specific injury must be calculated in a separate, time-consuming hearing--each conducted before the court, each specific to a given class member, and each replete with discovery, experts, cross-examination, and documents.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN13 [blue icon] **Class Actions, Certification of Classes**

A trial judge cannot, in determining the manageability of a proposed class action, look exclusively to only one aspect of the case; he can and must look at the case as a whole and consider proof of damages as well as other issues in the case.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN14 [blue icon] **Prerequisites for Class Action, Predominance**

Damage questions in a proposed class action can be deemed "irrelevant" only if it is first determined that the remaining issues "predominate" as common issues.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

[**HN15**](#) [blue icon] Prerequisites for Class Action, Numerosity

When a fluid recovery is sought in a proposed class action, no attempt is made to correlate class members with actual injuries. Damages are distributed in an imprecise manner that eliminates the need for individualized determinations. This "solution" is therefore impermissible as a matter of law. Fluid recoveries have been condemned as illegal in numerous decisions.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

[**HN16**](#) [blue icon] Class Actions, Prerequisites for Class Action

Under [Fed. R. Civ. P. 23\(c\)\(4\)\(A\)](#), an action may be brought or maintained as a class action with respect to particular issues.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

Civil Procedure > Trials > Separate Trials

[**HN17**](#) [blue icon] Jury Trials, Right to Jury Trial

By the plain, though unnecessary, terms of [Fed. R. Civ. P. 42\(b\)](#), a bifurcation order must preserve inviolate the right of trial by jury as declared by [U.S. Const. amend. VII](#) or as given by a statute of the United States.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > Trials > Separate Trials

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

Antitrust & Trade Law > Clayton Act > General Overview

[**HN18**](#) [blue icon] Clayton Act, Claims

In an antitrust action brought under the Clayton Act (Act), it is most important to be aware of the limitations of [U.S. Const. amend VII](#) on bifurcation under [Fed. R. Civ. P. 42\(b\)](#). This awareness is important because liability under [§ 4](#) of the Act, [15 U.S.C.S. § 15](#), necessarily includes proof of injury to business and property. Therefore, bifurcation to separate juries of liability and damages in a [§ 4](#) case inevitably introduces the possibility that in the liability phase the first jury might find that there was such injury, while the second jury might on the same evidence of injury in the damage phase, find none.

Counsel: Perry Goldberg, Granvil I. Specks, and Gary L. Specks, of Specks & Goldberg, Ltd., James B. Sloan, of Sloan & Associates, Michael J. Freed and Lawrence H. Eiger, of Much Shelist Freed Denenberg Ament & Eiger, Joseph A. Ginsburg, of Levin, Ginsburg & Novoselsky, Ltd., Marvin H. Glick, of Baum, Glick & Wertheimer, Assoc., P.C., Guido Saveri and Richard Saveri, of Saveri & Saveri, Leonard Barrack, of Barrack, Barrack, Rodos & McMahon, Lawrence Walner, Edmund W. Kitch, and Harold Z. Novak, of Lawrence Walner & Assoc., Roy B.

Schneider, Jr., Anthony Zummer, Perry Goldberg, J. Michael Katz, of Katz, Brenman & Angel, Edward A. Berman, of Berman, Roberts & Kelly, Arthur M. Mintz, Phillip C. Goldstick, and Steward M. Weltman, of Phillip C. Goldstick & Assoc., Ltd., Marck I. Harrison, of Harrison, Myers, Singer & Lerch, P.C., John A. Cochrane, of Cochrane & Bresnahan, John C. Blazier, of John C. Blazier & Assoc., Joel C. Meredith, of Meredith & Cohen, Robert S. Atkins, of Freeman, Atkins & Coleman, Ltd., Douglas V. Rigler, Michael P. Connelly, and David Beckwith, [**2] of Foley Larkner Hollabauch & Jacobs, for plaintiffs.

Blair White and Nathan P. Eimer, of Sidley & Austin, David H. Chaiefetz, for Union Carbide Corp., John E. Burke and Robert C. Newman, of Burke, Bosselman, Freivogel, Weaver, Glaves & Ryan, Robert J. O'Connell, for Airco, Inc., Henry P. Sailer, of Covington & Burling, John J. McHugh, of Chadwell & Kayser, Ltd., for Air Products & Chemicals, Inc., Bruce Whitney, and John F. McClure, of Arnstein Gluck & Lehr, for Chemetron Corp., William G. Schopf, Jr., of Reuben & Proctor, and Miles Kirkpatrick, of Morgan, Lewis & Bockius, for Liquid Air Corp. of North America, for defendants.

Judges: Getzendanner, D.J.

Opinion by: GETZENDANNER

Opinion

[*283] Memorandum Opinion and Order

GETZENDANNER, D.J.:

Plaintiffs in this antitrust action seek to represent a nationwide class of direct purchasers of industrial gas.¹ Each of the thirteen plaintiffs purchased a significant amount of gas itself. The court, on December 30, 1981, ordered class certification in part, ruling that the case could proceed as a class action with respect to certain issues, but not others. Defendants (who are the country's five leading producers of industrial gas)² responded [**3] to this decision with a motion asking for leave to take an interlocutory appeal. The court reviewed this pleading, and decided, *sua sponte*, to treat it as a request to reconsider. Plaintiffs countered with a cross-motion to reconsider the court's refusal to certify the entire case as a class action.

All told, well over three hundred pages of briefs have been submitted throughout the course of this litigation addressing the applicability of [Rule 23 of the Federal Rules of Civil Procedure](#). The court has carefully reviewed these filings as well as numerous affidavits and other documents of record. It is the court's judgment that its opinion [**4] and order of December 30, 1981 should be vacated,³ that defendants' motion to reconsider should be granted, and that plaintiffs' cross-motion to reconsider should be denied. Plaintiffs have not carried their burden of satisfying the requirements of [Rule 23](#).

I. The Industrial Gas Industry⁴

¹ Plaintiffs' substantive claims arise under [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#). See section II., *infra*. [Section 4](#) of the Clayton Act, [15 U.S.C. § 15](#), authorizes plaintiffs' private right of action.

² Defendants are Union Carbide Corp.; Air Products & Chemicals, Inc.; Airco, Inc.; Chemetron Corporation; and Liquid Air Corp. of North America.

³ Portions of the court's first opinion will, however, be reincorporated in this decision verbatim.

⁴ The sketch of the industrial gas industry that follows purports to be only that, a broad overview. Some of the court's statements are subject to qualifications that have been omitted in the interest of brevity.

The term "industrial gas" refers for purposes of this litigation to oxygen, nitrogen and argon. Each of these products is fungible in that one seller's merchandise is indistinguishable from that of a competitor. Industrial gases [**5] are sold at commercial levels of purity.

Customers utilize these gases in various industrial and other processes. In certain instances, substitute products and methods are also available. Nitrogen, for example, is often used as a freezing agent, but customers can alternatively satisfy their needs with either carbon dioxide or mechanical refrigeration devices. In these cases, a gas merchant must compete not only with rival gas merchants, but with businesses in the substitute fields.

The production of industrial gas occurs at facilities known as air separation plants, and involves a process called fractional distillation. Air is first liquefied through compression and cooling to temperatures less than -300 degrees F. The liquid mixture thereafter vaporizes, and the three gases separate as their respective boiling points are reached.⁵ Electricity costs constitute a significant portion of the production expenses incurred.

[**6] Some of the oxygen and nitrogen thus produced flows directly through a pipeline to a customer's nearby plant. Such "on-site" or "pipeline" purchasers do not fall within the putative class and will not be mentioned further.

All other product that is sold by defendants to end-users is called "merchant" product. Low volume merchant customers often receive their merchandise in gaseous form stored in high pressure steel cylinders. Defendants package "cylinder gas" in the following manner. First, the gases separated at the air separation plant are compressed [*284] and individually reliquefied. The liquid product is then transported by truck to a "filling station," where the liquid is compressed and vaporized back into a gaseous state. This gas is next pumped into cylinders, and thereafter delivered by truck to the customer's place of business. Most of the actual containers that are used in this distribution process are owned by the gas producer, and are rented by the customer. When a full cylinder is delivered, empty ones are retrieved.

Other low-volume customers purchase "liquid cylinders," which are fifty gallon thermos-like structures that are specially designed to retard [**7] the evaporation of the liquid they contain. Delivery is once again usually made by truck.

High volume bulk purchasers similarly have the option of receiving either gaseous or liquid product. When the former is purchased, the gas arrives in a large tube trailer pulled by a truck tractor. The majority of bulk sales, however, involve liquid product that is transported from an air separation plant in trucks and rail cars that are constructed to hold the product at temperatures low enough to maintain its liquid state. In general, it is much cheaper to transport liquid rather than gaseous product since a given volume of liquid contains many more molecules of product than does a corresponding volume of gas.

Bulk liquid purchasers must have on their premises a cryogenic storage tank that can sustain the product's liquefaction prior to its use. (Evaporation losses nevertheless occur so rapidly that, even with such a tank, it is uneconomical for a customer to purchase bulk liquid product if the customer does not intend to use the merchandise in a relatively short amount of time.) Such customers also require special devices for injecting the stored liquid into their business operations. [**8] If the product is ultimately to be used in a gaseous state, vaporizing equipment is needed. If the product is to be drawn and used as a liquid, vacuum insulated pipe is then required. Often, the company that provides the product also sells or furnishes these necessary devices.

The cost of transporting industrial gas, even in liquid form, is extremely high relative to product value. As a result, neither liquid oxygen nor liquid nitrogen may be economically shipped more than two hundred miles from the air separation plant from which it is produced. Similarly, cylinder product is rarely sold outside of a fifty to seventy-five mile radius centered at the point of distribution. Because of these economies, defendants assert that the industrial gas market in this country consists not of one overall market, but of numerous, localized sub-markets, each largely insulated from the rest. It can hence be misleading, defendants continue, to argue from the admitted fact that

⁵ Argon must be processed further to raise its purity level to commercial standards.

defendants collectively sold more than 80% of the industrial gas marketed in the United States during the period of the alleged conspiracy. In certain sub-markets, regional firms played a significant role.

Defendants [**9] further point out that they face considerable competition from numerous independent distributors, particularly in the cylinder gas field. These 1400-1500 independent businesses typically purchase bulk liquid product (usually from one of the defendants)⁶ for reconversion to gaseous form and ultimate resale.⁷ Defendants maintain that they themselves directly account for at most only 25% of all cylinder gas sales nationwide.⁸

[**10] [*285] In general, bulk-liquid purchasers must pay not only for the actual product they obtain, but also for the monthly rental and upkeep on the cryogenic tank they use. These two prices may be quoted separately or collectively, depending upon the customer's preference. An additional charge may also be added for the cost of transporting the product to the customer's tank. Other times, this cost is simply built into the basic product charge.

Most bulk liquid transactions are made pursuant to requirements contracts that last up to five years. These contracts are individually negotiated and contain varying provisions regulating whether, and how often, the seller may raise the stated price over the life of the contract. Some contracts bar all increases; others limit the number of increases allowed per year, or the percentage increase that may be tacked on. Numerous other formulae have been employed. Many contracts further authorize the customer to solicit competing bids whenever the seller attempts to raise the contractual price; in these circumstances, however, the seller often retains a right to match any lower bid that is received.

Cylinder customers, on the other hand, [**11] often purchase goods pursuant to individual purchase their orders rather than longterm requirements contracts. The amount they pay is also individually negotiated, and usually reflects both product and delivery charges, as well as a rental fee on the cylinders that are used.

It is apparent from the foregoing that numerous factors potentially influence the amount defendants can charge for a particular product distributed in a particular way under non-collusive circumstances. First, the conditions in the various sub-markets differ. The amount of local competition (both from defendants and regional producers) varies from area to area, as does the significant input cost of electricity. Moreover, even within a sub-market, purchasers may not be similarly situated. One may seek product in order to accomplish a goal that can be satisfied using alternative methods or goods. Such a purchaser will have greater bargaining strength than a second customer who does not have ready alternatives. One purchaser's bargaining strength may also be relatively stronger simply due to greater size. Different contracts further provide, as shown above, varying amounts of protection from inflationary [**12] and other upward pressures on price. Finally, different customers require and receive different amounts of technical assistance in integrating the product they purchase into their businesses.

II. Plaintiffs' Substantive Claims

In broad form, plaintiffs allege a conspiracy to raise "price schedules," and a conspiracy to allocate customers. Defendants' desire to obtain higher revenues allegedly motivated both forms of behavior.

An understanding of the former charge requires further background. Plaintiffs contend that defendants perceived and treated the American market for industrial gas as national in scope, notwithstanding the economic reasons why it *should* have been localized. See *supra*. Plaintiffs point out that each defendant maintained production and distribution facilities throughout the country. Moreover, gaps in this system were plugged through defendants' practice of "swapping" gas with one another. For example, if producer A possessed facilities in New York, but not

⁶The price paid by distributors for such liquid product is known as the "recompression" price.

⁷Not all distributors fit this mold. Some purchase for resale cylinders that have already been filled with gas by the defendants. Others purchase liquid product and resell it as such, either in cylinder or bulk form. Defendants' affidavits indicate that distributors consummate a large percentage of the liquid cylinder and small-volume bulk liquid sales that are made. In their briefs, however, defendants stress only the influence of the distributors in the cylinder gas end of the market.

⁸Defendants also run a few distributorships on their own. These distributorships are operated in the same manner as their independent counterparts.

Los Angeles, and producer B was situated in exactly the opposite manner, both merchants could sell in *both* markets by "swapping": A would deliver gas to B in New York in return for shipments [**13] in Los Angeles. Affidavits submitted by defendants' own employees confirm that swaps played an important role in the distribution of industrial gas:

To the best of my knowledge, the Linde Division [of Union Carbide] has exchanged these industrial gases with competitive industrial gas producers since as early as 1956. Product exchanges are common in many industries, for many of the same reasons that they have been such a long standing practice in the industrial gas industry. There are several basic reasons that the Linde Division has engaged in product exchange transactions [*286] including: (1) to supplement the product supply of a local plant that may be sold out; (2) to secure product to meet peak demand needs; (3) to reduce transportation expenses, and thus the price, that a customer would pay for transportation for long distance shipments from a more distant Linde plant; (4) to secure product in case of liquid production plant shutdowns (either for normal maintenance or unexpected plant outages); (5) to secure product for the backup of an on-site customer when an on-site plant suffers a shutdown; and (6) to secure product to build a baseload of business in a market [**14] in which the product recipient has little or no production capacity for the purpose of making the future construction of a plant in such a market economically viable.

Dobbins Supp. Aff. at para. 2. *Accord*, Hallet Aff. at para. 2 (Air Products); Wong Aff. at para. 2 (Liquid Air).

Further, plaintiffs assert, defendants actually attempted--through their national price schedules--to price their products on a national basis. These schedules were internal price lists each defendant maintained to one extent or another during the relevant period of time. The prices listed on them for each form of product were uniform; they did not contemplate regional variation.

Defendants contend that the prices reflected in these documents stated mere goals or targets that were seldom reached; "schedule prices" bore little or no relation to the actual prices that were charged during the time in question. Plaintiffs do not deny that few, if any, purchasers actually bought at schedule price. Plaintiffs claim instead that the schedules served as "benchmarks" from which all pricing negotiations began. By emphasizing these national prices, defendants attempted, in plaintiffs' view, to prevent [**15] the price erosion that might otherwise have occurred in numerous localities.

Most importantly, it is plaintiffs' theory of the case that defendants conspired to raise their price schedules in tandem, thereby raising the "benchmarks" and ultimately the entire market structure. As a subsidiary proposition, plaintiffs further allege that defendants illegally agreed to measures designed to police compliance with the underlying price agreement. Thus, defendants allegedly shared price information and agreed, as part of the conspiracy, to impose in their contracts the clauses requiring that they be notified of any lower bid received by a customer following an attempt to raise contractual prices.

Plaintiffs also assert that defendants conspired to allocate customers, mainly through an agreement not to offer competitive bids to "historical" accounts of rivals. Such quotes were instead to be made at or above the schedule price.⁹ The object of this alleged agreement was obviously to reduce the amount of competition each defendant faced in maintaining its client roster.

[**16] III. *Plaintiffs' Class Action Request*

Plaintiffs request declaratory, injunctive and damage relief on behalf of themselves and the putative class they seek to represent. This class consists of:

⁹ The statement in the text evidences the interrelationship between the alleged conspiracies to raise price schedules and allocate customers. The two alleged wrongs are, however, conceptually distinct. See *infra*.

All persons, firms and corporations in the United States that purchased industrial gas from any defendant (including their respective subsidiaries or affiliates), at any time during the period of July 1, 1974 to and including June 30, 1980 but excluding (a) any defendants, or other industrial gas manufacturers and their respective subsidiaries and affiliates and excluding (b) all on-site and pipeline purchasers.

IV. *The Requirements of Rule 23(a)*

HN1[] [Rule 23 of the Federal Rules of Civil Procedure](#) governs class action certification in the federal courts. All class proponents must first establish compliance with the [*287] requirements of subsection (a) of the rule. Accordingly they must show that:

(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 [**17] parties will fairly and adequately protect the interests of the class.

Defendants for the most part concede that these four tests have been satisfied. The court's discussion will be brief.

At oral argument held on the initial motion to certify, plaintiffs' counsel estimated that the proposed class contains at least 10,000 members. Defendants did not challenge this figure, and the court presumes it to be accurate. The requisite numerosity is clearly present.

The analysis found in section V. of this opinion confirms the undisputed proposition that at least some of the issues to be resolved in this case can be tried in a common fashion. The requirements of subsection (a)(2) do not bar prosecution of this suit as a class action.

Similarly, the requirements of subsection (a)(3) present no obstacle. As one court has noted, "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." [Minnesota v. United States Steel Corp., 44 F.R.D. 559, 567 \(D. Minn. 1968\)](#).

HN2[] The requirement of "adequate representation" contains two [**18] components: "(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." [Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 247](#) (3d Cir.), cert. denied, 421 U.S. 1011, 44 L. Ed. 2d 679, 95 S. Ct. 2415 (1975). The previous discussion of "typicality" establishes that the latter half of this test is satisfied. Counsel for plaintiffs, moreover, are both able and experienced in the prosecution of antitrust class actions. Plaintiffs have successfully crossed the threshold of subsection (a).

V. *The Requirements of Rule 23(b)(3)*

Class proponents must further demonstrate that their claims fit within a subpart of subsection (b) of [Rule 23](#). Plaintiffs seek large damage awards on behalf of the class, and accordingly rely on subpart (b)(3). **HN3**[] This section authorizes class actions when:

the court finds that 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 [**19] of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

From the very commencement of this suit, the parties have sharply disputed whether common questions "predominate," whether the proposed class action is "superior," and whether it is "manageable."

HN4[] The Seventh Circuit, in *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981), cert. denied, 456 U.S. 917, 102 S. Ct. 1773, 72 L. Ed. 2d 177 (1982), recently explained the proper method of analyzing "predomination" questions:

Our inquiry into the predomination analysis must take two steps. Our first focus must be on the substantive elements of plaintiffs' cause of action and inquire into the proof necessary for the various elements. Second, after examining the proof necessary we [**20] must inquire into the form that trial on these issues would take. At this point it also becomes necessary to [*288] examine the procedural devices and alternatives available in trying class actions. This discussion interfaces with many aspects of the issue of manageability

Id. at 672. To carry out this analysis, the court must first determine the substantive issues likely to arise at trial.

HN5[] Well established doctrine holds that all plaintiffs suing under [section 4](#) of the Clayton Act, see note 1, *supra*, must establish three facts in order to recover: (1) that defendants violated the antitrust laws; (2) that the alleged violations caused plaintiffs to suffer some injury to their "business or property"; and (3) that the extent of this injury can be quantified with requisite precision. See, e.g., *Windham v. American Brands, Inc.*, 565 F.2d 59, 65 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 968, 56 L. Ed. 2d 58, 98 S. Ct. 1605 (1978). Plaintiffs' extensive damage prayer injects several additional issues into the case as well. Specifically, since the initial filing occurred on July 3, 1980, all claims arising prior to July 3, 1976 are "forever" [**21] barred," [15 U.S.C. § 15](#), absent a showing that defendants "fraudulently concealed" their illegal conduct.¹⁰ The trier of fact must thus determine (with respect to the pre-1976 claims) whether defendants affirmatively attempted to conceal their wrongdoing, and whether plaintiffs either knew or reasonably should have known of their claims prior to the filing of the initial complaint. See, e.g., *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 460 (2d Cir. 1974). Overall, five issues of fact--violation, fact of damage, extent of damage, attempt to conceal, and due diligence--are present.

The analysis next proceeds under *Simer* to **HN6**[] an examination of the type of "proof necessary for the various elements." In particular, the court must determine [**22] which elements may be tried in "common" fashion. An issue meets this standard when there exists generalized evidence that proves or disproves the element on a simultaneous, class-wide basis. Such proof obviates the need to examine each class member's individual position, and permits the suit to go forward in a truly representative manner. As Judge Wyzanski has written, an issue is appropriately deemed "common" when there would not "be a substantial difference in the quantum or character of the requisite proof if the plaintiffs included all 20,000 in a class action or only the 6 named plaintiffs." *Windham v. American Brands, Inc.*, 539 F.2d 1016, 1019 (4th Cir. 1976) (Wyzanski, J., sitting by designation), reversed on different grounds, 565 F.2d 59 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 968, 98 S. Ct. 1605, 56 L. Ed. 2d 58 (1978).

When so phrased in terms of general principles, the scope of the necessary inquiry seems clear. Difficulties often arise, however, when the court turns to a case at hand. Suppose the class proponent proffers a description of a generalized approach it intends to follow in proving an element of its case. Can the opponent defeat the [**23] proffer on the ground that it is so substantively flawed it should be disregarded? Plaintiffs have consistently argued throughout this litigation that *no* such scrutiny is permissible given the Supreme Court's admonition that [Rule 23](#) deprives the court of "any authority to conduct a preliminary hearing into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974). In plaintiffs' view, if defendants think plaintiffs' approach is invalid, they should make their arguments at trial, not in their briefs opposing certification.

Plaintiffs read the delphic statements in *Eisen* too broadly. [Rule 23\(b\)\(3\)](#) specifically enjoins a court ruling upon a certification motion to make certain "findings." To carry out this judicial mandate, a court must of necessity function like one; it must be able to engage, for example, in independent analysis. Yet if plaintiff's position were accepted, a court would be obliged to accept all assertions of the class proponent at face value. The court's function would [*289] not be to "find," but to "ratify." [Rule 23\(b\)\(3\)](#) [**24] contemplates a different scheme.

¹⁰ In general, a claim under [section 4](#) of the Clayton Act "arises before" a specific date when the conduct causing the damage occurs prior thereto. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-42, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971).

Stated somewhat differently, [HN7](#)¹¹ the class proponent bears the burden of demonstrating compliance with [Rule 23\(b\)\(3\)](#). See, e.g., *Eggleston v. Chicago Journeymen Plumbers*, 657 F.2d 890, 895 (7th Cir. 1981), cert. denied, 455 U.S. 1017, 102 S. Ct. 1710, 72 L. Ed. 2d 134 (1982). To the extent such a showing requires a demonstration that certain issues can be handled with generalized proof, the proponent bears the burden with respect to this sub-point as well. Acceptance of plaintiffs' interpretation of *Eisen* would, however, virtually eliminate this burden. All proposed common methods would have to be credited so long as the class proponent set forth its belief that the method was probative of the ultimate issue in question; cognizance of any challenge to the latter qualifier would amount, under plaintiff's theory, to an "impermissible scrutiny of the merits." In this court's view, however, [HN8](#)¹¹ the ultimate determination of whether a proponent has sufficiently discharged its burdens under [Rule 23](#) must rest with the court, not the proponent. If a proposed common method of proof is so insubstantial that it realistically amounts to no method at all, [\[**25\]](#) the court must have the power to rule accordingly. Judge Pointer was clearly right when he stated that courts are "not impotent under [Rule 23](#), bound to accept any common methodology . . . which the plaintiffs may submit when seeking class certification." *Moore v. Southeast Toyota Distributors, Inc.*, No. CV 81-P-0491-S, slip op. at 8 (N.D. Ala. Feb. 4, 1982).¹¹

[\[**26\]](#) It cannot be denied that while engaging in the type of review just described, the court may touch upon issues that have relevance for the "merits" of plaintiffs' suit as well. But, for the reasons already stated, such scrutiny is necessary if the court is to fulfill its responsibilities under [Rule 23\(b\)\(3\)](#). These complications were not at issue in *Eisen*, and the decision's seemingly broad language must be interpreted in this light:

Nor is the class issue separable from the merits in all cases (including this one). The common questions, typicality, conflicts and adequacy of representation, [Fed. R. Civ. P. 23\(a\)](#), and predominance tests, [Fed. R. Civ. P. 23\(b\)\(3\)](#), are determinations (unlike, for example, the notice question involved in *Eisen* IV) which may require review of the same facts and the same law presented by review of the merits.

Blackie v. Barrack, 524 F.2d 891, 897 (9th Cir. 1975), cert. denied, 429 U.S. 816, 50 L. Ed. 2d 75, 97 S. Ct. 57 (1976). Indeed, in one post-*Eisen* decision, the Supreme Court has itself quoted similar remarks with approval:

[HN9](#)¹¹ Evaluation of many of the questions entering into the determination of class action questions [\[**27\]](#) is intimately involved with the merits of the claims. The typicality of the representative's claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples. The more complex determinations required in [Rule 23\(b\)\(3\)](#) class actions entail even greater entanglement with the merits.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 57 L. Ed. 2d 351, 98 S. Ct. 2454 n. 12 (1978) (quoting 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3911, p. 485 n. 45 (1976)). The Court of Appeals for this Circuit has similarly instructed that *Eisen* does not "foreclose inquiry into whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of [Rule 23](#)" *Eggleston v. Chicago Journeymen Plumbers*, [supra](#), 657 F.2d at 895. In short, [HN10](#)¹¹ while the court must assume that plaintiffs' claim is meritorious in the sense that defendant's liability ultimately could be established in some fashion, the court need not accept blindly every assertion that a particular common approach has validity. *Nichols v. Mobile Board of Realtors*, [1982-2 TRADE [\[**28\]](#) CASES P64 729], 675 F.2d 671, 678 (5th Cir. 1982). Some inquiry into the latter type of

¹¹ The court has no quarrel with the proposition that "care must be taken not to convert the preliminary consideration of whether the [predomination] requirement of [Rule 23\(b\)\(3\)](#) has been satisfied into a predetermination on the merits. Rather, if plaintiffs' assertion of class status is at least colorable, the court should allow the action to proceed under [Rule 23](#)." 7A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1781, p. 84 (1972) (emphasis added). The court understands that there are reasons to restrict the intensity of its scrutiny. See *infra*. The discussion in the text is intended solely to rebut plaintiff's overbroad contention that no scrutiny whatsoever is permissible.

claim is necessary for sound application of [Rule 23\(b\)\(3\)](#), and is not barred by the Supreme Court's assertions in *Eisen*.¹²

[**29] Yet even if a court finds, as this court ultimately will, that certain issues must be tried with individualized proof, the analysis does not end. The *Simer* Court squarely held that "[HN11](#)"¹³ the use of separate trials on individual issues of fact should not be an absolute bar to the use of the class action device. Rather we must examine whether any procedural devices can be utilized that would alleviate the burdens of such a trial procedure." [Id.](#), [661 F.2d at 674](#). A contrary ruling would "essentially preclud[e] class treatment whenever separate issues had to be tried. Such an approach has not been accepted since it would gut [Rule 23\(b\)](#) of its basic policy." [Id. at 672 n. 29](#).¹³ Thus, after examining which issues are common, the court must go on to examine exactly how the individualized issues will be tried. The court must assess each proposal that is offered to simplify the process of individualized adjudication. As before, the court need not accept all suggestions that are made, but if it finds at the conclusion of its analysis that various proposals are sufficiently viable, and that the individualized inquiries can thus be handled in a manageable fashion, class certification [**30] should be ordered.¹⁴

[**31] The remainder of this opinion constitutes an application of the *Simer* approach. In [*291] subpart V.A., the court examines each of the five issues implicated by the complaint in order to ascertain which are "common" as that term has been defined. After applying the form of analysis it believes is proper under *Eisen*, the court concludes that the issues of conspiracy, fact of damage and concealment are common, but that the remaining issues of damages and due diligence are not.

In subpart V.B., the court next examines the precise manner in which damages (the more significant of the two individualized issues) must be tried. The court starts from the premise that the proposed class action would be unmanageable if calculation of each purchaser's injury necessitated an individualized, full-scale "mini-trial" held before this court. The court thus examines the propriety of various procedural methods of alleviating the strain,

¹²The Court also finds it noteworthy that the *Eisen* "ban" on inquiries into the merits has often been justified on rationales sensitive to the rights of class opponents. Thus, in *Eisen* itself, the Court was worried "that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant." [Id. at 178](#). It has also been suggested that the *Eisen* "rule" is needed to protect class opponents from *de facto* "one-way intervention." See [Peritz v. Liberty Loan Corporation, 523 F.2d 349, 353-54 \(7th Cir. 1975\)](#); see also [Jimenez v. Weinberger, 523 F.2d 689, 698, 700 \(7th Cir. 1975\)](#), cert. denied, [427 U.S. 912, 49 L. Ed. 2d 1204, 96 S. Ct. 3200 \(1976\)](#).

Plaintiffs' subsidiary contention is that the court should abstain from all scrutiny of plaintiffs' proposed methods of proof since class determinations must be made "as soon as practicable after the commencement of an action brought as a class action," [Fed. R. Civ. P. 23\(c\)\(1\)](#), and thus prior to discovery. But the propriety of pre-certification discovery is now firmly established. [Eggleston v. Chicago Journeymen Plumbers, 657 F.2d 890, 895 \(7th Cir. 1981\)](#), cert. denied, [455 U.S. 1017, 102 S. Ct. 1710, 72 L. Ed. 2d 134 \(1982\)](#). If plaintiffs have failed to obtain the information they need to construct methods of proof capable of withstanding the limited form of scrutiny employed here, they have no one to blame but themselves. See also Pointer, "The Judge's Viewpoint on Issues and Problems Arising in Antitrust Class Actions," 49 Antitrust L.J. 1581, 1583 (1980).

¹³Indeed, the *Simer* Court rejected the idea that common questions "predominate" only when "the total time spent trying common issues would be greater than time spent on trial of individual issues." [Id. at 672](#). The Court believed that this approach "would unduly block class actions from going forward because only the most complex of common questions would require more litigation time than a series of individual trials." *Id.* When these statements are read in conjunction with those reprinted in the text, it becomes apparent that a class action may go forward even if individual trials are necessary, and even if these trials will take more time to resolve than the common questions, provided that in an *absolute* sense the individual trials do not render the class action unduly burdensome on the court and parties. Thus, if the class is relatively small, or if the individual trials are particularly easy to resolve, certification of the class would seem appropriate.

¹⁴There are undoubtedly situations in which a "manageable" class action, containing common questions that "predominate," might not be "superior to other available methods for the fair and efficient adjudication of the controversy." In light of the ultimate conclusion reached herein, the court need not explore this possibility.

testing each proposal, as before, for both minimal substance and legality. Finding no method acceptable, the court denies class certification.

A. Which Issues are Common?

1. Violation

Both sides agree that the violation issue is common. Resolution **[**32]** of this question depends solely upon an analysis of defendants' challenged behavior. Since this conduct did not vary from class member to class member, proof relevant to any one purchaser must of necessity apply equally to the case of each and every remaining member of the class as well.

2. Fact of Damage

The court, in its initial class action opinion, ruled that fact of damage was an issue susceptible to common proof. The court noted that plaintiffs had at their disposal common expert testimony supporting their assertion that each class member felt the effects of defendants' allegedly anti-competitive behavior. Particularly relevant were the following statements by Dr. Sam Peltzman, plaintiffs' expert:

7. The materials which I have reviewed indicate that the five defendants account for approximately 80% of the industrial gas market; that defendants consider the merchant market a national market and accordingly market, sell and price their fungible products on a national basis; that defendants, during the conspiracy, utilized national price schedules which served as benchmarks for their pricing in the merchant market; that defendants, during the term of the conspiracy, **[**33]** implemented general nationwide price increases in tandem fashion; and that these general price increases were implemented as to the class as a whole on an ongoing continuing basis.

8. In view of the characteristics of the industrial gas merchant market and defendants' dominant position in that market, I conclude that defendants' nationwide conspiratorial conduct, would over the term of the conspiracy, result in a general increase in the prices charged all class members throughout the United States.

Peltzman 1st Aff. at para. 7-8. In the court's view, plaintiff's ability to proffer such testimony adequately demonstrated the existence of a common method of going forward on the issue of fact of damage. The court specifically ruled that the general topic was suited for expert testimony, that plaintiff's expert was amply qualified to render an opinion, and that Dr. Peltzman's statements could not be rejected at this stage of the lawsuit.

In their motion to reconsider, defendants challenge only the latter finding. Defendants contend that Dr. Peltzman's assertions completely lack merit, and that plaintiffs therefore do not have a viable plan for proving impact in a common **[**34]** manner. For the reasons previously stated, such an attack cannot be rejected out of hand. The court will consider its particulars.

Experts can be challenged on various grounds. Opponents may, for example, concede the factual premises of an expert's testimony, but dispute the inferences he draws. Conceivably, such an attack will justify rejection of the expert's opinion, even at the certification stage of the lawsuit. An expert's bald face assertion that **[*292]** ultimate fact "X" follows from given fact "Y" simply does not prove or disprove the existence of "X" when no discernible reason justifies the suggested relationship. See [Fed. R. Evid. 401](#). An irrational belief remains irrational even when voiced by an expert.

But this form of attack has *not* been mounted by defendants against Dr. Peltzman. Defendants appear to concede (most clearly, in their reply brief in support of their motion to reconsider) that Dr. Peltzman's ultimate conclusion as to class-wide impact is tenable if the "assumptions" listed in paragraph seven of his affidavit are supportable.¹⁵

¹⁵ There is one qualification to this general statement. Defendants do challenge Dr. Peltzman's internal logic to the extent he believes that defendants' behavior inflated the prices charged end-users of cylinder gas. Defendants argue that they controlled such a small share of this sub-market, see *supra*, that their alleged activities could not possibly have affected cylinder prices, notwithstanding their control of over 80% of the overall market. See *In re Electric Weld Steel Tubing Antitrust Litigation*, [1980-

However, defendants continue, at least two of these beliefs cannot be credited in light of the "wealth of [**35] evidence" offered by defendants in opposition. Defendants specifically challenge Dr. Peltzman's "assumptions" that defendants' price schedules "served as benchmarks for their pricing in the merchant market," and that schedule increases "were implemented as to the class as a whole on an ongoing continuing basis."

[**36] Defendants mischaracterize the record. The quoted statements are not mere "assumptions" of Dr. Peltzman, but are summaries of factual claims the plaintiffs intend to prove in common fashion-- i.e., though the testimony of former employees of the defendants as to how defendants utilized their price schedules, both generally and following increases in their rates. To reject Dr. Peltzman's testimony on the ground asserted by defendants, the court would thus have to make factual determinations as to what exactly transpired during the period in question. The court would have to determine the "true" role played by the price schedules in the industrial gas industry.

As a theoretical matter, even factual inquiries may be permissible during the course of a certification ruling. In an oft-cited opinion, Judge Godbold, writing for an en banc court, postulated such an instance:

"On the merits" is an elusive term, not wholly suitable as a guideline in this situation. In a sense much that a plaintiff alleges with respect to his individual claim goes to the "merits" of his claim. A plaintiff who seeks to represent all employees on a claim of discriminatory denial of promotions [**37] might, if the case goes to trial, lose on his individual claim because it turns out that he was never employed by the defendant. Retrospectively, one might say he lost "on the merits." Yet *there is no doubt that the court could lay bare at a preliminary stage this fact concerning the plaintiff*, and, having done so, conclude plaintiff was not a proper representative because he lacked the nexus with the class and its interests and claims which is embraced in the various requirements of 23(a) and (b). [*293] It is inescapable that in some cases there will be overlap between the demands of 23(a) and (b) and the question whether plaintiff can succeed on the merits.

Huff v. N.D. Cass Company of Alabama, 485 F.2d 710, 714 (5th Cir. 1973) (en banc) (emphasis added); see also Nichols v. Mobile Board of Realtors, 675 F.2d 671, 678 (5th Cir. 1982). The type of factual determinations the defendants ask this court to make are, however, far more difficult and complicated than those suggested in *Huff*. The court's error quotient is accordingly high, particularly since it is being asked to rule without the benefit of traditional trial safeguards, and the court must move [**38] with trepidation in resolving these disputes in a way that effectively precludes further litigation, at least insofar as many of the absent class members are concerned. "There is a danger," Judge Marshall has written, "in delving too far into the merits of a case prior to a class action determination." McCray v. Standard Oil Co., 76 F.R.D. 490, 500 (N.D. Ill. 1977). These dangers are particularly acute here.

Simply put, the evidence before the court pertaining to Dr. Peltzman's "assumptions" is not nearly so one-sided as defendants apparently believe. The various "impact studies" submitted by the defendants¹⁶ can be impeached on statistical grounds,¹⁷ and do not in any event establish that the price schedules were completely divorced from

81] TRADE CASES (CCH) P63,783 (E.D. Pa. 1980), at 78,182-83. Plaintiffs counter that "the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962) (quoting American Tobacco Co. v. United States, 147 F.2d 93, 106 (6th Cir. 1944)). Plaintiffs further argue that "conspirators controlling a seemingly small percentage of the market can through an effective conspiracy cause classwide impact. If the conspirators are the largest producers and the price leaders, their price leadership can cause their conspiracy to have market wide impact." (Plaintiffs' Reply Memorandum in Support of Motion for Class Certification at 75 n. 26) What is missing from this response, however, is an indication of how, or even whether, plaintiffs intend to *prove at trial* that "price leadership" was present, or that the merchant market was so interrelated that the "conspiracy as a whole" must have influenced the gas cylinder sub-portion. In light of the court's ultimate holding, this point need not be pressed further. Plaintiffs should be aware, though, that, in light of the present record, the court might not have included merchant purchasers of cylinder gas in the class had one been certified at all.

¹⁶ These studies detail the percentage of prices in a given universe that, over various periods of time, either decreased, remained unchanged, or increased less than the full amount of the applicable schedule increases.

actual pricing decisions. Even if it is true that many purchasers did not experience price increases during the period the schedules were rising, such evidence does not exclude the possibility that these same individuals would have paid even less in the absence of the alleged conspiratorial behavior. The jury, of course, may ultimately agree with defendants that the factual basis for Dr. Peltzman's conclusion of class-wide impact do not **[**39]** exist. But this possibility is not fatal. Plaintiffs have suggested how they intend to present their evidence in a common manner, and the issue for the court is merely whether these showings are substantial enough to justify further proceedings in this direction. In this court's view, they are.

Furthermore, defendants attack a straw man to the extent they claim that the price schedules lacked market significance since few purchasers actually paid the pertinent schedule price. As set out before, plaintiffs have never argued that transaction prices precisely tracked the schedules; their claim is rather that these schedules influenced the actual prices paid in more subtle ways; the schedules are alleged to have been "benchmarks," nothing more.¹⁸ **[**40]**

It thus appears that plaintiffs have a sufficiently viable, common method of going forward on the question of impact. The only issue that remains on this phase of the case is whether the class format will similarly accommodate defendants' right to present their side of the story. See, e.g., *In re Transit Company Tire Antitrust Litigation*, 67 F.R.D. 59, 72 (W.D. Mo. 1975) (In ruling upon a class certification request, a court must consider both the affirmative evidence likely to be put forth by the plaintiffs and the defensive evidence likely to be offered by the defendants.). Not surprisingly, defendants answer in the negative, arguing that since each merchant price resulted from numerous factors of varying strength, see *supra*, conclusive proof **[**41]** that these prices were not influenced by the alleged conspiracy will necessarily require an individualized examination of each transaction. But defendants do not bear the burden of proof on the question of impact, and they accordingly need not "prove" anything in an affirmative sense. Defendants need only refute plaintiffs' presentation, and the relevant inquiry therefore **[*294]** turns on whether common proof will reasonably suffice for that purpose. The court believes it will.

Plaintiffs, as shown above, will attempt to establish class-wide impact by presenting Dr. Peltzman's testimony, and by proving the predicate facts underlying it, e.g., that defendants colluded to raise or stabilize the prices reflected on the price schedules, and that these schedule prices were in fact "benchmarks" influencing the actual prices charged in the merchant market. Defendants can rebut this case by presenting evidence either that no collusion occurred or that the price schedules were routinely disregarded when actual pricing decisions were made. Defendants also can impeach Dr. Peltzman by presenting *examples* of actual purchasers who, according to defendants' experts, paid no more **[**42]** over the life of the alleged conspiracy than they would have, even if defendants had refrained from the actions now challenged. All of these presentations fall under the "common" heading because they refute the evidence of impact relied upon by each class member, and thus tend to undermine each purchaser's cause of action *simultaneously*.

It follows that defendants' assertion that they will need to examine the situation surrounding *each* sale in the merchant market is flawed. Defendants need only point to *examples* of instances in which impact was not present, for the very existence of each example undermines a case like plaintiffs' which depends upon the testimony of an expert who denies the possibility that any such example might occur. Of course, as the number of examples expands, so does the strain on the court's ability to try the lawsuit. But without now deciding the outer limits of what is permissible, the court is confident that defendants' right to present an effective defense can be preserved within the context of a manageable proceeding.

3. Damages

¹⁷ See Madansky Aff. at para. 9.

¹⁸ Defendants' more powerful argument on the "benchmark" question is that no price schedules existed for various types of sales. Were a class otherwise certifiable, the court might have refined its definition accordingly. See generally note 15, *supra*.

The question of damages is individualized since each class member must step forward and make separate showings [**43] at least as to the amount of product purchased. Whether these are the only individualized showings that are needed is addressed at length *infra*.

4. Attempt to Conceal

All sides agree this issue is common for the same reasons that govern the question of violation.

5. Due Diligence

In the court's initial opinion, it found due diligence to be an individualized issue since resolution required specific knowledge of what each class member knew--or should have known--and when. See [*Simer v. Rios, supra, 661 F.2d at 673*](#) (question of the impact of an invalid regulation "extremely individualized" since it "depends on each individual's state of mind.") Plaintiffs did not challenge this assertion in their written cross-motion to reconsider, but did express disagreement with the court when questioned at oral argument. Plaintiffs' position is that once an attempt to conceal is shown, "due diligence does not become something which has to be proved affirmatively[] it has to be disproved." (Transcript of December 3, 1982 hearing at 54) But this contention, even if correct as a matter of substantive law, is irrelevant for present purposes. Whether due diligence is a matter to be [**44] proved by plaintiffs or disproved by defendants, it remains an issue that potentially must be litigated--and litigated individually--whenever a class member seeks damages on a claim that arises before the statutory period.¹⁹

6. Conclusion

Three of the five issues to be resolved [**45] in this case fall within the "common" category. [*295] Only damages and due diligence require individualized proof, and the inquiry thus shifts, in accordance with *Simer*, to a determination of whether even they may be handled in a manageable fashion.

B. Can the Burden of Trying the Individual Questions be Alleviated?

The court's primary concern is with the issue of damages.²⁰ Underlying this concern is a belief that this lawsuit cannot be deemed manageable if this court must hear an unending series of plenary "mini-trials" devoted to the question of damages. [**HN12**](#) Common questions simply do not "predominate" when each purchaser's specific injury must be calculated in a separate, time-consuming hearing--each conducted before this court, each specific to a given class member, and each replete with discovery, experts, cross-examination and documents. See, e.g., [*State of Alabama v. Blue Bird Body Co., 71 F.R.D. 606, 616 \(M.D. Ala. 1976\)*](#), approved on this point, [*573 F.2d 309, 328 \(5th Cir. 1978\); Ralston v. Volkswagenwerk, 61 F.R.D. 427, 433 \(W.D. Mo. 1973\)*](#).

[**46] In their briefs supporting the original motion to certify, plaintiffs disputed this view, arguing that even if a separate "mini-trial" was needed to determine the extent of each class member's injury, the class could still be certified since the damage question was simply "irrelevant." This claim finds no support in [*Rule 23: HN13*](#) "[A] trial judge cannot, in determining the manageability of a proposed class action, look exclusively to only one aspect of the case . . . ; he can and must look at the case as a whole and, as we have seen, consider proof of damages as

¹⁹ Assuming that the burden of showing the absence of due diligence is in fact properly placed upon defendants, this burden differs significantly from that faced by defendants in attempting to refute plaintiffs' proposed proof of impact. For the reasons already given, defendants could successfully negate plaintiffs' allegation of class-wide impact with a limited number of showings to the contrary. By contrast, an equally limited number of demonstrations of no due diligence would have relevance only for the class members in question. In order to prevail on the question of due diligence against *all* pertinent members of the class, defendants would have to offer separate proof with respect to each relevant purchaser's knowledge.

²⁰ The need to engage in individualized examinations of due diligence will not appreciably extend the litigation if complicated damage assessments must in any event be made. See [*In re Fine Paper Antitrust Litigation, 82 F.R.D. 143, 155 \(E.D. Pa. 1979\); In re Corrugated Container Antitrust Litigation, 80 F.R.D. 244, 248 \(S.D. Tx. 1978\); In re Plywood Antitrust Litigation, 76 F.R.D. 570, 586 \(E.D. La. 1976\).*](#)

well as other issues in the case." *Windham v. American Brands, Inc., supra, 565 F.2d at 71*. Indeed, when read closely, most of the decisions cited by plaintiffs do not take a different position. They merely assert the nearly tautological proposition that "the necessity for calculation of damages on an individual basis should not preclude class determination *when the common issues which determine liability predominate.*" *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977)*, cert. denied, 434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978) (emphasis added); accord, e.g., *In re South Central Bakery Products, I**471 86 F.R.D. 407, 419 (M.D. La. 1980)*; *In re Sugar Industry Antitrust Litigation*, [1977-1] TRADE CASES (CCH) P61,373 (N.D. Ca. 1976), at 71,335. **[HN14]** Damage questions can thus be deemed "irrelevant" only if it is first determined that the remaining issues "predominate." Under *Simer*, this predicate determination itself requires a finding that damages can be handled in a manageable fashion.

In the alternative, plaintiffs offer several proposals designed to simplify the damage phase of the case. Each suggestion is flawed, however, and the court is compelled to conclude that, on the basis of the present record, damage adjudication appears likely to assume the unmanageable character that is feared. Therefore, class certification must be denied.

Plaintiffs' main proposal involves use of a formula. Plaintiffs postulate that each class member's injury can be calculated through a simple process of multiplying the amount of the individual's purchases by the uniform overcharge figure applicable to the time and product under scrutiny. Plaintiffs further explain that the uniform overcharge figure is the difference between the average FOB market price (for the relevant time and product) **[**48]** and the governing "swap price." The "swap price" refers to the price defendants charged one another when settling imbalances in their "swap accounts"--accounts that recorded the net amount of product supplied to competitors through swap transactions of the type described before.²¹

[49] [*296]** Clearly, if this methodology is sufficiently viable, manageability concerns would greatly subside, for individualized proof would be needed only to establish the amount of each class member's purchases; the applicable overcharge figure would be set without reference to considerations that vary from purchaser to purchaser. Recognizing these facts, defendants challenge the economic logic underlying the swap price theory. The issue for the court is whether these attacks undermine plaintiffs' theory to such an extent that the formula may now be rejected.

To have any significance, this formula must be programmed to determine the difference between the prices actually paid and the prices that would have been paid in the absence of defendants' allegedly illegal behavior; such is the

²¹ An example may help clarify the formula plaintiffs have in mind. Assume that during 1978 the average FOB price for all liquid oxygen sold in the merchant market was 10 cents per 100 cubic feet, and that the swap price for the same product and time period was 7 cents per 100 cubic feet. Assume further that during 1979, the relevant figures (again with reference to liquid oxygen) were 12 cents per 100 cubic feet (average FOB merchant) and 8 cents per 100 cubic feet (swap). Under plaintiffs' approach, the uniform overcharge figure governing 1978 would be 3 cents per 100 cubic feet (the difference between 10 and 7); the 1979 figure would be 4 cents per 100 cubic feet (the difference between 12 and 8).

Assume further that customer A purchased 400 cubic feet of liquid oxygen during 1978 at 12 cents per 100 cubic feet, and that customer B purchased 400 cubic feet of liquid oxygen during the same year at 10 cents per 100 cubic feet. Finally, assume that in 1979 customer A again bought 400 cubic feet at 12 cents per 100 cubic feet.

Under plaintiffs' methodology, customer A would thus be entitled to damages equalling 12 cents (400 cubic feet times 3 cents per 100 cubic feet) for his purchases during 1978, and to 16 cents (400 cubic feet times 4 cents per 100 cubic feet) for his purchases in 1979. Customer B would receive 12 cents (400 cubic feet times 3 cents per 100 cubic feet) for his 1978 transactions.

Note that customers A and B receive the exact same award for their 1978 purchases even though they paid varying amounts in the merchant market. This equality results from the fact they both purchased the same amount of product, and from the fact that plaintiffs' formula rests on a belief that each contemporaneous sale in the merchant market was influenced by defendants' illegal activities to the same extent (i.e., 3 cents per 100 cubic feet in 1978). In other words, under plaintiffs' assumptions, customer A would have paid--in the absence of defendants' conspiratorial behavior--9 cents per 100 cubic feet in 1978, and customer B would have paid 7 cents per 100 cubic feet. See *infra*.

conceptual measure of damages applicable in this case. See P. Areeda & D. Turner, Antitrust Law para. 344 (1978). Defendants argue from this definition that since plaintiffs intend to subtract swap prices from actual merchant prices (*i.e.*, prices that were allegedly the product of a conspiracy), the swap price theory "works" only if swap prices approximate the prices that would have [**50] been paid by the class members in the absence of the alleged conspiracy. However, defendants continue, no such equation can be drawn, for while swap prices were uniform throughout the country (for a given time and product), pricing in a hypothetically non-collusive merchant market would most certainly have been otherwise. Defendants base the latter assertion on their belief that the pricing actually observed in the purportedly price-fixed merchant market was "chaotic" itself; it makes no sense, defendants reason, to assume that greater uniformity would have prevailed under uncontrolled, competitive conditions.

Plaintiffs do not deny that the swap prices were nationally uniform. Nor do they dispute the factual assertion that non-collusive pricing would have been variable. (Indeed, one of plaintiffs' substantive contentions appears to be that defendants artificially reduced such diversity by utilizing their national price schedules. See *supra*.) Defendants' attack nevertheless fails, for it is based on a misunderstanding of the manner in which the swap price formula operates. Defendants' argument would have force *if* plaintiffs were claiming that each class member was overcharged [**51] by the difference between *that individual's* actual price and the applicable swap price. Under this approach, the resulting difference could reasonably be said to approximate the purchaser's injury only if the swap price itself approximated the price *that purchaser* would have paid but - for the conspiracy. As this would be true equally in the case of each class member, it would then follow, [*297] given the uniform nature of the swap price, that plaintiffs' theory implicitly assumed a non-collusive world in which price variation was absent.

But plaintiffs proffer an entirely different approach. They propose instead to subtract the swap price from the average price paid for the relevant product during the year of the conspiracy in question. In this way plaintiffs seek to determine a single unit overcharge figure to be applied against each purchaser who bought during that time period. See note 21, *supra*. Furthermore, plaintiffs argue, the use of a uniform overcharge figure is appropriate regardless of whether non-collusive pricing was variable: Even if it was, collusive pricing was presumably disparate to the exact same degree; each price in the latter market [**52] simply was higher than its corresponding measure in the non-collusive market by the uniform amount. Dr. Peltzman explains:

Contrary to Professor Markham's assertion, my proposed use of swap prices as a non-conspiratorial benchmark does not assume that there must be a single "competitive price" for the entire country and for all customers (para. 18). Nor does geographic diversity of prices make it impossible to have a single benchmark (para. 23). In a conspiracy which is national in scope, customers in all areas will pay prices which are higher than they would have been without the conspiracy. Those high conspiratorial prices may differ among customers, just as it might be the case that the lower non-conspiratorial prices differed among customers. My methodology is designed to provide an estimate of the excess of the conspiratorial price. For this purpose, I proposed a comparison of a competitive benchmark to an average conspiratorial price. Nothing in this methodology requires any assumption that all customers pay the same conspiratorial price or that all would have paid the same price absent conspiracy. And, unless it can be convincingly shown that the effects [**53] of the conspiracy *differed* among customers, an attempt at individual calculation of damages is not only not required [but] would be invalid methodologically.

Peltzman 4th Aff. at para. 16 (emphases in original). In short, plaintiffs' theory rests not on an assumption of uniform non-collusive pricing, but on a presumption that defendants' illegal activities presumptively influenced each sale transaction to the exact same extent. According to Dr. Peltzman, the trier-of-fact should find, in the absence of contrary evidence put forth by defendants, that each purchaser (of a given product during a given time) paid a uniform surcharge.

This presumption is an absolutely crucial lynch pin in the analysis justifying the swap price formula as a lawful determinant of damages. Without it, there is little, if any, reason to think that plaintiffs' formula adequately

measures the extent of each class member's *individual* injury, as the antitrust laws demand.²² Clearly, if members of the class paid varying amounts of overcharge, a theory that assumes the contrary is hardly programmed to deal with the complexities of each plaintiff's situation.²³ Such a theory would appear [**54] instead [*298] to be capable of nothing more than mere arbitrary assignments of injury.

[**55] It follows that plaintiffs' theory cannot be accepted at this time, notwithstanding the court's rejection of defendants' prior challenge. See pp. 35-37, *supra*. Plaintiffs have offered neither argument nor citation in support of their claim that they are entitled to invoke the crucial presumption in question. Plaintiffs have simply made the bald face assertion that a presumption of uniform impact embodies "the best approximation of the real world that can be made today after defendants conspired." (Transcript of September 2, 1981 hearing at 57) The court cannot accept this proposition--given the nature of this case--without further elaboration. Plaintiffs are not alleging that defendants' conspiratorial behavior simply generated a higher plateau from which defendants entered into the very same pricing activities they would have commenced even in the absence of the conspiracy; plaintiffs are not claiming, in other words, that "everything that went on would have gone on anyway, except at a lower level." Plaintiffs' theory of the case is much broader. It encompasses the notion that certain forms of behavior occurred (e.g., forbearance from competitive solicitations of [**56] rivals' "historical" customers) that simply would not have been observed under non-collusive circumstances. Under plaintiffs' own theory of the case, defendants' allegedly illegal behavior thus added to the pricing universe several factors, all of which might not have affected each transaction. Under these circumstances, and without meaningful argument from plaintiffs, the court cannot now assume that uniform impact was present.²⁴ The fact of such impact could be *proven* at trial, but plaintiffs have offered absolutely no indication of how, or, for that matter, whether, they will lay a foundation for Dr. Peltzman's conclusory assertions; plaintiffs are silent as to their method, if any, of going forward on this crucial point.²⁵

[**57] The nature of the court's holding should not be misunderstood. The court is *not* making a final, binding determination that the alleged conspiracy must have influenced the merchant market, if at all, in a non-uniform manner. Nor is the court even foreclosing the possibility that plaintiffs might be entitled to a contrary presumption. The court is simply holding that, on the present record, plaintiffs have failed to offer even a minimal explanation of why the court should accept the assumption anchoring their theory.²⁶

²² Although a private claimant under the antitrust laws need only quantify the extent of his injury with reasonable approximation, see, e.g., *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566, 75 L. Ed. 544, 51 S. Ct. 248 (1931), such approximation must relate to the injury felt by *that* claimant. See, e.g., *Windham v. American Brands, Inc.*, *supra*, 565 F.2d at 66; *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 236 n. 8 (9th Cir. 1974); *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974); *Al Barnett & Son, Inc. v. Outboard Marine Corporation*, 64 F.R.D. 43, 54-55 (D. Del. 1974); Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 So. Cal. Rev. 842, 869-70 (1974); Handler, *Twenty-Fourth Annual Antitrust Review*, 72 Colum. L. Rev. 1, 37 (1972).

²³ It is conceivable that the overcharges might differ, but within a range small enough that the common number generated by the swap price method would be a sufficiently reasonable approximation of each. See generally note 22, *supra*. Alternatively, the overcharges might differ greatly, but each might be smaller than the swap price number. In that case, the inaccuracies in plaintiffs' method would redound to defendants' advantage. Neither of these possibilities have been suggested or advocated by plaintiffs.

²⁴ Cf. *In re Master Key Antitrust Litigation*, 70 F.R.D. 23, 26 (D. Conn.), appeal dismissed, 528 F.2d 5 (2d Cir. 1975) ("in few class actions is there a simple per capita measure of recovery.").

²⁵ The present situation thus differs greatly from what was observed on the fact of damage issue, where it was evident that plaintiffs intended to offer common *proof* supporting Dr. Peltzman's "assumptions." See *supra*. The record before the court offers no such assurance with respect to the presumption of uniform impact.

²⁶ Plaintiffs' alternative damage theory is based upon the post-conspiracy decrease in merchant prices. It suffers from an identical infirmity since it is similarly designed to generate a common overcharge figure. See Transcript of December 3, 1982 hearing at 50.

Moreover, even if the concept of uniform impact is accepted, the specific figure generated by the swap price method must additionally bear some reasonable relation to the "true" amount of uniform damage. Under Dr. Peltzman's [**58] assumptions, this relation holds only if the applicable swap price is equal to or greater than the average price that would have been paid in the absence of the conspiracy for the product at issue. See Appendix. (This assertion is obviously a more refined version of defendants' earlier-rejected claim. See pp. 35-37, *supra*.) Since plaintiffs have made sufficient showings that non-collusive prices would have tended in this industry towards marginal cost,²⁷ the necessary relation may be restated as follows: Swap prices must have been equal to or greater than the [*299] average marginal cost of producing the product in question during the relevant period of time.

Defendants vigorously argue that no such relation can be proven since swap prices were mere accounting devices that bore no market significance. See *In re Transit Company Tire Antitrust Litigation*, 67 F.R.D. 59, 77-78 (W.D. Mo. 1975).²⁸ Defendants claim that they intended all swaps [**59] to be pure barter, that swap accounts were carefully monitored to prevent buildups of large imbalances either way. Most importantly, a swap "purchaser" had no assurance that it could compensate the "seller" with money rather than return product; it was the seller's option either to demand a money settlement determined by the swap price (usually at the end of the year) or to carry its receivable into the future in the hope that additional transactions would eliminate the imbalance. Swap prices thus could not have served as market signals guiding the purchaser's decision to enter into the swap arrangement. Cf. *Airweld v. Airco*, 576 F. Supp. 676 (D. Or. 1983) (swap transactions in the industrial gas industry are not "sales" for purposes of the Robinson-Patman Act).

[**60] Whatever the merits of this argument, it cannot be held, on the basis of this record, that swap prices had no relevance for the seller:

The plain and important fact is that swaps are not pure barter. Even if defendants wish it would work out that way, there is no obligation that a recipient of x cubic feet of oxygen supply x cubic feet to the sender. Once this elemental fact is grasped, the consequences of truly arbitrary swap prices are easily grasped [If] the swap price is set arbitrarily low, there would of course be many requests for swapped gas, but few would be accommodated, *since potential senders would understand the recipient's incentives to settle in cash*. Again, there would be a supply-demand imbalance. This time much would be demanded but little offered. As in any market, there will be some price intermediate between those which are so high as to provoke excess supply and those so low as to provoke excess demand at which the swap market will clear. Such a price will convince potential suppliers that when they honor a swap request, their request will be honored in the future or they will be adequately compensated in money.

Peltzman [**61] 4th Aff. at para. 13 (emphases added). Plaintiffs might thus be able to construct a viable explanation as to why swap prices could not possibly have been set at a level under the average marginal cost. The simple truth, however, is that no such explanation has been tendered. During the original round of briefing and argument, plaintiffs did contend that *the* swap price must have exceeded *the* marginal cost. See Transcript of September 2, 1981 hearing at 64. But no consideration was given then, or has been given since, to average measures.

There are additional problems with the swap price methodology. First, plaintiffs intend to estimate average FOB merchant prices from publicly available Census figures. However, these figures do not list average FOB prices since they are based on price submissions that often reflect built-in transportation charges. (Transportation

²⁷ See Peltzman 2d Aff. at paras. 4, 8.

²⁸ Of course, even if defendants' economic logic were correct, swap prices might coincidentally equal or exceed average marginal costs. The determination of such a coincidental relationship would, however, require an initial calculation of each relevant marginal cost, and the manageability problems the swap price method was designed to cure would thus resurface.

assessments do not come into play in swap deals; the purchaser simply fills its truck up at the seller's plant.)
²⁹ [**63] Dr. Peltzman has assured the court that

[*300] the methodology for (making the necessary adjustment) is surely simple to comprehend: estimate the portion of revenues per 100 cubic [**62] feet as reported to the Census which is non-product charge and either deduct this from the gross revenues per 100 cubic feet or add it to the non-collusive benchmark price. Given this, the question becomes whether it is practical to do so with some reasonable degree of accuracy. *While the precise way in which this cannot be specified at this stage of the case, without further data*, it is clear that nothing in my methodology requires an individualized invoice-by-invoice calculation of damages.

Peltzman 4th Aff. at para. 15 (emphasis added). ³⁰ This response is insufficient. For the court to accept Dr. Peltzman's claims, it needs to know at least the rough outlines of how he would approach the problem at hand. No such guidance has been given, however, and the court is left merely with his unexplained assurance that he can proceed in a common fashion. Courts should not certify class actions on this basis. *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974).

Moreover, the rationality of applying the swap formula to cylinder sales is seriously in doubt. The materials before the court ³¹ [**64] indicate that cylinder products were not swapped, and that the various swap prices hence did not pertain to them. The relevant Census figures also do not segregate cylinder sales of argon from liquid sales. Because these two forms of product sold at differing price levels, such joint reporting diminishes the usefulness of the Census data as a determinant of the average FOB price of either form. In short, all of the data needed to operate the swap price theory in a proper manner cannot be obtained easily. Plaintiffs' formula approach does not ease the court's concern that the proposed class action is unmanageable. See *Klein v. Henry S. Miller Residential Services*, 94 F.R.D. 651, 660-61 (N.D. Tx. 1982); *Chmielecki v. City Products Corp.*, 71 F.R.D. 118, 162 (W.D. Mo. 1976); *In re Transit Company Tire Antitrust Litigation*, *supra*, 67 F.R.D. at 77. ³²

Nor is the court aware of any other viable method of handling the damages question. The solution adopted by the court in its initial opinion was to attack the very premise that a problem existed. The court reasoned that the danger of burdensome "mini-trials" was merely speculative, because the case might be settled or otherwise resolved long before damages had to be reached, and because the very complexity of the damage question--the complexity which rendered the "mini-trials" unmanageable in the first place--would, in any event, likely reduce the number of plaintiffs willing to prove up damages. See generally note 13, *supra*. The court now recognizes that *Simer* implicitly forecloses such an approach. Plaintiffs in *Simer* sued the federal Community Services Administration [**65] for improperly denying cash assistance payments to members of the proposed class of low-income individuals. Without ever ruling on the propriety of the class certification request, the district court granted summary judgment for the plaintiffs on the purely legal issue of whether the agency's authorizing statute supported its position. The parties then devised a settlement plan under which the funds not spent on the assistance program were to be funneled into various projects purportedly of interest to the class. Subsequently, the district judge vacated the settlement and dismissed the suit, finding that the settlement had been improperly obtained, that the named

²⁹ Defendants have argued that swap transactions differ from merchant sales in several additional ways, and that for this reason, FOB merchant prices can never be meaningfully compared with swap prices. *In re Transit Company Tire Antitrust Litigation*, 67 F.R.D. 59, 76 (W.D. Mo. 1975). Dr. Peltzman has adequately answered these remaining assertions. See Peltzman 3d Aff. at paras. 5-8.

³⁰ See generally *Martino v. McDonald's System, Inc.*, 81 F.R.D. 81, 91-92 (N.D. Ill. 1979).

³¹ Only defendants placed evidence in the record on this question. Plaintiffs explicitly declined to take discovery on how the swap prices were actually set. See Transcript of September 2, 1981 hearing at 19.

³² Other courts have rejected damage formulae proffered by class proponents. See, e.g., *Moore v. Southeast Toyota*, No. CV 81-P-0491-S, slip op. at 7 (N.D. Ala. Feb. 3, 1982); *Yanai v. Frito Lay, Inc.*, 61 F.R.D. 349, 352 (N.D. Ohio 1973); *Ralston v. Volkswagenwerk*, 61 F.R.D. 427, 432 (W.D. Mo. 1973).

plaintiffs had been fully compensated, and that a [*301] class could not be certified. In affirming the latter ruling, the Seventh Circuit stressed that resolution of the class members' individual damage claims would necessitate an unmanageable series of "mini-trials." The Court "gave no consideration to the possibility of settlement--which was very high, inasmuch as one settlement had already been reached--nor did it consider the likelihood that individual class members would pursue their individual claims--which [**66] was very low, in that the class members were poor people with claims of no more than \$250." (Reply Memorandum in Support of Defendants' Motion to Certify a § 1292(b) Appeal from the Class Certification Order at 3). The considerations which originally motivated this court were present in *Simer*, but ignored.

Sub-classing pursuant to subsection (c)(4)(B) of [Rule 23](#) is, by contrast, a recognized solution to problems of manageability in certain cases. See *Simer v. Rios, supra, 661 F.2d at 674*. Plaintiffs, however, have not suggested this solution, and the court is at a loss as to how sub-classing would be of assistance in this particular lawsuit.

What plaintiffs do suggest is that they be permitted to obtain a "fluid recovery" on behalf of the class. The Court in *Simer* explained this term:

The fluid recovery is used where the individuals injured are not likely to come forward and prove their claims or cannot be given notice of the case. In a fluid recovery the money is either distributed through a market system in the way of reduced charges or is used to fund a project which will likely benefit the members of the class.

Id., 661 F.2d at 675 (citation [**67] and footnotes omitted). [HN15](#) When a fluid recovery is sought, no attempt is made to correlate class members with actual injuries. Damages are distributed in an imprecise manner that eliminates the need for individualized determinations.

The problem with this "solution"--aside from plaintiffs' failure to specify exactly what type of fluid recovery they envision--is that it is simply impermissible as a matter of law. Fluid recoveries have been condemned as illegal in numerous decisions. See, e.g., *Windham v. American Brands, Inc., supra, 565 F.2d at 72*; *In re Hotel Telephone Charges, supra, 500 F.2d at 90*; *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), vacated on other grounds, *417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*; *Al Barnett & Son, Inc. v. Outboard Marine Corporation*, 64 F.R.D. 43, 55 (D. Del. 1974). But see *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 353-54 (E.D. Pa. 1976). To be sure, *Simer* rejects the breadth of these precedents and authorizes a fluid approach when "the use of such a mechanism is consistent with the policy or policies reflected by the statute violated." *Id. at 676*. The Court explicitly [**68] recognized, however, that this form of reasoning might lead to an absolute ban on fluid recoveries in antitrust cases. *Id. at 676 n. 42*.

Such a *per se* approach is entirely correct. The Clayton Act limits recovery to those actually injured by defendants' conduct,³³ and further limits the extent of the recovery to the amount the claimant has approximately suffered. See note 22, *supra*, and accompanying text. Fluid recoveries disregard these limitations, and hence are not "consistent with the policy or policies reflected by the statute violated."

The final question is whether the case could be made manageable by bifurcating the trial. See [Fed. R. Civ. P. 42\(b\)](#). A positive response might be possible if the court coupled bifurcation with an order [**69] under subsection (c)(4)(A) of [Rule 23](#)³⁴ certifying the case as a class action solely with respect to the common issues raised by the complaint; the court would then have before it all common questions (those arising out of [*302] the actions of the named plaintiffs and the absentees), as well as the individual questions presented solely by the complaints of the named plaintiffs. Trial would be bifurcated between the common and individual issues. If the class prevailed in the initial, common phase of the proceeding, the named plaintiffs would then continue to litigate their individual questions in this court; the remaining class members could also proceed, but since no class action would then exist,

³³ Indeed, the courts have grafted even further limitations on this rule. See, e.g., *In re Industrial Gas Litigation*, 681 F.2d 514 (7th Cir. 1982), cert. denied, *460 U.S. 1016, 103 S. Ct. 1261, 75 L. Ed. 2d 487, 51 U.S.L.W. 3634 (1983)*.

³⁴ [HN16](#) Under subsection (c)(4)(A), "an action may be brought or maintained as a class action with respect to particular issues."

they would not be obligated to pursue their individual claims here. Rather, they would be entitled to sue in any district court in which jurisdiction and venue could be obtained.

[**70] This plan would ease manageability concerns by decentralizing the second phase of the litigation. The individual questions would be tried before many courts, and the burden experienced by any one tribunal would correspondingly diminish.

Defendants argue that *Simer* rejects this "solution" to manageability problems. Relying on one sentence in one footnote, defendants assert that under *Simer*, "a bifurcated trial would not solve the problem of individual issues . . . since it would merely delay the issue to a later date and at that point the complications would arise." *Id.* 661 F.2d at 673-74 n. 33. However, it is not clear from the context of the quoted statement whether it reflects the *Simer* Court's own view, or merely its summary of a prior decision. It is also not clear whether the Court had in mind bifurcation involving several courts, or simply bifurcation in the context of a lengthy trial conducted in phases before one court. Defendants must point to more than an ambiguous sentence in a footnote before this court will conclude that the Seventh Circuit has rejected the procedural set-up proposed here.³⁵

[**71] But while *Simer* does not necessarily bar the bifurcation plan described above, constitutional considerations might. **HN17**[↑] By the plain, though unnecessary, terms of *Rule 42(b)*, a bifurcation order must "preserv[e] inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States." The concern created by the proposed scheme is that it contemplates separate juries trying different aspects of single causes of action, those of the unnamed class members. In *Gasoline Products Co. v. Champlin Co.*, 283 U.S. 494, 75 L. Ed. 1188, 51 S. Ct. 513 (1931), the Supreme Court dealt with an analogous situation. The Court of Appeals had found error in the district court's jury instructions on the damage aspects of a breach of contract counterclaim, and had remanded for a retrial limited to a recalculation of the damages due. The Supreme Court reversed, holding that the proceedings on remand had to encompass not only the question of damages, but also the underlying issue of whether the counter-defendant was liable at all. The Court stated that "where the practice permits a partial new trial, it may not properly be resorted [**72] to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. No sharp line could be drawn in the case under review because a proper damage assessment necessitated a prior understanding of what the pertinent contract specifically provided. But the initial jury's verdict definitively revealed only a finding that a contract had existed and had been breached; it offered no guidance as to what that jury had specifically understood the contract to require. Thus, it was impossible for the district court to instruct the jury on remand as to the details originally determined; the members of the second panel could only guess as to what determinations had been originally made and were hence binding. The damage question was "so interwoven with that of liability that the former [could not] be submitted to the jury independently of the latter without confusion and uncertainty, [*303] which would amount to a denial of a fair trial." *Id.*³⁶

[**73] The principles announced in *Gasoline Products* apply outside the context of retrials; they similarly govern instances, like here, where bifurcation is proposed as an initial matter. 9 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2391, p. 303 (1971). The question for the court is thus whether the issues to be separated are distinct enough that they may be considered fairly in isolation. In particular, the court must consider whether damages can be properly assessed apart from inquiries into violation or fact of damage.

The latter separation--between fact of damage and damages--is the most troubling. Though there is precedent upholding this form of bifurcation against *Seventh Amendment* challenge, see *In re Ampicillin Antitrust Litigation*, 88

³⁵ Indeed, at least two members of this Court have relied in part upon concepts of bifurcation while certifying (b)(3) classes in the aftermath of *Simer*. *Ridings v. Canadian Imperial Bank*, 94 F.R.D. 147, 151 (N.D. Ill. 1982) (Aspen, J.); *Board of Education v. Admiral Heating*, Nos. 79 C 3046, 79 C 5253 (N.D. Ill. Aug. 10, 1982) (Shadur, J.).

³⁶ Stated otherwise, to the extent there is uncertainty as to the original panel's findings, the *Gasoline Products* "rule is dictated for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent." *State of Alabama v. Blue Bird Body Co.*, *supra*, 573 F.2d at 318.

[F.R.D. 174, 179 \(D.D.C. 1980\)](#); [In re Master Key Antitrust Litigation, supra, 70 F.R.D. at 29](#), the weight of authority suggests caution:

HN18 [↑] In an antitrust action brought under the Clayton Act, it is most important to be aware of the [Seventh Amendment](#) limitations on a [Rule 42\(b\)](#) bifurcation. This awareness is important because liability under [§ 4](#) necessarily includes proof of injury to business and property. Therefore, [**74] bifurcation to separate juries of liability and damages in a [§ 4](#) case inevitably introduces the possibility that in the liability phase the first jury might find that there was such injury, while the second jury might on the same evidence of injury in the damage phase, find none.

[State of Alabama v. Blue Bird Body Co., supra, 573 F.2d at 318](#); accord, [Windham v. American Brands, Inc., supra, 565 F.2d at 71](#); [Link v. Mercedes-Benz of N. Am., Inc., 550 F.2d 860, 875](#) (3d Cir.) (Gibbons, J., dissenting),³⁷ cert. denied, 431 U.S. 933, 53 L. Ed. 2d 250, 97 S. Ct. 2641 (1977); [Al Barnett & Son, Inc. v. Outboard Marine Corporation, supra, 64 F.R.D. at 56-57](#); Silberman, *The Defense View--Litigating With Just a "Touch of Class,"* 49 Antitrust L. J. 1529, 1543-44 (1980); Simon, [Class Actions--Useful Tool or Engine of Destruction, 55 F.R.D. 375, 386 \(1973\)](#); cf. [In re Transit Company Tire Antitrust Litigation, supra, 67 F.R.D. at 75](#).

[**75] Having contended from the start of this litigation that damages are susceptible to common proof, plaintiffs have for the most part ignored the possibility of individualized damage "mini-trials." Little attention has been focused in this direction, and the court consequently lacks much, if any, guidance as to the issues and questions that would arise in such proceedings. Accordingly, it is impossible to determine with much certainty the degree to which bifurcated damage and fact of damage inquiries would overlap. But certainly, as the *Blue Bird* Court noted, the potential is very great; both inquiries concern themselves with the presence of an alleged overcharge; one inquiry is simply a more particularized variant of the other. See also [United Air Lines, Inc. v. Wiener, 286 F.2d 302](#) (9th Cir.), cert. denied, 366 U.S. 924, 6 L. Ed. 2d 384, 81 S. Ct. 1352 (1961). Thus, were bifurcation ordered, the court might well learn at the end of the common phase of the trial that the issues to be raised in the individualized proceedings were so "interwoven" with those already tried that the second stage could not go forward as planned. Instead, the damage "mini-trials" would have [**76] to expand to encompass a re-exploration of the overlapping issues necessary for a constitutionally fair [*304] assessment of damages. A major systemic goal underlying the concept of class actions--the realization of final, classwide resolutions of disputed factual questions--would thus be frustrated.

The danger that the foregoing scenario might materialize is simply too great for this court to ignore. Moreover, to the extent the question is merely uncertain in large degree, plaintiffs once again fail. It is they who bear the burden of persuading the court that the proposed bifurcation plan is viable.³⁸

³⁷ "The majority believes that the dissents' discussion of [the Gasoline Products] issues is premature in this case, and on this procedural point we differ. Therefore, even though some opinions are styled as dissents, their reasoning on those issues is not necessarily at variance with the views of a majority of this court." [Link v. Mercedes-Benz of N. Am. Inc., 550 F.2d 860, 865 n. 4](#) (3d Cir.), cert. denied, [431 U.S. 933, 53 L. Ed. 2d 250, 97 S. Ct. 2641 \(1977\)](#).

³⁸ It should be apparent that this analysis is based upon considerations unique to the Clayton Act. This opinion does not address the permissibility of bifurcation in other contexts, such as when violations of the federal securities laws are alleged.

In must be emphasized as well that the court's discussion refers solely to cases in which inquiries into fact of damage and damages are completely bifurcated. If the second jury need only determine the appropriate values to plug into a generalized damage formula established at the first trial, [Seventh Amendment](#) concerns disappear. See, e.g., [In re Plywood Antitrust Litigation, 655 F.2d 627, 636 \(5th Cir. 1981\)](#), cert. granted, [456 U.S. 971, 102 S. Ct. 2232, 72 L. Ed. 2d 844, 50 U.S.L.W. 3907 \(1982\)](#); [Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686, 696](#) (9th Cir.), cert. denied, [434 U.S. 829, 54 L. Ed. 2d 88, 98 S. Ct. 109 \(1977\)](#).

[**77] Nor can these problems be avoided by limiting the common phase of the trial to the question of violation, the issues of fact of damage and damages both being reserved for individualized adjudication. As Professor Areeda has noted, "an antitrust damage assessment cannot be divorced from thoughtful attention to the rationale for liability and the internal logic of the liability holding." Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1139 (1976). Judge Wyzanski, though ultimately finding this point non-dispositive, evidently agrees: "Proof as to what such violations, if they occurred, caused in the way of damage may become relevant to, and even to some degree intertwined with, issues of violation" [*Windham v. American Brands, Inc.*, 539 F.2d 1016, 1022 \(4th Cir. 1976\)](#), approved on this point *en banc*, [*565 F.2d 59, 71 \(4th Cir. 1977\)*](#). [*Seventh Amendment*](#) concerns might thus require a retrial of nearly all issues litigated in the initial phase of a bifurcated version of this lawsuit. Under these circumstances, it is difficult to see how a class suit, with its attendant costs of notice and management, would be "superior" to a series of [**78] individual cases brought by purchasers who desired to proceed. This difficulty is particularly pronounced when the individual actions may be consolidated, as here, for discovery and trial.

There are additional difficulties with a trial procedure that limits the absent class members' formal interest to a determination of liability. First, the only discovered opinion squarely endorsing this form of bifurcation--Judge Wyzanski's panel opinion in *Windham*--was promptly reversed *en banc*. See also *In re Electric Weld Steel Tubing Antitrust Litigation*, [1980-81] TRADE CASES (CCH) P63,783 (E.D. Pa. 1980), at 78,183. But cf. [*Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 \(3d Cir. 1977\)](#), cert. denied, 434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978) (suggesting in dictum--prior to the Fourth Circuit's *en banc* reversal--that Judge Wyzanski's approach might have merit); [*Link v. Mercedes-Benz of N. Am., Inc.*, supra, 550 F.2d at 876-78](#) (Gibbons, J., dissenting) (approving Judge Wyzanski's approach, but with serious reservations).

Further, the doctrine of standing requires that a private antitrust claimant be one who has suffered injury to his business or property [**79] on account of the defendants' illegal acts. It is seriously open to question whether an absent class member may "join" a class suit if allegations of injury are not simultaneously pressed on his behalf. See generally [*Windham v. American Brands, Inc.*, supra, 565 F.2d at 71 n. 38](#); [*Link v. Mercedes-Benz of N. Am., Inc.*, supra, 550 F.2d at 875-76](#) (Gibbons, J., dissenting).

For all the reasons which have been given, the court cannot make the findings necessary for certification under [*Rule 23\(b\)\(3\)*](#). Plaintiffs have failed to propose a sufficiently viable and permissible method of [*305] alleviating the burden of calculating and distributing damages.

VI. Conclusion

Throughout the course of this opinion, the court has examined the manageability of a class action trial as a vehicle for resolving plaintiffs' claims. The court has sought to "survey the factual scene on a kind of sketchy relief map, leaving for later view the myriad of details that cover the terrain." [*Professional Adjustment Systems of America v. General Adjustment Bureau, Inc.*, 64 F.R.D. 35, 38 \(S.D.N.Y. 1974\)](#). This review has been at times searching, but it has not been, in this court's view, improper. [**80] Plaintiffs' proposals cannot survive the level of scrutiny necessary for principled application of [*Rule 23*](#), and cannot anchor a finding in favor of class certification.

The court labors under no illusion that its approach can be reconciled with every decision ever written on the subject of antitrust class actions. Indeed, this opinion differs significantly from the original class action opinion issued in this very case. This opinion reflects nothing more than the court's best understanding of the applicable law and facts. To the extent this understanding diverges from that reflected in prior decisions, such divergence is, with respect, intentional.

Perhaps this divergence is most acute in the treatment of ambiguity in the record. Many courts have simply ignored obvious failures by plaintiffs to specify how they intend to proceed. These courts have nevertheless granted class certification seemingly on the hope that things would eventually work out. This court cannot endorse such an approach. If it is unclear whether plaintiffs' proposed method of proceeding is sufficiently viable to justify further action in that direction, such ambiguity must be construed against the plaintiffs. [**81] It is they who bear the burden on these questions.

The court recognizes, though, that some of the deficiencies highlighted in this opinion were not contested vigorously in the briefs filed in connection with the cross-motions to reconsider. Therefore, the court may permit plaintiffs to supplement the record in order to bring a renewed motion for class certification based upon firmer ground.

Accordingly, this court's opinion and order of December 30, 1981 is vacated, defendants' motion to reconsider is granted, and plaintiffs' cross-motion to reconsider is denied. This case may not proceed as a class action. Liaison counsel are directed to report for status conference at 9:30 A.M. on August 4, 1983 to discuss the future of this litigation.

It is so ordered.

Appendix

Dr. Peltzman assumes that a uniform overcharge figure is appropriate, and that the difference between the average FOB (conspiratorial) price and the governing swap price generates a uniform figure that is no more than the constant overcharge number. (If the actual overcharge figure exceeds the number dictated by the subtraction, plaintiffs' method is, if anything, defendant-biased, and defendants have no grounds [**82] for complaint.)

Assuming the above constraints, the swap price can be related to the other relevant variables. In the equations to follow, S represents the swap price; X represents the "actual" uniform overcharge; Y represents the number of purchasers in the relevant market (it is assumed there are more than one); and P[i] represents the non-collusive price charged customer i.

In light of these definitions, Dr. Peltzman's assumptions can be described algebraically as follows:

[SEE ILLUSTRATION IN ORIGINAL]

End of Document



Altemose Constr. Co. v. Building & Constr. Trades Council of Philadelphia & Vicinity

United States District Court for the Eastern District of Pennsylvania

July 5, 1983, Decided; July 6, 1983, Filed

Civil Action No. 73-773

Reporter

1983 U.S. Dist. LEXIS 15697 *; 117 L.R.R.M. 3170

Altemose Construction Company, Associated Builders and Contractors, Inc., the Chamber of commerce of the United States of America v. Building and Construction Trades Council of Philadelphia and Vicinity, et al.

Core Terms

subcontractors, conspiracy, subcontracting, general contractor, contractors, anti trust law, picketing, secondary, non-union, collective bargaining, employees, exemption, labor law, antitrust, collective bargaining agreement, Sherman Act, summary judgment, organizational, injunction, wages, site, construction industry, non-statutory, organizations, immune, statutory exemption, non-labor, firms, working conditions, hot cargo

Opinion by: [*1] SHAPIRO

Opinion

MEMORANDUM OF DECISION

NORMA L. SHAPIRO, J.

I. PROCEDURAL AND FACTUAL BACKGROUND

Before the court in this labor-antitrust litigation are cross-motions for summary judgment. The issue is whether the union activities to obtain certain agreements in the construction industry are protected from antitrust attack by labor exemptions to the antitrust laws. Plaintiffs' motion was for partial summary judgment; it seeks only an adjudication on the question of liability.¹ Defendants filed an answer and cross-motions for summary judgment, and a second motion to dismiss. After supplemental memoranda were filed, the court held oral arguments on a voluminous record.² Defendants' cross-motions are now granted.³

¹ The individual plaintiff also seeks treble damages.

² This case had been previously assigned to two other district judges before transfer to this judge. A prior opinion by then District Judge Higginbotham dismissed the counterclaims based on the antitrust laws. See *Altemose Const. v. Bldg. & Const. Trades Council*, 443 F.Supp. 492 (E.D. Pa. 1977).

³ Plaintiffs' statement of material facts is accepted as a basis for decision. Any disputed facts are resolved in favor of the plaintiffs, except as noted. See *infra* at n. 79. Moreover, all inferences drawn are viewed in the light most favorable to the plaintiffs. See *infra* at p. 15.

[*2] This is an action for both declaratory and injunctive relief under the Declaratory Judgment Act,⁴ and for damages pursuant to § 4 and 16 of the Clayton Act.⁵ [*3] The plaintiffs are Altemose Construction Co. ("Altemose"), a general contractor in the Philadelphia area; Associated Builders and Constructors, Inc. ("ABC"), an association of open shop contractors, and the Chamber of Commerce ("Chamber"), an association whose members purchase construction services. The defendants are the Building and Construction Trades Council of Philadelphia ("Council"), a labor association of local trade unions, and fifty-six labor organizations who are members of the Council.⁶ There are also other unnamed union contractors, suppliers and financial institutions implicated in a conspiracy to restrain trade and monopolize the construction market in a five county geographic area.

In the construction industry owners and developers solicit bids from general contractors for particular building projects. The general contractor who receives the contract will ordinarily subcontract most of the specialty work to other subcontractors who perform the work at the job site. There is no established pattern as to the amount of work performed by the general contractor's own employees and that which is subcontracted. Some general contractors employ no construction employees other than supervisory personnel. A subcontractor is usually a separate business enterprise specializing in one phase of construction. Labor relations policy for each sub-contractor is decided initially by that business enterprise. Union subcontractors in the greater Philadelphia area have agreed to be bound by the terms of multi-employer collective bargaining agreements with the various trade unions.

The purpose of the Council is "[t]o establish and maintain legal and proper business relations and agreements between [itself] and other responsible parties, either individuals or associations, to the extent that the best [*4] interest of the building industry be served for both employers and employees." By-Laws Art. II, § 3. Its geographic jurisdiction is the five counties of Delaware Valley; Philadelphia, Chester, Bucks, Delaware and Montgomery, and "completely covers the building and construction industry, either in erection, repair, alteration or demolition." Exb. 22 at 1. More importantly for its member unions, the Council is prohibited from entering into any agreement with a contractor or employers' association which requires union members to work with non-union men. Id. at 22.

Most building trade union By-Laws have a prohibition against their members working with non-union employees or non-union firms. These clauses generally require members to report non-union jobs to the union and refuse to handle non-union goods. The General Building Contractors Association ("GBCA") represents active general contractor and subcontractor members who assign to it their rights to bargain collectively with certain defendant unions. Some of the defendant trade unions have established standard collective bargaining agreements with GBCA. The collective bargaining agreements give the union members the right not to work [*5] with non-union laborers. The GBCA member contractors hire only union employees under the terms of these agreements and never contract with subcontractors who are not on the Council's fair contractor list. The administration expense of the collective bargaining agreements is financed through an Industry Advancement Fund to which employers make contributions based on hours worked by their union employees. Contributions are required from all employers of covered workers even though such employers are not GBCA members.

The Council seeks to establish and maintain adequate wages and working conditions by members of its constituent unions by means of a Building Trades Agreement which the Council attempts to have general contractors sign.⁷ The Council has entered into over four hundred (400) of these agreements with general contractors. They require the general contractor to do business only with subcontractors who enter into collective bargaining agreements with the appropriate craft union members of the Council. The only subcontractors with whom the general contractor may

⁴ [28 U.S.C. §§ 2201-02 \(1982\)](#). Only the association plaintiffs desire injunctive relief. Altemose seeks treble damages.

⁵ [15 U.S.C. §§ 15, 26 \(1973\)](#). Section 4 of the Clayton Act provides the jurisdiction of this court, and the treble damage remedy for violations of [§§ 1 & 2](#) of the Sherman Act ([15 U.S.C. §§ 1 & 2](#)). Section 16 of the Clayton Act provides an equitable remedy.

⁶ Several of the defendant unions are no longer members of the Council.

⁷ See Appendix for Text of Forms 1, 2 and 3. The forms include a clause binding the firm and any other operation in which the signatory firm has a substantial interest, whether or not under separate corporate or company name, e.g., App. I "Scope of Obligation."

do business under such an agreement are Council approved union (so-called "fair") subcontractors. These fair subcontractors [*6] all have collective bargaining agreements with the appropriate trade or craft unions. The "fair" list is circulated by the Council throughout the industry. Since 1966, over 90% of the non-residential construction work has been performed by union contractors.

In order to obtain these subcontracting agreements from general contractors, the defendants have picketed jobsites where non-union men are working; there have been threats of violence as well as actual violence at various construction sites in the course of this picketing. The unions have also employed economic pressure on developers, owners and financial institutions to force general contractors to employ union labor exclusively. Some contractors have acceded to union demands and hire only union labor or signed an agreement not to subcontract any work to any subcontractor who has not contracted with the appropriate craft union. Although these tactics have been employed [*7] against Altemose since 1971, Altemose has refused to sign such an agreement.

In April 1971, Altemose obtained a general contract to build Valley Forge Plaza in Montgomery County, Pennsylvania. The project consisted of an office building, a hotel, movie theaters and various stores and shops. Altemose representatives had several meetings with representatives of the Council concerning the exclusive use of union labor on the project. The Altemose policy was that specialty work for the project would be given to the lowest bidding subcontractor whether or not it employed union labor. It was anticipated that this would result in unionized subcontractors for more than half the project work. The Council and its member unions insisted that unless Altemose signed a subcontractor's trade agreement there would be picketing at the jobsite.

On occasion, between August, 1971 and May, 1972, several Altemose construction projects were picketed by union members to protest Altemose's refusal to enter into a subcontractor's trade agreement with the Council. On June 5, 1972 approximately 1,000 persons, including some principals of the Council, came to the Valley Forge Plaza construction site; what was [*8] described by a Pennsylvania trial judge as a "virtual military assault" resulted in the "systematic decimation of the project. Damage was estimated at \$300,000 . . .⁸

Thereafter, negotiations took place at which time the Council repeated its demand that the Valley Forge project be built solely with union labor. Altemose refused. Picketing occurred at another Altemose job-site in November, 1973 and several projects were continuously picketed from January, 1975 through April, 1975 to protest the Altemose refusal to sign a union subcontractor agreement with the Council. After unfair labor practice charges were filed, the NLRB issued an injunction on April 22, 1975,⁹ [*9] but picketing resumed on April 28, 1975. Its stated purpose was to require Altemose to observe area wages and standards (rather than to compel it to sign a union subcontractor agreement). After further litigation before the NLRB, the picketing ceased at those sites and the Board issued its decision.¹⁰

During the period of labor dispute, material suppliers and subcontractors informed Altemose that they would no longer be involved with its construction projects because of the continuing labor problems. The pressure against non-union subcontractors consisted of threats and intimidation to force them to cease doing business with Altemose and other general contractors. Investors in the projects were urged by the unions to withdraw their financial support. The union membership and general public were urged to withdraw their funds from First Pennsylvania Bank, a major financier of the Valley Forge Project. Because of the labor unrest, Altemose also found it more difficult to obtain performance bonds for its projects and did not receive some jobs even though it had been the low bidder. Some business associations cancelled reservations for use of the Sheraton Hotel in the Valley Forge complex because of their union sympathies.

⁸ See *Altemose Const. Co. v. B.T.C.T. Council of Phila.*, 449 Pa. 194, 198, 296 A.2d 504, 508 (1972), cert. denied, 411 U.S. 932 (1973).

⁹ *Hirsch v. Building & Constr. Trades Council of Phila.*, (E.D. Pa. C.A. Nos. 75-646-647), aff'd, 530 F.2d 298. (3rd Cir. 1976).

¹⁰ See infra at n. 75-79 and accompanying text.

The union actions against other general contractors who are members of the ABC were similar in kind to those experienced by Altemose. Union sponsored picketing pressured general contractors to utilize union subcontractors; [*10] the union pressure directed at these general contractors was to replace non-union with union subcontractors on the Council's "fair" list. Union pressure was also directed toward suppliers of material and capital (i.e., investors and financial institutions) to convince them to withdraw support for the projects. It cannot be denied that the Council's actions in a sense protected union employers as well as its union members.

Count I of the complaint alleges that the unions have conspired with non-labor entities - unnamed coconspirators (i.e., union employers, suppliers, developers) - to force non-union general contractors and subcontractors out of the Philadelphia construction market and create a monopoly of union contractors in violation of [Sections 1](#) and [2](#) of the Sherman Act.¹¹ The plaintiffs contend that the unions have combined with employers of union labor in a concerted effort to control the product-market for construction services by using secondary tactics¹² to force general contractors to execute industry-wide subcontracting agreements providing for the exclusive use of union labor. The sub-contracting agreements require the general contractor to sub-contract work only to [*11] subcontractors who are parties to collective bargaining agreements with the union. The unions and union contractors are alleged to have agreed to impose direct restraints on competition in the market for construction services that restrict the construction industry's size, allocate the market and create a geographical enclave for union employers. Such conspiratorial activities without legitimate labor objectives and with predatory intent may be a violation of the antitrust laws. [Allen Bradley Co. v. Local No. 3, 325 U.S. 797 \(1945\)](#). See also, [United Mine Workers v. Pennington, 381 U.S. 657 \(1965\)](#).

Count II alleges that the unions have conspired among themselves to restrain [*13] trade and monopolize the construction market through the use of the subcontracting agreements to force non-union employers out of the market and protect the unions and their members. Antitrust liability is allegedly imposed by the use of illegal methods having substantial anti-competitive effects in the product market to achieve otherwise legitimate objectives (i.e., standardization of wage and working conditions). See [Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 \(1975\)](#). Plaintiffs argue that even if this is union conduct ordinarily legal under the labor laws, it is here subject to antitrust attack because the anti-competitive effects outweigh the benefits sought to be achieved by the labor laws. See [Meat Cutters v. Jewel Tea Co., 381 U.S. 678 \(1965\)](#).

Because of these practices engaged in by the defendants and their effect on the construction industry, Altemose alleges that it is prevented from bidding for construction work in Philadelphia County. The association plaintiffs

¹¹ [Section 1](#) of the Sherman Act ([15 U.S.C. § 1](#)) provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[*12] [Section 2](#) of the Sherman Act ([15 U.S.C. § 2](#)) provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

¹² Pressure exerted upon the employer with whom the union has a labor dispute is "primary," and lawful; pressure exerted on a neutral third party in his relations with the primary employer is "secondary," and unlawful, under [§ 8\(b\)\(4\)](#) of the National Labor Relations Act. See, St. Antoine, Secondary Boycott: From Antitrust to Labor Relations, 40 Antitrust L.J. 242 (1971); Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA [§§ 8\(b\)\(4\)](#) and [8\(e\)](#), 113 U. Pa. L. Rev. 1000 (1965); R. Gorman, Labor Law Text, 240 (1976).

claim that the union tactics are designed to force non-union labor out of the industry, increase construction costs and injure their business in violation of the Sherman Act. [*14] Defendants assert the union objective was to organize and obtain recognition and that this conduct was immune from antitrust liability by statute and case law.¹³

The issues are: (1) whether liability is imposed under the teaching of *Connell Construction Co., supra*, where unions use picketing and secondary pressure to obtain subcontracting agreements but do not succeed; (2) whether *Connell* is applicable when unions seek to organize the employees of a general contractor, and (3) [*15] whether there is sufficient probative evidence of a conspiracy between the unions and non-labor entities to present a jury question.

II. STANDARDS GOVERNING SUMMARY JUDGMENT

Cross-motions for summary judgment do not warrant the grant of summary judgment to either party unless one of them is entitled to judgment as a matter of law upon material facts not in genuine dispute. See *Manetas v. International Carriers, Inc.*, 541 F.2d 408 (3rd Cir. 1976).

In *Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90 (3rd Cir. 1982), the Court of Appeals summarized the law as follows:

Rule 56 of the Federal Rules of Civil Procedure provides that a trial court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." We have characterized summary judgment as "a drastic remedy", and have made clear "that courts are to resolve any doubts as to the existence of genuine issues of fact against the moving parties." *Ness v. Marshall*, 660 F.2d 517 at 519 (3d Cir. 1981) (quoting *Tomalewski v. State Farm Life Insurance Co.*, 494 F.2d 882, 884 (3d Cir. 1974)). Moreover, "[i]nferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion." *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (Id Cir. 1976), cert. denied, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed. 2d 748 (1977)) . . .

Id. at 95 (quoting *Hollinger v. Wagner Mining Equip. Co.*, 667 F.2d 402, 405 (3rd Cir. 1981)). While the Supreme Court has cautioned that summary judgment should be used sparingly in antitrust cases,¹⁴ summary adjudication may be granted even in these complex cases. See *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 513 F.Supp. 1100, 1140 n. 53 (E.D. Pa. 1981), appeal docketed, Nos. 81-2331, 81-2332 and 81-2333 (3rd Cir. August 24, 1981). See also, *Mid-South Grizzlies v. National Football League*, 550 F.Supp. 558 (E.D. Pa. 1982); *American Structures v. Fidelity & Deposit Co.*, 545 F.Supp. 1021 (E.D. Pa. 1982).

[*17] But it is the movant's burden to show the absence of a genuine issue of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). This burden of proof can be satisfied by affidavit or otherwise as provided in *Fed. R.*

¹³ Dean St. Antoine describes this conflict between the labor and antitrust laws as an "intractable" problem. St. Antoine, *Connell: Antitrust at the Expense of Labor Law*, 62 Va. L. Rev. 603 (1976). Professor Winter concludes that the conflict between antitrust and labor policies is "so irreconcilable that . . . the regulatory distinctions employed must be largely arbitrary - there are no general principles by which these policies can be harmonized." Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L.J. 14, 16-17 (1963). See also, Cox, *Labor and the Antitrust Laws - A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254-55 (1955).

¹⁴ See *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). One commentator has suggested that the *Poller* case rests on certain assumptions about the evidence in the case and its application to the substantive antitrust principles involved. Thus, "the often quoted general language of *Poller* is in itself no barrier to summary judgment." P. Areeda & D. Turner, *Antitrust Law* § 316 at 62 (1978). Even so the case has become a "magic wand waved indiscriminately by those opposing summary judgment motions in antitrust actions." *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977).

Civ. P. 56(e).¹⁵ When a motion for summary judgment is properly supported, Fed. R. Civ. P. 56(e) "makes it clear that 'an adverse party may not rest upon his pleading' .[I]t is incumbent upon the plaintiff to produce significant probative evidence demonstrating that a genuine issue of fact exists'"Sunshine Books Ltd. v. Temple University, supra, 697 F.2d at 96 (quoting Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 554 (5th Cir. 1980), cert. denied, 454 U.S. 927 (1981).¹⁶ [*18] Failure to discharge this burden requires the grant of summary judgment despite a party's right to trial.¹⁷ A party should not be allowed to proceed in the hope of developing evidence at trial to support his claims. Parsons v. Ford Motor Co., 669 F.2d 308, 313 (5th Cir. 1982), cert. denied, 103 S.Ct. 73 (1983).

III. SHERMAN ACT §§ 1 & 2 CLAIMS

A. Jurisdiction and Standing

The defendants challenge both the interstate commerce connection of the activities complained of and standing of the plaintiffs to contest the alleged restraints.

It is clear that the interstate commerce nexus is a prerequisite for federal jurisdiction and an element of the substantive claim under the Sherman Act. See Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 742 n. 1 (1976).¹⁸ [*20] The Sherman Act reaches "to the utmost extent of [Congress'] constitutional power." United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 558 (1944). The test focuses on the impact of the anticompetitive behavior on interstate commerce.¹⁹ See Manderville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948). In McClain v. Real Estate Bd., 444 U.S. 232 (1980), the [*19] Court concluded that to establish the requisite interstate nexus, it is only necessary that the alleged restraint "be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." Id. at 246 (quoting Hospital Building Co. v. Rex Hospital Trustees, supra, 425 U.S. at 745). Applying this test in the light most favorable to the plaintiffs, we find the requisite effect on interstate commerce present. The foreclosure of the construction market resulting from the alleged restraint would force those construction contractors affected to seek projects in other areas of the interstate market.²⁰ It would also reduce the amount of construction materials and goods supplied to contractors through interstate commerce. Moreover, the record shows that a combination of out-of-state developers and financiers provided consulting and financial support for the projects involve herein. Both the direct

¹⁵ See Zenith Radio Corp. v. Matsushita Electric Industrial Co., supra, 513 F.Supp. at 1118 n. 3.

¹⁶ Pan-Islamic involved sworn denials of any conspiracy. We are faced with the same question here. See also, Parsons v. Ford Motor Co., 669 F.2d 308, 313 (5th Cir. 1982), cert. denied, 103 S.Ct. 73 (1983) (plaintiff's failure to present significant probative evidence of conspiracy in response to defendant's sworn denials warrants summary disposition) and Zenith Radio Corp. v. Matsushita, supra.

¹⁷ Summary disposition avoids an often expensive and needless trial on the merits. See Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1167 (7th Cir. 1978), cert. denied, U.S. 982 (1979); Zweig v. Hearst Corp., 521 F.2d 1129, 1135-36 (9th Cir.), cert. denied, 423 U.S. 1025 (1975).

¹⁸ The jurisdictional reach of the Sherman Act "extends to both activities that are actually *in* interstate commerce and to activities that, though purely intrastate in character, nevertheless, substantially affect interstate commerce. Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr., 536 F.Supp. 1065, 1073 (E.D. Pa. 1982) (emphasis :n original). Because we assume that the plaintiffs' activities are intrastate in nature, our discussion is confined to the interstate ramifications of the restraint. The procedural contours and jurisdictional anomalies of the interstate commerce question are discussed in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F.Supp. 1161, 1171 n. 21 - 77 E.D. Pa. 1980) and need not be reiterated here.

¹⁹ On the history of the interstate commerce connection, see P. Areeda and D. Turner, *supra* at n. 14, Vol. I at 228-340.

²⁰ Altemose does business in other states and purchases materials from out-of-state suppliers.

ramifications of the alleged restraint and its ancillary consequences involve a not insubstantial amount of interstate commerce. See [Hospital Building Co. v. Trustees of Rex Hospital, supra](#), [425 U.S. at 745-46](#).²¹

The defendants attack the standing of both Altemose and the association plaintiffs. Defendants [*21] argue that the alleged market foreclosure affected only subcontractors rather than Altemose as the general contractor. We view this argument as foreclosed by [Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 \(1975\)](#). See [Associated General Contractors of Calif., Inc. v. Calif. State Council of Carpenters, U.S. , 103 S.Ct. 897, 910 n. 44 \(1983\)](#). The loss of business from higher labor costs is a sufficiently direct antitrust injury to establish standing under the factual matrix test adopted in this circuit. See [Midwest Paper Products v. Continental Group, 596 F.2d 574, 582-83 \(3rd Cir. 1979\); Bogus v. American Speech & Hearing Ass'n., 582 F.2d 277, 282 \(3rd Cir. 1978\).](#)

The standing of the Chamber and ABC as associations bringing suit on behalf of their members is determined by applying the factors set forth in [Hunt v. Washington Apple Comm ., 432 U.S. 333 \(1977\)](#). "[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim [*22] asserted nor the relief requested requires the participation of the individual members in the lawsuit."²² [Id. at 343.](#)

To the extent that the plaintiff associations challenge the general pattern of union conduct in securing these subcontracting agreements, the standing requirements are satisfied. Any challenge not to the agreements as anticompetitive *per se* but to the *particular* conduct of the unions in securing a specific subcontracting agreement from a particular contractor requires joinder as plaintiff the individual contractor; the organizational intent of the unions as to each individual contractor would be critical.²³ The association plaintiffs cannot fulfill the third requirement of the Court's standing test and do not have standing to assert charges on behalf of specific contractors.

Plaintiffs have alleged two distinct types of conspiracies as violative of both [Sections 1 & 2](#) of the Sherman Act.²⁴ The conspiracy averred in Count I is an illegal combination [*23] of the labor defendants with union contractors, suppliers, and lending institutions to restrain trade in and monopolize the construction market. Although identical in purpose and market effect, the conspiracy alleged in Count II is among the labor defendants only.

The elements of a claim under [Section 1](#) of the Sherman Act have been set forth by the Third Circuit:

In order to sustain a cause of action under [§ 1](#) of the Sherman Act, the plaintiff must prove: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy

²¹ Chief Judge Emeritus Lord's persuasive analysis of [Hospital Building, supra](#) in [Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr., 552 F.Supp. 1170, 1203 \(E.D. Pa. 1982\)](#) supports our conclusion. In *Cardio-Medical*, Judge Lord noted, while distinguishing the facts before him, that *Hospital Building* involved a substantial interstate commerce nexus through the interstate purchase of building supplies and financing. Accord, [Schnabel v. Building Trades Council of Phila., Etc., C.A. No. 82-2256, Slip. Op. at 28 \(E.D. Pa. April 13, 1983\)](#). Because we have analyzed the nexus between the alleged restraint and interstate commerce and found that jurisdiction is established, we need not delve into the academic quandary rooted in a more liberal reading of *McClain*. See e.g., [Pao v. Holy Redeemer Hospital, 547 F.Supp. 484, 488-89 \(E.D. Pa. 1982\)](#).

²² The Court quoted extensively from [Worth v. Seldin, 422 U.S. 490, 511-12 \(1975\)](#). Accord, [Phila. Citizens in Action v. Schweiker, 669 F.2d 877, 880 n. 1 \(3rd Cir. 1982\)](#).

²³ See infra at p.26.

²⁴ See [supra at pp. 8-12.](#)

Unless the particular restraint falls within a category that has been judicially determined to be illegal per se, the legality of a restraint challenged under [§ 1](#) of the Sherman Act must be assessed under the rule of reason. Under the rule of reason standard, only those restraints upon interstate commerce which are [*24] unreasonable are proscribed by [§ 1](#) of the Sherman Act.²⁵

[Martin B. Glauser Dodge Co. v. Chrysler Corp.](#), 570 F.2d 72, 81-82 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978) (citations omitted).

In addition to the dual conspiracies to restrain trade in violation of [Section 1](#), plaintiffs have alleged two distinct conspiracies to monopolize in violation of [Section 2](#). See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, *supra*, 513 F.Supp. at 1319. A conspiracy to monopolize requires, (1) "proof of concerted action deliberately entered into with the specific intent to accomplish the unlawful result of achieving a monopoly;" and (2) proof of "at least one overt action in furtherance of the conspiracy." L. Sullivan, *Handbook of Antitrust Law* 132-33 (1977). Proof of such a conspiracy [*25] does not require successful accumulation of monopoly power." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, *supra*, 513 F.Supp. at 1319.²⁶ These claims, like those under [Section 1](#), also require proof of illicit concerted action or combination. In practice, the conspiracy claims under [Sections 1 & 2](#) in both counts are supported by similar, if not identical, evidence. Id. at 1320. See [Edward J. Sweeney & Sons v. Texaco](#), 637 F.2d 105, 118 (3rd Cir. 1980). The combinations which plaintiffs allege to support the conspiracies to monopolize violating [Section 2](#) are the same combinations alleged to be a restraint of trade violating [Section 1](#); therefore, a failure of proof regarding the existence of concerted action and unity of purpose on the [Section 2](#) claims condemns the claims under [Section 1](#) as well.

[*26] B. Count II - Exclusivity of Labor Law Remedies for Unilateral Union Activities - Impact of *Connell*

Labor's partial exemption from the antitrust laws represents an attempt of both Congress and the courts to reconcile the conflicting policies expressed in the labor and antitrust laws. In labor-antitrust cases, we must first determine whether the labor exemption is applicable and, if the conduct is not exempt, then determine liability under traditional antitrust principles. See [Larry V. Muko, Inc. v. Southwestern Pa., Etc.](#), 670 F.2d 421, 427 (3rd Cir. 1982) cert. denied, 103 S.Ct. 229 (1982) ("Muko" II). Because the defendants argue that both statutory and non-statutory exemptions apply to the conduct at issue, it is necessary to explore the Court's recent pronouncement in the construction industry context.

In [Connell Construction Co. v. Plumbers and Steamfitters Local 100](#), 421 U.S. 616 (1975),²⁷ the Court, dividing 5 - 4, reversed a judgment for union defendants on the ground that a subcontracting agreement was exempt from

²⁵ Although the plaintiffs argue that the conduct in this case is a species of group boycott which requires application of the *per se* rule under [Klors, Inc. v. Broadway-Hale Stores, Inc.](#), 359 U.S. 207 (1959), the recent decision in *Muko* II suggests otherwise. [Larry V. Muko, Inc. v. Southwestern Pa., Etc.](#), 670 F.2d 421 (3rd Cir.), cert. denied, 103 S.Ct. 229 (1982).

²⁶ Attempted monopolization by combination is discussed in [American Tobacco v. United States](#), 328 U.S. 781 (1946). As stated by Professor Sullivan, "there is a substantial area of potential overlap between the offenses of conspiracy to restrain trade, conspiracy to monopolize . . ." Sullivan, *Antitrust*, *supra* at 133. Professors Areeda and Turner find any attempted distinction between conspiracies under [Sections 1 & 2](#) redundant. P. Areeda and D. Turner, *supra*, n. 14 at 358.

²⁷ Professor Handler has called *Connell* the "principal culprit" in making the treatment of labor unions under the antitrust laws one of the most frustrating areas of antitrust jurisprudence. Handler, *Reforming the Antitrust Laws*, 82 *Colum. L. Rev.* 1287, 1339 (1982). The decision has been severely criticized for its disconcerting impact in the field. See King & Smith, *New Antitrust Developments Affecting Labor Law*, 33 *Syracuse L. Rev.* 945, 985-93 (1982); Handler and Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 *Colum. L. Rev.* 459 (1981); Casey and Colzillo, *Labor-Antitrust: The Problems of Connell and a Remedy That Follows Naturally*, 1980 *Duke L. J.* 235 (1980); Supreme Court, 1974 Term, 89 *Harv. L. Rev.* 234 (1975). See also, [Muko v. Southwestern Pa., Etc.](#), (*Muko I*) 609 F.2d 1368, 1377 (3rd Cir. 1979) (Aldisert, J., dissenting).

federal antitrust law, it held that a subcontracting agreement, "which is outside the context of a collective bargaining relationship and not [*27] restricted to a particular jobsite, but which nonetheless obligates a [general contractor] to subcontract work only to firms that have a contract with [the trade union]", stated a cause of action under federal antitrust law. *Id. at 635*. The case was remanded for consideration of whether the agreement did in fact violate the Sherman Act.

[*28] In *Connell*, Local 100, a bargaining representative for the plumbing and mechanical trades in Dallas, sought to compel general contractors to agree that in letting subcontracts for mechanical work they would deal only with firms that were parties to the union's current collective bargaining agreement. The union disclaimed any interest in representing the general contractors' employees. When Connell, a general contractor, refused to sign such an agreement, the union positioned a single picket at one major construction site whereupon construction at the site came to a halt. Connell filed suit in state court to enjoin the picketing, and the union removed the case to federal court. Connell signed the union agreement under protest and amended its complaint to claim the agreement violated Sections 1 and 2 of the Sherman Act. The union defended on the ground that its labor activities were exempt from the antitrust laws. edged two

Justice Powell, writing for the majority, acknowledged two types of labor exemption from operation of the antitrust laws. First, the statutory exemption provided by the Clayton and Norris-LaGuardia Acts protects unilateral union activity such as secondary picketing [*29] and boycotts.²⁸ Second, there is a nonstatutory exemption, which "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions". *421 U.S. at 622*.

The executed union-subcontractor agreement with Connell was a union combination with the employer, a non-labor entity; the Court held that the statutory exemption accorded labor organizations did not apply. Addressing the non-statutory exemption,²⁹ the Court found that the agreements excluded non-union subcontractors from a portion of the market even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. [*30] Because the agreements imposed direct restraints on the product market not following naturally from the elimination of competition over wages and working conditions, it contravened antitrust policy to a degree not justified by labor policy and the nonstatutory exemption was not available.

The Court then considered the union's argument that the agreement was specifically allowed by the construction industry proviso to Section 8(e) of the National Labor Relations Act (hereinafter NLRA).³⁰ The Court held that

²⁸ The statutory exemption is grounded in § 6 and § 20 of the Clayton Act ([15 U.S.C. § 17](#); [29 U.S.C. § 52](#)) and §§ 4, 5, 13 of the Norris-LaGuardia Act ([29 U.S.C. §§ 104, 105, 113](#)) which declare that labor unions are not combinations in restraint of trade and exempt specific union activities from the operation of the antitrust laws. See *infra* at n. 37. See also *United Mine Workers v. Pennington*, [381 U.S. 657, 661-62 \(1965\)](#); *Muko I*, *supra* [609 F.2d at 1372](#).

²⁹ Labor policy contemplates some lessening of business competition by the elimination of competition regarding wages and working conditions. See *United Mine Workers v. Pennington*, [381 U.S. 657, 666 \(1965\)](#); *Meat Cutters v. Jewel Tea Co.*, [318 U.S. 676, 692-93 \(1965\)](#). For a history of the non-statutory exemption see *Consol. Exp. Inc. v. N.Y. Shipping Assn.*, [602 F.2d 494, 513-15 \(3rd Cir. 1979\)](#), vacated, [448 U.S. 902](#) on remand [641 F.2d 90 \(3rd Cir. 1980\)](#), mandamus and prohibition denied, sub. nom., *In re Int'l Longshoreman's Assn.*, [451 U.S. 905 \(1981\)](#) (hereinafter Conex).

³⁰ [29 U.S.C. § 158\(e\)\(1976\)](#). Section 8(e) provides that:

[i]t shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . .

Section 8(e) extends only to agreements in the context of collective bargaining relationships [*31] and "possibly common-situs relationships on particular jobsites." 421 U.S. at 633. Finally, the Court held that the remedies under the NLRA for violation of Section 8(e) were not exclusive. Thus, an antitrust suit based on illegal hot cargo agreements was not inconsistent with the remedial scheme of the NLRA.

[*32] Justice Stewart, joined by Justices Douglas, Brennan, and Marshall, dissented on the ground that the union's conduct was regulated solely by the NLRA and was immune from federal antitrust prosecution because Congress intended the labor laws to provide the exclusive remedies for the unlawful conduct alleged by Connell.³¹ Justice Douglas in a separate dissent emphasized that Connell failed to allege or prove any conspiracy between the union and the other unionized subcontractors. This infirmity in the complaint in his view placed the union's conduct under the exclusive purview of the labor laws.

[*33] The Court majority held the statutory exemption inapplicable because the union agreement was with a non-labor party. It is not clear if the Court was referring to the union-Connell agreement alone or to the union agreements with Connell and other general contractors. It seems more likely that the Court viewed the union-Connell agreement itself an antitrust combination³² and held that the statutory exemption applied only to a union acting alone and not to any union-non-labor agreement.³³

In considering the claim of non-statutory exemption, the Court pointed to three significant factors in finding the direct restraint imposed by the subcontracting agreement had substantial anticompetitive effects [*34] not flowing from legitimate labor concerns. First, the union had no interest in representing Connell's employees so that the congressional policy in favor of collective bargaining was not implicated. 421 U.S. at 626. This takes the agreement outside of the scope of the construction industry proviso of § 8(e) of the NLRA as well. Id. at 633. The Court pointed out that in a collective bargaining context, labor law safeguards contained in Sections 8(b)7 and 8(b)(4)(b) come into play, but "[T]hese careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the provision to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing." 421 U.S. at 633. See also, Woeilke & Romero Framing, Inc. v. NLRB, U.S. , 102 S.Ct. 2071, 2082 n. 16 (1982). Because the union did not seek to represent the general contractor's employees in collective bargaining, labor law protections were not present and antitrust laws applied.

Second, the multi-employer collective bargaining agreement with subcontractors which the union action against Connell sought [*35] to protect contained a "most favored nation" clause by which the union agreed that if it granted a more favorable contract to any employer it would extend those terms to all other member subcontractors. In this manner, the unionized subcontractors would be protected from competition on all subjects covered by the multi-employer agreements, even if unrelated to wages and working conditions. Third, because the subcontractor agreements prohibited contracting with any firm that did not have a contract with Local 100, the union had the

The construction industry proviso to this subsection, however, exempts from its operation any agreement "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . ." Id.

³¹ Both the majority opinion and the dissent in *Connell* apparently agreed that Congress rejected the use of antitrust sanctions to curb secondary union activities when it considered revising the NLRA in 1947. Compare 421 U.S. at 634 & n. 15 (Powell, J.) with id. at 641 (Stewart, J. dissenting). Justice Powell found that this legislative choice had no relevance to the issue whether Congress intended to preclude antitrust attack when hot cargo agreements were forbidden as unfair labor practices by the Landrum-Griffin amendments to the NLRA enacted in 1959. 29 U.S.C. § 158(e) (1976). See 421 U.S. at 634.

³² The complaint alleged that the subcontractor agreement violated §§ 1 & 2 of Sherman. 421 U.S. at 620-21. Moreover, immediately prior to the conclusion of the opinion, the Court stated that "the union's agreement with Connell is subject to the federal antitrust laws." Id. at 635.

³³ This assumes that a union-employer agreement is not necessarily immune from antitrust sanctions because the union's unilateral action to secure it was immune. See St. Antoine, *supra* n. 13, at 614.

power to control access to the market. This the Court said gave the union the ability to create a geographical enclave for local contractors.

Although the broad *dicta* can be read to subject all coercive union action excluding non-union firms from the subcontracting market to the antitrust laws, the aforementioned factors limit the actual holding of *Connell*. In this case, it is undisputed that Altemose did not actually sign any subcontractor agreement as did the plaintiff in *Connell*. Altemose argues that it should not have to sign an agreement with the identical market effects as those in *Connell* to validate its claim under the antitrust [*36] laws and that *Connell* forbids any direct restraints on the product market that benefit a favored employer group even when achieved by unilateral union conduct. Its claim in essence is that *Connell* proscribes action by unions among themselves to secure the type of subcontracting agreements declared unlawful in that case, or alternatively, that the antitrust laws also interdict secondary union pressure to secure a lawful "hot-cargo clause." ³⁴ This overextends the holding in *Connell*³⁵ and ignores the remedial scheme of the Taft-Hartley and Landrums-Griffin Amendments to the labor laws. The conduct alleged in Count II is without antitrust significance.

[*37] 1. Statutory Exemption Viewed in Conjunction with the Labor Laws.

The statutory labor exemption originates in the Clayton Act, [15 U.S.C. § 17](#) and [29 U.S.C. § 52](#), and the Norris-LaGuardia Act [29 U.S.C. §§ 104, 105](#) and [113](#). *Connell, supra, 421 U.S. at 621-22*: Section 6 of the Clayton Act, [15 U.S.C. § 17](#), provides:

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, 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.

Section 20 of the Clayton Act prohibits the courts from enjoining specified acts by employees that occur in the course of disputes "concerning terms or conditions of employment," and states that these acts cannot be "held to be violations of any law of the United States." [29 U.S.C. \[*38\] § 52](#).

The Norris-LaGuardia Act re-emphasizes and further expands the intended scope of the labor exemption. The Act prohibits injunctions against employees engaged in various activities during a labor dispute, even where a claim of an unlawful combination or conspiracy is made.³⁶ [*39] The right to bargain collectively is specifically protected.³⁷

³⁴ The Supreme Court in *Connell* left this question open. [421 U.S. at 684 n. 14](#).

³⁵ Although the Court did refer to the other agreements with general contractors and the multi-employer collective bargaining agreement to assess the effect on the product market, it specifically noted that *Connell* did not argue the case on a conspiracy between the union and unionized subcontractors. The Court focused exclusively on the executed agreement with *Connell* in its statement of the holding. [421 U.S. at 625 n. 2](#) and 635.

³⁶ As under the Clayton Act, the specified activities are protected only in the context of a labor dispute. A *labor dispute* is defined by the Norris-LaGuardia Act as including "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 relations of employer and employee." [29 U.S.C. § 113\(c\)](#). Contrary to the arguments advanced by the plaintiffs, we have no difficulty in finding that the parties were engaged in a labor dispute within the meaning of [§ 113\(c\)](#). See [Marine Cooks & Stewards v. Panama Steamship Co., 362 U.S. 365 \(1960\)](#); [NLRB v. Rice Milling Co., 321 U.S. 665 \(1951\)](#); [Utilities Ser. Eng. v. Colo. Bldg. & Const. Trades, 549 F.2d 173, 176-77 \(10th Cir. 1977\)](#).

³⁷ [29 U.S.C. § 102](#) provides:

Although the Act does not by its terms provide a labor exemption from antitrust laws, "it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H. A. Artists & Associates v. Actors' Equity Association*, 451 U.S. 704, 714 (1981). See Sullivan, *supra* at 723.

The seminal case regarding the statutory exemption is *United States v. Hutcheson*, 312 U.S. 219 (1941).³⁸ [*41] *Hutcheson* involved a nationwide jurisdictional dispute between the Carpenters' and the Machinists' unions. Pursuing its jurisdictional objective, the Carpenters struck and picketed the Anheuser-Busch Brewing Company, picketed another [*40] company located next to Anheuser-Busch on land leased from Anheuser-Busch, and asked union members and their friends for a national boycott of Anheuser-Busch beer. Officers of the Carpenters were charged with a criminal violation of the Sherman Act.³⁹

The Court found no antitrust violation. It rejected the Government's argument that strikes growing out of jurisdictional disputes are Sherman Act violations:

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 of the Clayton Act are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232 (footnote omitted). The Court then considered whether the picketing of Anheuser-Busch and its tenant and the call for a consumer boycott was within the immunity granted to labor unions by Section 20 of the Clayton Act and reasoned that this conduct was lawful unless the enlistment of employees of other employers made it a violation. The Court held there was antitrust immunity⁴⁰ by reading in the Clayton Act the Norris-LaGuardia Act's definition of a labor dispute which applies "regardless of whether or not the disputants stand in the proximate relation of employer and employee."⁴¹ In the Court's view, the Sherman, Clayton, and [*42] Norris-LaGuardia Acts, read together, provide "a harmonizing text of outlawry of labor conduct."⁴² As recently emphasized by the

Whereas under prevailing economic conditions. . . the individual unorganized worker is commonly helpless to exercise actual liberty or contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his own employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

³⁸ The first case to employ a species of the statutory exemption was *Milk Wagon Drivers, Union Local 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940). There the Court noted that federal courts did not have jurisdiction to grant injunctions in cases involving labor disputes under the Norris-LaGuardia Act even though a secondary boycott in violation of the Sherman Act was alleged. *Id. at 103*. In *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940) the Court discussed the Clayton and Norris-LaGuardia Act provisions, but decided that the conduct did not violate the terms of the Sherman Act. Thus, it was not necessary to examine the statutory exemption. See *Mid-American Reg. Bar. v. Will County Carpenter, District Council*, 675 F.2d 881, 885 n. 11 (7th Cir.), cert. denied, 103 S.Ct. 132 (1982). Apex is sometimes considered the origin of the non-statutory exemption because the unions' goal of the elimination of price competition based on the differences in labor standards was not the type of restraint in price competition prohibited by the Sherman Act. See, *Conex, supra*, 602 F.2d at 513-14.

³⁹ *312 U.S. at 220*.

⁴⁰ *Id. at 232-37*.

⁴¹ *29 U.S.C. § 113(c) (1976)*.

Court "under *Hutcheson*, no federal injunction may issue over a 'labor dispute', and § 20 [of the Clayton Act] removes all such allowable conduct from the taint of being a violation of any law of the United States, including the Sherman Act'." [*H. A. Artists, supra, 451 U.S. at 715*](#) (quoting [*Hutcheson, 312 U.S. at 236*](#)).

The teaching of *Hutcheson*, therefore, is that union actions immune from injunction under the Clayton or Norris-LaGuardia Acts are also immune from antitrust treble damages or criminal prosecutions. *Hutcheson* in effect overruled both *Duplex Printing Press Co. v. Deering*⁴³ and *Bedford Cut Stone Co. v. Journeyman Stone Cutters Ass'n.*⁴⁴ which had previously subjected these union tactics to the antitrust laws. See [*National Woodwork Mfg. Ass'n. v. NLRB, 386 U.S. 612, 623 \(1967\)*](#). *Hutcheson* made clear that these and other forms of secondary pressure were protected by the Norris-LaGuardia Act's definition of "labor dispute" [*43] and were free from injunctive restraint;⁴⁵ [*44] since the conduct was not subject to injunctive restraint; injunction, it was also immune from the antitrust laws. See [*Ramsey v. UMW, 401 U.S. 302, 313 \(1970\)*](#). After *Hutcheson*, the secondary pressures such as those brought to bear on Altemose in this case were no longer deemed illegal.⁴⁶

[*45] Congress enacted the Taft-Hartley Act⁴⁷ in 1947 to remedy a perceived imbalance in the labor relations field. In [*Section 8\(b\)\(4\)*](#) Congress outlawed pressure tactics with certain secondary objectives⁴⁸ in order to confine

⁴² [*312 U.S. at 231*](#).

⁴³ [*254 U.S. 443 \(1921\)*](#). *Duplex* was a private Sherman Act suit to enjoin a peaceful, nationwide, secondary boycott in aid of organizational efforts' at the plaintiff's factory, effected, first, by refusal of union members employed by plaintiff's customers to handle non-union manufactured goods, and second, by inducing customers to cease dealing with the plaintiff.

⁴⁴ [*274 U.S. 37 \(1927\)*](#). In *Bedford Stone* the Court condemned a union's unilateral refusal to work on plaintiff's non-union quarry stone brought to the construction worksite and held the union's conduct to be an unlawful secondary boycott.

⁴⁵ See, e.g., [*American Fed'n. of Musicians v. Carroll, 391 U.S. 99 \(1968\)*](#) (union's pricing practices affecting orchestra leaders involved "labor dispute" and thus were exempt from antitrust); [*United States v. American Fed'n of Musicians, 318 U.S. 741 \(1943\)*](#) (per curiam) (primary and secondary boycott to prevent technological innovation in music industry); [*Milk Wagon Driver's Union Local 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91 \(1940\)*](#) (secondary organizational picketing); [*New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 \(1938\)*](#) (consumer picketing). Cf., [*Bakery Sales Drivers Local 33 v. Wagshal, 333 U.S. 437 \(1948\)*](#) (union boycott in aid of commercial dispute between bakery and retailer enjoined on ground that no labor dispute existed). See also, [*American Fed'n of Labor v. Swing, 312 U.S. 321 \(1941\)*](#) (organizational picketing).

⁴⁶ See *Handler & Zifchak*, *supra* n. 28 at 477 (citing inter alia) [*United States v. American Fed'n of Musicians, 318 U.S. 741 \(1943\)*](#) (per curiam) (Sherman Act injunction denied against union efforts to prevent use of recorded music in commercial music industry, including attempts to secure hot cargo agreements from employer's; lower court relied upon *Hutcheson* and *Hod Carriers* cases); [*United States v. Building & Constr. Trades Council, 313 U.S. 539 \(1941\)*](#) (per curiam) (Sherman Act indictment against recognitional picketing and refusal to handle materials delivered by rival union certified by NLRB, dismissed); [*United States v. United Bhd. of Carpenters, 313 U.S. 539 \(1941\)*](#) (per curiam) (indictment for secondary pressure and product boycott directed at company whose employees had elected rival union as bargaining agent, dismissed); [*United States v. International Hod Carriers Dist. Council, 313 U.S. 539 \(1941\)*](#), aff'd per curiam [*United States v. Carozzo, 37 F.Supp. 191 \(N.D. Ill. 1941\)*](#) (indictment for, inter alia, strikes and threats of strikes to prevent manufacturers of labor saving concrete truck-mixers from selling them to employers in Chicago, dismissed); [*Gundersheimers, Inc. v. Bakery Int'l Confectionery Workers Union, 119 F.2d 204 \(D.C. Cir. 1941\)*](#) (secondary strike to compel employer to cease importing non-union goods); [*ILGWU v. Donnelly Garment Co., 119 F.2d 892*](#), modified, [*121 F.2d 561 \(8th Cir. 1941\)*](#) (Sherman Act injunction against secondary boycott denied on basis of *Hutcheson*, *Apex*, and *Milk Wagon Drivers*; [*United States v. Gold, 115 F.2d 236 \(2d Cir. 1940\)*](#); [*United States v. B. Goedde & Co., 40 F.Supp. 523 \(E.D. Ill. 1941\)*](#) (product boycott of non-union-made building materials). The Court has subsequently cited *Hutcheson* as taking all labor disputes as defined by the Norris-LaGuardia Act, outside of the reach of the Sherman Act. [*American Fed'n. of Musicians v. Carroll, 391 U.S. 99, 106 \(1968\)*](#).

⁴⁷ Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (current version at [*29 U.S.C. §§ 141-197 \(1976\)*](#)).

⁴⁸ For the changes in the law effected by the Taft-Hartley and Landrum-Griffin Amendments, see gen., *Handler & Zifchak*, *supra*, n. 28, at 471-75.

labor disputes to the situs of the primary employer.⁴⁹ [*46] Secondary tactics banned under [Section 8\(b\)\(4\)](#) may be enjoined upon petition by the NLRB⁵⁰ compensatory damages are also available under Section 303.⁵¹ It remained lawful for unions to induce customers of the primary employer to boycott the primary's goods, or to negotiate with secondary employers voluntary agreements (so-called "hot-cargo" agreements) requiring them to boycott the primary employer.⁵²

In 1959 Congress passed the Landrum-Griffin Amendments⁵³ to close loopholes in the Taft-Hartley prohibitions.⁵⁴ It became an unfair labor practice to "threaten, restrain or coerce" a person including the secondary employer in furtherance of a proscribed objective.⁵⁵ "Hot Cargo" agreements⁵⁶ [*47] and any secondary pressure to secure an unlawful cargo clause were outlawed.⁵⁷ Finally, the amendments limited primary picketing with an organizational or recognitional objective⁵⁸ and clarified the right of unions to engage in various other practices.⁵⁹

⁴⁹ [29 U.S.C. § 158\(b\)](#)4. The section prohibited unions from striking or inducing employees of a neutral, "secondary" employer to strike, to force the secondary employer either to cease dealing with the primary employer target or induce the primary to change his method of business. Thus, [T]he forms of labor boycotts condemned in Duplex and Beford Stone were for the post part outlawed as a matter of labor law." *Handler & Zifchak*, *supra*, n. 28, at 472.

⁵⁰ 10(1) of the Taft-Hartley Act, [29 U.S.C. § 160\(1\)](#).

⁵¹ § 303(b) of Taft-Hartley Act, [29 U.S.C. § 187](#).

⁵² See [Local 1976, United Bhd. of Carpenters v. NLRB \(Sand Door\)](#), *357 U.S. 93* (1958).

⁵³ Labor Management Reporting and Disclosure Act, Pub. L. No. 86257, 73 Stat. 519 (1959) (current version at [29 U.S.C. §§ 158-97](#), 401-531 (1976)).

⁵⁴ [National Woodwork Mfrs. Ass'n v. NLRB](#), *386 U.S. 612*, 633-43 (1967); [NLRB v. Servette, Inc.](#), *377 U.S. 46*, 51-54 (1964).

⁵⁵ Formerly, only inducements directed at the secondary employer's employees were proscribed.

⁵⁶ [Section 8\(e\)](#), of course, contained two provisos which exempted with certain qualifications, agreements negotiated in the construction and garment trades. [29 U.S.C. § 158\(e\)](#). The Court, however, had found those agreements with primary work preservation characteristics to be lawful. See [National Woodwork, supra](#), *386 U.S. at 644-65*; [NLRB v. Pipefitters Local 638](#), *429 U.S. 507* (1977).

⁵⁷ [29 U.S.C. § 158\(b\)\(4\)\(ii\)\(A\)\(1976\)](#).

⁵⁸ [29 U.S.C. § 158\(b\)\(7\). § 8\(b\)\(7\)\(C\)](#) proscribes much picketing for more than thirty days when the union fails to petition for a representation election under § 9(c) of the NLRA, ([29 U.S.C. § 159\(c\)](#)). Only injunctive relief was made available for violations of [§ 8\(b\)\(7\)\(C\)](#).

⁵⁹ See [29 U.S.C. § 158\(b\)\(4\)\(B\)](#) (primary strikes and picketing); [§ 158\(b\)\(4\)](#) (consumer picketing); [§ 158\(b\)\(7\)](#) (informational picketing).

The changes effected by Landrum-Griffin, italicized hereinafter, provide that it shall be an unfair labor practice for a union:

(4)(i) to engage in, or to induce or encourage *and individual employed by any person engaged in commerce or in an industry affecting commerce* to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or

(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:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to *enter into any agreement which is prohibited by sub-section (e) of this section*;

[*49] Section 303 was amended to include a damage remedy for outlawed secondary pressure. Pressure in the form of strikes, inducements to strike, or coercion to obtain or enforce a hot cargo agreement became unfair labor practices under [Section 8\(b\)\(4\)](#) and remedial by a damage action under Section 303. This is because [Section 8\(b\)\(4\)\(A\)](#) makes it illegal to coerce an employer to enter into an agreement violating [Section 8\(e\)](#), and [Section 8\(b\)\(4\)\(B\)](#) outlaws secondary pressure to enforce a voluntary hot cargo agreement, whether legal or illegal. However, no Section 303 damages remedy exists for the voluntary execution of an illegal hot cargo agreement; only injunctive relief was made available.⁶⁰

The remedial scheme embodied in the Taft-Hartley and Landrum-Griffin Amendments to the labor laws strictly limited labor's use of secondary activities but left intact its statutory exemption to the antitrust laws for the type of conduct considered in *Hutcheson*. The authorities agree that the legislative history of the Taft-Hartley Act was explicit that its remedies were exclusive with respect to conduct prohibited therein. [n61] The legislative history of [*50] the Landrum-Griffin Amendments does not contain direct evidence of exclusivity but neither does it suggest that the legislation was intended to resurrect antitrust liability.⁶² Congress in Landrum-Griffin provided a deterrent to illegal hot cargo agreements by permitting Section 303 damage actions for secondary pressure to obtain or enforce such agreements.⁶³

The legislative scheme, when [*51] viewed in conjunction with *Connell*, makes clear that absent the execution of a "hot cargo" agreement which is prohibited by [§ 8\(e\)](#), mere union pressure or coercion of whatever form is regulated

[*48] (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;*

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of [section 159](#) of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *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, of 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.*

⁶⁰ See [29 U.S.C. § 160\(1\)](#).

⁶² This conclusion draws support from the overwhelming number of scholars and commentators who have examined the question See cf. St. Antoine, *supra*, n. 13 at 603; Handler & Zifchack, *supra*, n. 28, at 514-15, Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term - 1977*, 77 Colum. L. Rev. 979 (1977); Note the Supreme Court, 1974 Term, 89 Harv. L. Rev. 47 at 237 (1975); Note, 21 Vill. L. Rev. 342, 351-353 (1975-76); Note, 61 Cornell L. Rev. 436, 459 (1976). See [Connell, supra, 421 U.S. at 640-44](#) (Stewart J., dissenting).

⁶³ Justice Stewart persuasively argued that the sequence of events occurring during the debate of the bill reveals "unmistakeably" that Congress chose with great care the labor law remedy over the antitrust remedy. [421 U.S. at 634, 651-54](#).

exclusively under the labor laws by [Section 8\(b\)\(4\)](#) enforcement and damage actions under Section 303.⁶³ Here, even if the subcontracting agreements sought Section 303, from Altemose and members of the ABC violated [Section 8\(e\)](#) because no agreement was voluntarily executed, Count II at most alleges violations of the secondary boycott prohibitions of [Section 8\(b\)\(4\)](#). Union picketing and violence designed to secure an unlawful [Section 8\(e\)](#) agreement would violate [Section 8\(b\)\(4\)\(a\)](#) and possibly [Section 8\(b\)\(1\)\(a\)](#). The numerous other secondary activities which plaintiffs allege as overt acts in a union-Council conspiracy to force Altemose out of business are also regulated exclusively by the labor laws. Secondary pressure applied against the various *subcontractors, suppliers and developers*, to force these third parties to bring pressure on the primary employer target (Altemose) to accede to union demands, would be a secondary boycott in violation of [Section 8\(b\)\(4\)\(b\)](#). And the [*52] unions' attempts to force existing non-union subcontractors off the job under the subcontracting agreements would violate [Section 8\(b\)\(4\)\(b\)](#). As recently stated " . . . the legislative history of [Section 8\(b\)\(4\)](#) manifests a clear Congressional intention to remedy illegal secondary activities exclusively by way of the labor laws. Recovery of treble damages by way of the antitrust laws, for the same illegal activities, is prescribed" at least when the unions act alone. [C & K Coal Co. v. U.M.W., 537 F.Supp. 480, 503 \(W.D. Pa. 1982\)](#), aff'd in part, [704 F.2d 690 \(3rd Cir. 1983\)](#) (citing [Allied Inter. v. Int. Longshoremen's 640 F.2d 1368, 1381 \(1st Cir. 1981\)](#)).

The distinction between the facts of this case, where union pressure was used to try to force Altemose to sign the sub-contracting agreement, and *Connell*, where the contractor actually did sign the agreement, [*53] is decisive. Here the full panoply of remedies under the labor laws, including the damage remedy under Section 303, were available to Altemose and members of the plaintiff associations for union coercion to secure an illegal subcontract agreement or illegal union secondary pressure on third parties. In either case, [Section 8\(b\)\(4\)](#) proscribed these activities, and the labor laws provide the exclusive remedy.

In *Connell*, because the contractor signed the agreement, Section 303 did not provide a damage remedy for the violation of [Section 8\(e\)](#) itself. Thus, the antitrust remedy was not cumulative⁶⁴ and the statutory exemption was inapplicable. But the union conduct in this case which forms the basis for the conspiracy alleged in Count II is regulated exclusively under the labor laws and is statutorily immune from the antitrust laws. See [Allen Bradley v. Electrical Workers 325 U.S. 797, 809 \(1945\)](#); [Hunt v. Crumboch, 325 U.S. 821, 825 \(1945\)](#); [Jou-Jou Designs v. Intern. Ladies. Etc., 643 F.2d 905, 910 \(2nd Cir. 1982 cert. denied, 103 S.Ct. 174 \(1982\); \[Utilities Ser. Eng. v. Colo. Bldg. & Const. Trades, 549 F.2d 173, 178 \\(10th Cir. 1977\\)\]\(#\); \[Iodice v. Calabrese 512 F.2d \\[*54\\] 383 \\(2nd Cir. 1975\\)\]\(#\); \[Levering & Garrigues Co. v. Morrin, 71 F.2d 284 \\(2nd Cir.\\), cert. denied, 293 U.S. 595 \\(1934\\)\]\(#\).](#)

2. Non-Statutory Immunity - Existence of a *Collective Bargaining Relationship*⁶⁵

Even if the statutory immunity were inapplicable, there is a non-statutory exemption from the antitrust laws for certain activities of organized labor. This is a "shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly [*55] power in the labor market." [Conex, supra, 602 F.2d at 513](#). But secondary product or service market restraints such as those sought here must meet a high standard to warrant exemption. [Id. at 514](#). The unions organizational interest furthered by the subcontracting agreements is the justification here claimed. To determine if this confers non-statutory immunity,

⁶³ See [Connell, 421 U.S. at 634](#) ("But whatever significance this legislative choice has for antitrust suits based on those secondary activities prohibited by [§ 8\(b\)\(4\)](#), it has no relevance to the question whether Congress meant to preclude antitrust suits based on the 'hot cargo' agreements outlawed in 1959.").

⁶⁴ See [Connell, supra, 421 U.S. at 634 n. 16](#).

⁶⁵ Because plaintiffs attack the subcontracting agreements in general as violative of the labor and antitrust laws, the discussion of the collective bargaining relationship created by the agreements under [§ 8\(f\)](#) applies to the association plaintiffs as well. See infra at n. 82 and accompanying text. But since the association plaintiffs do not have standing to contest union conduct taken against individual member contractors, only the history of the labor dispute with Altemose is pertinent in determining whether a sufficient collective bargaining context existed to satisfy the criteria of *Connell*.

we must first examine the validity of the conduct under the labor laws.⁶⁶ [*56] If the conduct is unlawful under the labor laws, antitrust immunity is probably lost⁶⁷ and traditional antitrust analysis follows.⁶⁸

[*57] The history and purpose of the construction industry proviso to [Section 8\(e\)](#) is traced in *Pacific Northwest Chapter v. NLRB*, 654 F.2d 1301 (9th Cir. 1981), aff'd in part sub. nom., *Woeilke Romero Framing, Inc. v. NLRB*, U.S., 102 S.Ct. 2071 (1982). In *Local 1976, United Brotherhood of Carpenters v. NLRB*, (Sand Door),⁶⁹ [*58] the Supreme Court held a union could not engage in strikes or other concerted activity to enforce "hot cargo" agreements. However, *Sand Door* suggested that employers and unions might enter into these agreements that required employees to boycott the goods or services of another party with whom the union had a dispute so long as it was done voluntarily. [357 U.S. at 108](#). Congress enacted [Section 8\(e\)](#)⁷⁰ to eliminate the loopholes for "hot cargo" agreements created by the *Sand Door* decision and to accommodate the special conditions of the construction industry.⁷¹ The intent of [Section 8\(e\)](#) has to preserve the pattern of collective bargaining existing prior to the Landrum-Griffin Amendments as well as reduce labor controversy at the site of the construction project.

⁶⁶ In *Connell* it is arguable from a reading of the Court's opinion that the antitrust exemption did not turn on the validity of the agreement under [§ 8\(e\)](#) because the Court first addressed the exemption question and then proceeded to determine the validity of the agreement under the labor laws. See *Casey*, supra n. 28, at 256 n. 117 (suggesting that the Court would have found no exemption regardless of the outcome of the [§ 8\(e\)](#) issue). Whatever academic significance this may have has been laid to rest in *Kaiser Steel Corp. v. Mullins!* [U.S., 102 S.Ct. 851 \(1982\)](#). The Court explaining the *Connell* mode of analysis stated "[W]e addressed the [§ 8\(e\)](#) issue on the merits and found that [§ 8\(e\)](#) did not allow the agreement at issue . . . [A]s a result, the agreement was subject to the antitrust laws [Id. at 860](#). In summary the Court went on "In *Connell* we decided the [§ 8\(e\)](#) issue in the first instance. It was necessary to do so to determine whether the agreement was immune from the antitrust laws." *Id.*

⁶⁷ In *Cnex*, supra, the court stated that a [§ 8\(e\)](#) violation automatically precludes recognition of non-statutory immunity. [602 F.2d at 518-19](#). But in *Muko I* the court retreated from this view suggesting that a [§ 8\(e\)](#) violation does not necessarily lead to a finding of non-exemption. [Muko I, supra, 609 F.2d at 1375](#). And the court reserved judgment on the effect of a [§ 8\(e\)](#) violation standing alone. See discussion Areeda & Turner, supra n.14, at 82-84.

⁶⁸ See *Sullivan*, supra n.27, at 730. *Casey*, supra n. 28, at 272-75. See also, *Berman Enterprises v. Local 333*, 644 F.2d 930, 935-36 (2d Cir. 1981), cert. denied, [102 S.Ct. 506 \(1982\)](#); *Grandad Bread v. Continental Banking Co.*, 612 F.2d 1105, 1110 (9th Cir. 1979), cert. denied, [101 S.Ct. 854 \(1981\)](#); *Meat Cutters Local 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979). The Third Circuit, however, has stated in dicta that an NLRB holding that agreements were legal under the labor laws was "not conclusive on the issue of their illegality under the antitrust laws." *Conex, supra, 602 F.2d at 519* (quoting *Heat Insulators v. United Contractors*, 494 F.2d 1353, 1354 (3rd Cir. 1974)). We view this language appropriate in the context of executed collective bargaining agreements which were at issue in *Cnex*. See *Meat Cutters v. Jewel Tea Co., supra, 381 U.S. 676*.

⁶⁹ [United Brotherhood of Carpenters v. NLRB, 357 U.S. 93 \(1958\). *Sand Door* was widely interpreted as permitting voluntary "hot cargo" agreements. See supra n. 53.](#)

⁷⁰ It must be remembered that [§ 8\(e\)](#) with its construction industry proviso was added to the Act by the 1959 Landrum-Griffin Amendments, P.L. 86-257, 23 Stat. 543-544. For the text of [29 U.S.C. § 158\(e\)](#), see supra at n. 31.

⁷¹ The unique nature of the construction industry is summarized in the Senate Report:

The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employed typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.

S.Rep. No. 187, 86th Cong., 1st Sess. 27, (1959) U.S. Code Cong. & Admin. News, pp. 2318, 2344; I *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* 423. With its enactment, Congress necessarily chose to tolerate a degree of "top down" pressure for unionization. See *Woeilke Romero , supra, 102 S.Ct. at 2081-82*. But the "top down" organizing effect of subcontractor agreements is limited by other provisions of the NLRA when sought in the collective bargaining context. *Id.* See gen., [29 U.S.C. § 158\(B\)\(7\)\(C\); 29 U.S.C. § 158\(f\)](#).

[*59] In defining the scope of permissible agreements under the construction industry proviso to [Section 8\(e\)](#), the *Woelke Romero* Court stated it was deciding "a question left unresolved in *Connell*: the extent the proviso shelters agreements sought or negotiated within the context of a collective bargaining relationship." [102 S.Ct. at 2076-77 n. 8](#). In *Connell*, the unions expressly disavowed any intent to organize or represent employees. [421 U.S. at 619, 631, 639](#).⁷² [*60] Because the legislative history of [Section 8\(e\)](#) revealed that Congress believed broad subcontracting clauses were part of the industry collective bargaining pattern prior to the adoption of the Landrum-Griffin Amendment of 1959,⁷³ the Court held that the construction industry provision to [Section 8\(e\)](#) is not limited to union signatory subcontracting clauses applying to jobsites at which both union and non-union workers are employed, but shelters such clauses so long as they are sought or negotiated in the context of a collective bargaining relationship. *Id. at 2083*. So the question in this case is whether the agreement can be said to be sought in the context of a collective bargaining relationship.

The NLRB has found with regard to those parties that the union picketing on various occasions was for organizational objectives.⁷⁴ On September 9, 1975, an Administrative Law Judge ("ALJ") found that the picketing of Altemose Construction sites which occurred from January 20 through April 23, 1975 and April 23 through May 1, 1975 was for organizational and recognitional objectives;⁷⁵ the ALJ inferred an organizational objective in part from the testimony of Council agent Magrann,⁷⁶ and from the resumption of picketing after April 23. Therefore, the ALJ found the union in violation of [Section 8\(b\)\(7\)](#)⁷⁷ [*61] and the NLRB upheld this decision including the finding of organizational purpose.⁷⁸ Thus, regarding these activities, Altemose is collaterally estopped from denying that the Council's conduct had an organizational purpose.⁷⁹

⁷² As previously noted, the *Connell* decision hinged on the absence of a collective bargaining relationship between the union and the general contractor. A number of courts have limited *Connell* to the proposition that a hot cargo agreement, if an unfair labor practice because secured outside of the collective bargaining practice, may be the basis of an antitrust suit. See [Gorgan v. Swanson Painting Co.](#), [682 F.2d 807 \(9th Cir. 1982\)](#); [Donald Schriver Inc. v. NLRB](#), [635 F.2d 859 \(D.C.Cir. 1980\)](#), cert. denied, [451 U.S. 976 \(1981\)](#). The NLRB general counsel has also taken this position regarding [§ 8\(e\)](#). See NLRB Guidelines for handling [§ 8\(e\)](#) Construction Industry Proviso Cases under the Supreme Court's *Connell* Decision; 9105 CCH Labor Law Reports.

⁷³ [Woelke Romero, supra, 102 S.Ct. at 2080](#).

⁷⁴ See App. Ex. 18 at 476(a).

⁷⁵ App. Ex. 18 at 482(a). NLRB Case No. 4-CP-233.

⁷⁶ App. Exh. 18 at 486(a).

⁷⁷ [222 NLRB No. 198](#) aff'd mem., [93 LRRM 3025](#) (3rd Cir. 1976). Moreover, in related cases which are referred to by the plaintiffs the Board found organizational objectives in the picketing. In [Samnoff v. Building Construction Trades Council](#), [346 F.Supp. 1071 \(E.D. Pa. 1972\)](#), rev. on other grounds, [425 F.2d 203](#) (3rd Cir.), vacated, [414 U.S. 808 \(1973\)](#), the Board on remand found the picketing violative of [§ 8\(b\)\(7\)\(c\)](#) because of its recognitional object. See [201 NLRB No. 42 at 203](#), aff'd mem., [485 F.2d 680 \(3rd Cir. 1973\)](#). See e.g., [Danielson v. I.G.W.](#), [494 F.2d 1230, 1239 \(2nd Cir. 1974\)](#) (explaining the subsequent history of Samnoff); [Samuel Long, Inc.](#), [201 NLRB No. 42 at 203](#) (finding of recognitional objective); [Hirsch v. Building & Const. Trades Council, Etc.](#), [530 F.2d 298, 304 \(3rd Cir. 1976\)](#) (finding of organizational purpose).

⁷⁸ In [Conex, supra, 602 F.2d at 503, 511](#), the court held that a prior judgment of the NLRB was entitled to preclusive effect as to all labor law issues in an antitrust action. Accordingly, the rule of collateral estoppel is applicable to prior administrative proceedings involving these parties, and the adjudicative facts are treated as undisputed for the purpose of this opinion. See [United States v. Utah Const. and Minino Co.](#), [384 U.S. 394, 422 \(1966\)](#). The plaintiffs do not contend that these administrative proceedings were inadequate to fairly present their claims. See [Nasem v. Brown](#), [595 F.2d 801, 806-07 \(D.C. Cir. 1979\)](#); [Jaden Elec. v. Int'l. Broth., Etc.](#), [508 F.Supp. 983, 988 \(D.N.J. 1981\)](#).

⁷⁹ Furthermore, Form 3 which was then in effect does not prohibit subcontracting to non-union firms as did the agreement in *Connell*; it has an ancillary purpose to organize the general contractor's employees. Any antitrust claim based on Form 3 is without merit.

However, in state court proceedings the trial court found no organizational or recognitional purpose in union conduct occurring at the Valley Forge construction site in 1972. This finding was made on application for preliminary injunctive relief. Under Pennsylvania law there must be preliminary findings to support a court's determination to issue a temporary injunction but these findings are not conclusive of the rights of any party to the litigation. Pa. R. Civ. P. § [*62] 1531(c); 18 P.L.E., Injunction § 108 at 395. On appeal from a decree which grants a preliminary injunction, the Supreme Court will "only look to see if there were any apparently reasonable grounds for the action of the court below, and . . . will not further consider the merits of the case or pass upon the reasons for or against such action . . ." *Lindenfelser v. Lindenfelser*, 385 Pa. 342, 343, 123 A.2d 626 (1956); *Drum v. Dinkelacker*, 261 Pa. 392, 105 A. 509 (1918). In affirming the grant of the injunction, the Pennsylvania Supreme Court expressly did not decide whether the activities complained of [i.e.: unlawful violent picketing] were protected or prohibited under the labor laws. See *Altemose Construction Co. v. B. & C. T. Council of Philadelphia*, 449 Pa. 194, 203 n. 8, 296 A.2d 504 (1972). Thus, these findings in the state proceedings are not determinative. Because of the organizational objective, the parties were engaged in a labor dispute within the collective bargaining context in 1975. Thus, *Connell* and *Woelke Romero* compel the conclusion that no § 8(e) violation occurred in that time frame.⁷⁹ Those activities taken to obtain subcontracting [*63] agreements prior to 1975 were also in a collective bargaining context.

[*64] In *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), cert. denied, 451 U.S. 976 (1981), the court found that an Section 8(f) prehire agreement covering the full conditions of employment of a contractor's own employees was sufficient to satisfy the collective bargaining requirement of *Connell*. The court reasoned that:

The requirement in *Connell* that there be a collective bargaining relationship only has meaning within its own context. *Connell* required a collective bargaining relationship to guarantee that a union seeking a subcontracting agreement could not sidestep § 8(b)(7) and apply unlimited secondary pressure on nonunion subcontractors. An attempt by a union to establish an § 8(f) relationship is sufficient to satisfy that concern; a union seeking an § 8(f) agreement covering wages and other terms of employment remains subject to the restrictions of § 8(b)(7). *Dallas Building and Construction Trades Council v. NLRB*, 396 F.2d 677 (D.C. Cir. 1968). Whether an ou(r) relationship is otherwise deemed to be a "collective-bargaining relationship" is a question totally academic to this case, missing the entire purpose and thrust of *Connell*.

[*65] *Shriver, supra*, 635 F.2d at 875. The court held that a subcontracting agreement sought in the context of an Section 8(f) prehire agreement does not violate Section 8(e).

Recognizing the concerns expressed in *Shriver* as well as the attendant interests of the employees of the general contractor, the court of appeals has held in related litigation that picketing directed at obtaining a subcontractor agreement is recognitional in nature and, therefore, Section 8(b)(7)(c) limitations are applicable. *Hirsch v. Building & Construction Trades Council, Etc.*, 530 F.2d 298, 303 (3rd Cir. 1976). *Altemose*, in fact, did resort to Section 8(b)(7) remedies and secured a cease and desist order in 1975.⁸⁰ Therefore, the pertinent question is whether

The unions here at the time of the picketing denied any organizational objective. The unions wanted to picket *Altemose* as long as they could and § 8(b)(7) limits this right to thirty days. Antitrust consequences from lack of organizational intent in mass picketing was inconceivable in 1972. Subcontracting agreements in the construction trade had been upheld by the courts on numerous occasions even in the absence of a collective bargaining relationship. See *Suburban Tile Center, Inc. v. Rockford Bldg. Trades Council*, 354 F.2d 1 (7th Cir.) cert. denied, 384 U.S. 960 (1966); *Construction Laborers Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Papazian v. Los Angeles Bldg. Trades Council*, 83 L.R.R.M. 2710 (C.D. Cal. 1973); *Los Angeles Bldg. Trades Council (Fowler-Kenworthy Elec. Co.)*, 151 N.L.R.B. 770 (1965); *Los Angeles Bldg. Trades Council (Couch Elec. Co.)*, 151 N.L.R.B. 413 (1965). Not until the Fifth Circuit's consideration of *Connell* had the issue of whether a collective bargaining relationship was required arisen. *Connell, supra*, 483 F.2d at 1173-74. See also, *Samnoff, supra*, 346 F.Supp. 1071 (E.D. Pa.), rev'd on other grounds, 475 F.2d 203 (3rd Cir. 1973) (Becker, J., picketing to obtain subcontracting agreement legal even absent organizational purpose) (Citing *Essex County Dist. Coun. of Carpenters, Etc. v. NLRB*, 332 F.2d 636 (3rd Cir. 1964)).

⁸⁰ See supra at n. 77. It does not appear in the record why *Altemose* did not resort to a § 8(b)(7) remedy in 1972.

Forms 1 and 2 establish a [Section 8\(f\)](#) pre-hire agreement - (i.e., whether they create a sufficient collective bargaining relationship on their face to take this case beyond the ambit of *Connell*).

An organizational purpose is evinced by the agreements themselves. See [Schrive, supra, 635 F.2d at 868 n. 11](#). Form [*66] 1 has numerous sections. Although the Recognition Section states that the agreement "is not deemed to imply direct recognition . . . under [Section 8\(b\)](#),⁸¹ this does not preclude its being organizational or recognitional in nature. The Council, of course, does not have members as individual workers but is made up of affiliate unions so that there can be no true § 9 relationship. What the agreement does provide is that all employers on the job site will enter into a collective bargaining agreement with the appropriate craft union. This is accomplished by both the subcontracting obligations section, and the direct obligations section applicable to the general contractor. The text reads:

SUBCONTRACTING OBLIGATIONS

1. The Employer agrees to provide in the specifications on doing any business with subcontractors for work on the building or construction job site that such subcontractors as a condition precedent to their commencing [*67] work on the job site will enter into collective bargaining agreements with the appropriate craft union member of the Council which is the recognized collective bargaining agent of the particular trade. In no event, will the Employer subcontract any work to any subcontractor who is not in such contractual relations or who does not achieve such contractual relations prior to commencing work.

2 A list of all subcontractors will be posted on the site of the job.

DIRECT OBLIGATIONS

The following obligations of the Employer will apply when contract has been entered into between the Employer and the Council. If, however, it has been deemed necessary by the Council to picket or take other appropriate economic action against the Employer prior to achieving contractual relations, in which even such picketing or other economic action shall be deemed to be taken for the purposes of achieving this collective bargaining agreement only to obtain accord to the portion of this contract referred to as "Subcontracting Obligation."

1. *The Employer, with reference to work required by him in the industry, agrees to enter into collective bargaining agreements with only member unions of the [*68] Council which are recognized collective bargaining agents for the particular trade or craft required for the job.*

(Emphasis added.)

Under this agreement the employer (general contractor) must enter into a collective bargaining relationship with the respective craft unions. The employer agrees to pay union wages and observe union working conditions, rules and regulations under Para. 3.

3. The Employer agrees to abide by all the rules and regulations of the respective trades affiliated with the Building and Construction Trades Council, and to comply with the rates and the specified hours as recognized by the respective trades. In the event that the employer should engage subcontractors to perform such work, then the employer agrees that such subcontractors will observe hours, wages, fringe benefits and working conditions as recognized by the different trades.

Form 1 also contains a grievance procedure⁸² and a reference to work stoppages and strikes upon termination.⁸³

⁸¹ The reference to [§ 8\(b\)](#) of the Labor Management Relations Act of 1947 is a misnomer (Representation-elections). We believe the intent was to refer to [29 U.S.C. § 159](#). [Section 8\(b\), 29 U.S.C.](#) § ?158(b) merely refers to unfair union labor practices.

All the indicia in Form 1 establish the existence of at least a pre-hire agreement under [Section 8\(f\)](#). Its purpose is to initiate a collective bargaining [*69] relationship with the general contractor and it establishes enforceable terms concerning the conditions of employment when the general contractor is the employer. It is the first step toward a more specific § 9 (a) collective bargaining agreement. The Board has certified this method of convenience bargaining. See Standard Brands, inc., [175 NLRB No. 122, 71 LRRM 1057 \(1969\)](#), and pre-hire agreements achieved through this type of bargaining are enforceable in an action under section 301 of the LMRA, [29 U.S.C. § 185](#). See [McNeff v. Todd, U.S. 51 U.S.L.W. 4497](#) (Apr. 27, 1983). It is a method to secure a multicraft contract from a general contractor which would have the "advantage not only of promoting union organization objectives within a collective bargaining context, but also of meeting the subsidiary Connell test of protecting the union employees of the general contract from being forced to work with non-union employees.⁸⁴ This agreement is far more explicit in organization purpose than that in [Los Angeles Building Construction Trades Council \(B&J Investment Co.\), 214 NLRB No. 86, 87 LRRM 1424 \(1974\)](#)⁸⁵ which the Court in Connell distinguished as a pre-hire contract under [Section I*701 8\(f\)](#). [Connell, supra, 421 U.S. at 631 n.10](#). See also, [Schriver, supra, 635 F.2d at 873 n.22](#). it is distinguished that Altemose employed workers of the respective trade unions constituting the Council.

Form 2 explicitly requires the general contractor to enter into collective bargaining agreements with member unions of the Council which are recognized collective bargaining agents for the particular craft or trade required for the job and with reference to work required by it. These agreements must contain the Union Security Clause permitted by [Section 8\(f\)\(2\)](#) of the LMRA. The plaintiffs argue that this is merely an agreement which requires the signatory contractor to enter into pre-hire agreement in futuro and it cannot be a pre-hire contract because the Council is not a labor organization composed of individual laborers. This is too formalistic a reading of [Section 8\(f\)](#). In fact, the NLRB has suggested that the execution with a Building and Trades Council of an agreement including a subcontractor's clause covering existing [*71] employees of the general contractor fulfills the criteria for a pre-hire agreement under [Section 8\(f\)](#). See Memorandum of General Counsel on Connell, 9105 at 15, 84-85 CCH Labor Reports (1976). These agreements which require an employer to enter into a collective bargaining relationship evidence sufficient organization purpose to satisfy the concerns of Connell. See [McNeff, supra, 51 U.S.L.W. at 4500 n.9](#).

The remaining arguments concerning the legality of the subcontracting agreements can be addressed seriatim. First, the particular union requirements of the agreements⁸⁶ are not illegal. [Pacific Northwest, supra, 654 F.2d at 1323](#). Shriver, supra, 635 [Pacific Northwest, supra, 654 F.2d at 1323](#). Shriver, supra, 635 F.2d at 885. Nor does lack of specification of a particular jobsite in the agreement make them illegal. [Pacific Northwest, supra, 654 F.2d 1320](#), aff'd sub. nom., [Woelke Romero, supra, 102 S.Ct. at 2083](#); [Shriver, supra, 635 F.2d at 882](#). The distribution of a list of subcontractors party to the collective bargaining agreements, the so-called "fair" contractors list, is not an illegal act in regard to Count II; whether some conspiratorial purpose can be inferred in [*72] Count I will be discussed hereafter. Finally, Altemose has no standing to challenge the Industry Advancement Fund provide for by any collective bargaining agreements to which it is not a party.⁸⁷

Because the agreements seek to establish terms and conditions of employment for then existing employees of the general contractor, a collective bargaining relationship sufficient to satisfy the concerns of *Connell* is present; the

⁸² Enforcement 2.A.

⁸³ [Id. at 2.D.](#)

⁸⁴ St. Antoine, supra n.13, at 629-30.

⁸⁵ The Board in B & J Investments referred to the agreement as a "collective bargaining contract". [214 NLRB at 563](#).

⁸⁶ See Form I, Subcontracting Obligations 1; Form 2, Employment # (2).

⁸⁷ The Industry Advancement Fun to which the contributions are made based on employee hours does not have the price fixing implications condemned in [Nat. Elec. Contractors v. Nat. Construction, 675 F.2d 492, 521 \(4th Cir. 1982\)](#). Plaintiffs' general assertions of unlawfulness under [§ 1](#) of the Sherman Act is without merit.

limitations of Section 8(b)(7)(C) are applicable and the agreements do not violate Section 8(e). Such amendments which are legal under the labor law enjoy non-statutory exemption from the antitrust laws. The union conduct alleged in Count II is statutorily immune from challenge under Sections 1 and 2 of the Sherman Act because the alleged conspiracy is in [*73] reality unilateral union activity. Alternatively, the union subcontracting agreements have sufficient organization intent to establish as a matter of law a collective bargaining relationship which provides sufficient justification for application for the non-statutory exemption to the union activities complained of here.

C. Count I - Conspiracy with Non-Labor Entities

In Count I the plaintiffs invoke *Allen Bradley Co v. Local 3, International Brotherhood of Electrical Workers, 325 U.S. 797 (1945)*, in which the Court found that labor's statutory exemption had been forfeited because the union defendant conspired with employers to restrain trade in the produce market. [n88] *Id. at 809*. The Court concluded that, "when the unions participated with a combination of businessmen 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." *Id.* See also, *Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n, 155 F.2d 799 (3rd Cir. 1946)* The plaintiffs allege that the unions have conspired with union employers, developers, suppliers [*74] and financial institutions to drive non-union contractors out of the market for construction services. Under this type of conspiracy to restrain trade in the product market, the unions can claim neither statutory nor non-statutory exemptions to the antitrust laws. See *Conex, supra, 602 F.2d at 514*. The defendants deny the existence of any conspiracy or agreement of the Council and its union members with an employer or non-labor organizations.⁸⁹

[*75] 1. Inferring Conspiracy from *Circumstantial Evidence*

Because defendants deny any conspiracy, to withstand a motion for summary judgment the plaintiffs must come forward with "significant probative evidence"⁹⁰ that the defendants had a "conscious commitment to a common scheme." See *Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 111 (3rd Cir. 1980)*, cert. denied, 451 U.S. 911 (1981); *Klein v. American Luggage Works, Inc., 323 F.2d 787, 791 (3rd Cir. 1963)*. The existence of a conspiracy by its nature is not conducive to direct proof. Circumstantial evidence must often establish the requisite concert of action. See *United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948)*; *American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)*. Accordingly, we must assess the probative value of the circumstantial evidence offered by the plaintiffs to determine if there is a genuine issue of material fact regarding the existence of a conspiracy. If the inference from the circumstantial evidence to the ultimate fact of conspiracy is not permissible as a matter of law, it cannot raise an issue of material fact to defeat a properly supported motion for [*76] summary judgment. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., supra, 513 F.Supp. at 1171*. As stated in a similar context:

When a trial court grants a directed verdict in a circumstantial evidence case, the court makes a legal determination that the narrative or historical matters in evidence allow no permissible inference of the ultimate fact urged by the opposing party. It decides that no reasonable person could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture. To permit a jury to draw an inference of the ultimate fact

⁸⁹ In *Allen Bradley*, the plaintiffs were non-New York City manufacturers of electrical equipment. The defendant was the local union representing electrical workers in the New York City. The plaintiffs challenged industry wide agreements negotiated by the union which provided that contractors would purchase equipment only from the city electrical manufacturers and the manufacturer would sell only to contractors by using labor union methods, such as strikes and boycotts. The effect of these closed shop and hot cargo agreements was to establish a market closed to competition from out-of-state manufacturers. The Court noted that the evidence of conspiracy extended beyond closed shop and hot cargo restraints imposed in the collective bargaining agreements which "standing alone would not have violated the Sherman Act." *325 U.S. at 809*.

⁹⁰ See, e.g., Affidavit of Ralph Williams, Business Representative of the Council, Exhibit 1 at 12 and 13.

under these circumstances is to substitute the experience of logical probability for what the courts described as "mere speculation." *Galloway v. United States*, 319 U.S. [372] at 395; *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d [20] at 25.

Sweeny, supra, 637 F.2d at 116.⁹¹ [*77] Thus, to withstand the motion for summary judgment, plaintiffs' circumstantial evidence of conspiracy in this case must be such that a "reasonable person could reach the conclusion on the basis of the hard evidence without resorting to guesswork or conjecture." Sweeny, supra. We scrutinize the plaintiffs' circumstantial evidence accordingly.⁹²

1. Evidence of Conspiracy in the Record

Notwithstanding an extensive record, plaintiffs have failed to set forth specifically the circumstantial evidence believed probative of a conspiracy with non-labor entities. They rely essentially on the same evidence proffered in support of Count I as probative of a conspiracy with union employers - both general contractors and subcontractors - and others. We have endeavored to segregate the [*78] evidence apparently relied on by plaintiffs.

Initially, plaintiffs note that the avowed purpose of the Council is to organize the construction industry and obtain adequate wages and working conditions. But this purpose is made lawful by the labor laws⁹² and itself cannot give rise to an inference of conspiracy with non-labor parties. The unions may achieve their goal by organizing non-union firms, pressuring non-union firms to meet area wages, or forcing them out of the market. Plaintiffs argue that the unions here chose to try to force non-union firms from the market⁹³ by picketing general contractors to obtain the subcontracting agreements restricting subcontracting to union firms. But there is no evidence in the record to suggest that the unions in seeking the subcontractor agreements tried to protect a select group of union contractors and deny non-union firms the option of becoming union or paying union scale wages. The evidence suggests the opposite; the unions' sole purpose was to organize as many contractors as possible to standardize wages and working conditions in the industry. The unions pursuit of subcontracting clauses to secure only union employment might benefit [*79] all union employers by stabilizing wage rates, but it is not probative evidence of a conspiracy with them as a matter of law under the prior precedent of the Court. See Bernhardt, The Allen Bradley Doctrine: An Accommodation of Conflicting Policies, 110 Pa. L. Rev. 1094, 1101-02 (1962).

In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court reaffirming *Allen Bradley* stated that, "[o]ne group of employers may not conspire to eliminate competition in the industry and the union is liable with the employers if it becomes a party [*80] to that conspiracy." *Id. at 665-66*. But a union may pursue a policy unilaterally and implement it even though such a policy affects some employers adversely and benefits others. Such union conduct "is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act." *Id. at 665 n. 2*. Cf., *Jou- Jou Designs, supra, 643 F.2d at 910* (the implication that certain subcontractors would benefit from a hot cargo agreement is not an allegation that they conspired to achieve it); *Smitty Baker Coal, supra*.

⁹¹ See *Sunshine Books v. Temple University, supra, 697 F.2d at 96* and discussion of *Fed. R. Civ. P. 56(e)*, *supra*, at n. 16 and accompanying text.

⁹² Although the discussion of the permissible inferences from evidence was made in the context of appeal from a directed verdict, it is equally applicable to a motion for summary judgment. See *Zenith Radio, supra, 513 F.Supp. at 1171* ("Mere speculation", in the form of an inference which is not supported by logic, is not sufficient to withstand a motion for summary judgment.) (Footnote omitted).

⁹² See *Leslie*, Principles of Labor Antitrust, 66 Va. L. Rev. 1183, 1183-88 (1980).

⁹³ The antitrust implications of this type of conduct are obvious. Where the unions seek to limit the number of firms in the product market by creating barriers to entry, a predatory purpose to erect and enforce a cartel of particular firms in the product market may be inferred. In this manner the employer cartel could regulate prices and outputs, while the union policed the arrangement to protect the dominant position of the cartel. See *Leslie*, *supra* n.93, 1190-92. This was the effect of the arrangement condemned in *Allen Bradley*.

620 F.2d at 434 (union seeking to compel all non-member coal operators to conform to union wage scale at behest of employer group does not show concert of action); Iodice v. Calabrese, supra, 512 F.2d at 390 (union secondary boycott which forced firms not to deal with non-union employer is insufficient evidence of conspiracy); Webb v. Bladen, 480 F.2d 306, 308 (4th Cir. 1971) (union secondary boycott which forced firms not to deal with non-union subcontractors was insufficient evidence of conspiracy.) A jury may not infer a union-employer conspiracy from a union's pursuit of a uniform wage and/or employment policy which indirectly benefits [*81] an employer group since the identify of interests is merely coincidental and not necessarily the product of a conspiracy. Meat Cutters v. Jewel Tea Co., supra, 381 U.S. at 720 (Goldberg J., dissenting and concurring). To infer a conspiracy from this evidence would allow juries to become the arbiters of the social and economic desirability of union action in a particular case, which is nothing more than mere speculation. We therefore find this evidence alone lacking in probative value.

The secondary pressure tactics employed by the Council ⁹⁴ against various materialmen, financial institutions, and developers to force those business entities not to do business with Altemose or any other non-union contractor, do not support an inference of conspiracy with those entities. See American Fed. of Musicians v. Carroll, 391 U.S. 99, 105 n. 8 (restraint instituted by union conduct and acquiesced to by so-called employer group was not evidence of a conspiracy); Allen Bradley, supra, 325 U.S. at 809 (union pressure alone resulting in individual refusals of all employers to buy electrical equipment not made by the union-labor is not a Sherman Act violation); Hunt v. Crumboch, supra, [*821] 325 U.S. at 822-23 (union refusal to negotiate with employer causing third party to cancel existing contract did not create a conspiracy). As the Court of Appeals recently stated, this theory "suggests that the victim who hands over his wallet to an armed robber thereby becomes a coconspirator in the armed robbery. Absent extrinsic agreement, there is no concert of action with a non-labor party . . ." C & K Coal Co., supra, 704 F.2d at 699. It would be at best "mere speculation", as well as contradictory to the intent of labor's statutory exemption, if a jury were permitted to draw an inference of conspiracy from the favorable results of union secondary tactics. See Mid-City Regional Bargaining Assn. v. Will County Carpenters District Council, 675 F.2d. 881, 886-87 (7th Cir.), cert. denied, 103 S.Ct. 132 (1982).

[*83] There is evidence of a predominantly unionized construction market. The Council is shown to have executed over eight hundred fifty (850) contracts with general contractors. The unions have collective bargaining agreements with more than four thousand (4,000) subcontractors. This active union organizational effort has resulted in approximately 90% of the construction market being unionized. The Council distributes a list of so-called "fair," i.e., union sub contractors, to general contractors with whom it executes a subcontracting agreement. This list is provided so that the general contractors will know who the union subcontractors are. There is no evidence that union-employers prompted or encouraged the distribution of the "fair" list.

The inference from these facts supports the conclusion that the unions' unilateral organizational activities were very successful. Even if this circumstantial evidence can be said to give rise to an inference of some union-employer scheme, it simply does not rise to the level of "significant probative evidence" which is required to demonstrate that a genuine issue of fact exists as to the conspiracy charged in Count I.

Although we are cognizant of [*84] a party's right to have a jury resolve disputed facts, "a party resisting a motion [for summary judgment] cannot expect to rely merely upon bare assertions, conclusory allegations or suspicions." O'Brien v. Eli Lilly Co., 668 F.2d 704, 712 (3rd Cir. 1981) (quoting Ness v. Marshall, 660 F.2d 517, 519 (3rd Cir. 1981)). That is the cumulative nature of the extensive evidence in this case. We conclude, therefore, that in absence of any proof of knowledge or intentional participation in an illegal combination or common scheme of the union with non-labor entities, summary judgment must be granted with respect to Count I.

⁹⁴ There are no antitrust consequences from the fact that the union tactics included violence directed at Altemose and other subcontractors since the Sherman Act "draws no distinction between restraints effected by violence and those achieved by peaceful means," Apex Hosiery; supra, 310 U.S. at 513. To the extent that Altemose Const. Co. v. Atlantic Cape May, Etc., 493 F.Supp. 1181, 1188 (D.N.J. 1980), differs with this conclusion, we note that its disregard of Apex Hosiery is at odds with its subsequent citation with approval by the Court in Allen Bradley, supra, 325 U.S. at 810. See also, Schnabel v. Building & Const. Trades Council of Phila., Etc., supra, at 45.

IV. CONCLUSION

We hold that the evidence in support of Count I is insufficient as a matter of law to provide an inference of conspiracy to violate [Sections 1](#) or [2](#) of the Sherman Act. We also hold that based on the evidence of record in support of Count II, any concerted action is solely among the union defendants, such union activity is protected by a statutory exemption to the antitrust laws. Alternatively, we find that the subcontracting agreements at issue have sufficient indicia of organizational intent to establish they were negotiated and enforced [[*85](#)] in a collective bargaining context and, not being in violation of [29 U.S.C. § 158\(e\)](#), enjoy non-statutory exemption from the antitrust laws. For these reasons, defendants' cross-motion for summary judgment must be granted.

(See Exhibit in original)

End of Document



Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.

United States Court of Appeals for the Ninth Circuit

February 8, 1983, Argued and Submitted ; July 5, 1983, Decided

No. 82-3262

Reporter

710 F.2d 1366 *; 1983 U.S. App. LEXIS 26121 **; 1983-2 Trade Cas. (CCH) P65,482

CASCADE CABINET CO., Plaintiff-Appellant, v. WESTERN CABINET & MILLWORK INC., Milton Skutle & Jane Doe Skutle, American Prefinish Corp. and Donald McDonald & Jane Doe McDonald, Defendants-Appellees

Prior History: [**1] Appeal from the United States District Court for the Western District of Washington.

Core Terms

lease, per se rule, competitor, rule of reason, Sherman Act, anticompetitive, horizontal, concerted, plant, summary judgment, monopolization, cabinets, cases, concerted refusal, per se violation, conspiracy, antitrust, vertical, district court, slip opinion, facilities, boycott

LexisNexis® Headnotes

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

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

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

HN1 [down arrow] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment is appropriate when the moving party demonstrates that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.

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

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

HN2 [down arrow] **Summary Judgment, Entitlement as Matter of Law**

During a summary judgment motion the court must view the evidence in the light most favorable to the party opposing the motion for summary judgment.

710 F.2d 1366, *1366LÁ1983 U.S. App. LEXIS 26121, **1

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

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

HN3 **Per Se Rule & Rule of Reason, Sherman Act**

The rule of reason, under the Sherman Act, [15 U.S.C.S. § 1](#), as its name suggests, requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.

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

HN4 **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the Sherman Act, [15 U.S.C.S. § 1](#), the per se rule's conclusive presumption of illegality is not applied to a challenged practice until experience with the particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it.

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

HN5 **Regulated Practices, Price Fixing & Restraints of Trade**

The Supreme Court described the per se violations of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), as 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.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

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 > Price Fixing

HN6 **Practices Governed by Per Se Rule, Boycotts**

710 F.2d 1366, *1366LÁ1983 U.S. App. LEXIS 26121, **1

The Supreme Court has, in antitrust cases, applied the per se rule to four categories of restraints: horizontal and vertical price fixing, horizontal market division, group boycotts or concerted refusals to deal, and tying arrangements.

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

Agreements among vertically integrated organizations are not per se illegal.

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

HN8 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Restraints solicited by a distributor but implemented by a manufacturer are not automatically per se violations. Restraints of this type come within the per se rule only if they clearly had, or were likely to have, a pernicious effect on competition and lacked any redeeming virtue.

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

HN9 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The critical inquiry in deciding whether to extend per se condemnation to conduct which does not fit easily within the limits of previously recognized per se categories is whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.

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

HN10 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), departure from the rule-of-reason standard must be based upon demonstrable economic effect.

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

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

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

HN11 [blue document icon] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The critical question in refusal to deal cases is whether the refusal to deal, manifested by a combination or conspiracy, is so anticompetitive, in purpose or effect, or both, as to be an unreasonable restraint of trade.

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

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

HN12 [blue document icon] Per Se Rule & Rule of Reason, Sherman Act

Rule of reason analysis under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), calls for a thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.

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

HN13 [blue document icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The fact that no competitive benefits are advanced in favor of a restraint does not automatically constitute it unreasonable under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#). It must first be established to be a restraint on competition and this involves a consideration of the impact of the restraint on the competitive conditions within the field of commerce in which the plaintiff was engaged and upon those commercially engaged in competition with it.

Antitrust & Trade Law > Sherman Act > Claims

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

HN14 [blue document icon] Sherman Act, Claims

To establish a cause of action for an unreasonable restraint of trade in violation of the Sherman Act, [15 U.S.C.S. § 1](#), under the rule of reason, the plaintiff must show the following elements: (1) an agreement among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN15 [blue icon] Sherman Act, Claims

In order to establish a claim for attempted monopolization under the Sherman Act, [15 U.S.C.S. § 2](#), a plaintiff must show: (1) a specific intent to control prices or destroy competition in the relevant market; (2) predatory or anticompetitive conduct directed to accomplishing this unlawful purpose; and (3) a dangerous probability of success.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN16 [blue icon] Monopolies & Monopolization, Attempts to Monopolize

In an antitrust action, in the absence of direct evidence of specific intent to monopolize, however, the level of proof required to establish the conduct element increases. In this situation, the plaintiff must introduce evidence of conduct amounting to a substantial claim of restraint of trade or conduct clearly threatening to competition or clearly exclusionary.

Counsel: Carl H. Hagens, Seattle, Washington, for Plaintiff-Appellant.

Terrence C. Brown, Seattle, Washington, for Defendants-Appellees.

Judges: Wallace, Anderson, and Schroeder, Circuit Judges.

Opinion by: WALLACE

Opinion

[*1368] WALLACE, Circuit Judge:

Cascade Cabinet Company (Cascade) appeals from a summary judgment. The district court held that Cascade had failed, as a matter of law, to establish a violation of either [section 1](#) or [section 2](#) of the Sherman Act. [15 U.S.C. §§ 1, 2](#). We affirm.

I

Viewing the evidence in the light most favorable to Cascade, we accept as true the following version of the facts. Timberland Industries, Inc. (Timberland)¹ controls a substantial part of the market for modular kitchen and vanity cabinets in western Washington. During a period of remarkable [*1369] success in the late 1970s, Timberland outgrew its cabinet manufacturing plant in Kirkland, Washington and constructed a larger plant in Woodinville, Washington. Timberland vacated the Kirkland plant, and American Prefinish Corporation (American), a manufacturer of interior [**2] millwork and lumber, leased the premises. The president of American, McDonald, was formerly the chairman of the board and president of Timberland. McDonald's brother is currently president of Timberland. Because the new Woodinville plant was constructed with state of the art technology, Timberland left most of the leasehold improvements in the Kirkland plant intact.

¹ While there is some confusion in the record, it was indicated at oral argument that Western Cabinet Company is a division of Timberland and that Timberland is the proper defendant.

Cascade, a newly formed producer of modular kitchen cabinets, obtained its first order in late 1980, a \$330,000 contract which had to be completed in February 1981. Anxious to find a site from which to conduct business, Holan, president of Cascade, visited the Kirkland plant and spoke with McDonald about subleasing the space. The facilities were ideally suited for Cascade's needs because they already contained many improvements required for the manufacture of modular **[**3]** cabinets, such as dust collecting systems, paint booths, fire sprinkling equipment, loading docks, and special wiring.

Negotiations followed, and Holan and McDonald reached an oral agreement upon all material terms. Before they reduced the agreement to writing, however, Timberland intervened. Skutle, president of the Western Cabinet and Millwork division of Timberland, telephoned McDonald and advised him that Timberland would prefer that the abandoned plant not be sublet to Cascade and that Timberland might be interested in leasing the premises again. After the telephone conversation, McDonald told Holan that American would not lease the facilities to Cascade. Holan objected, but to no avail. Cascade alleges that the refusal to lease the premises was motivated by American's desire to maintain the goodwill of Timberland, its largest customer. Timberland did not lease the plant and Cascade alleges Timberland never intended to lease it. Cascade has produced some evidence tending to show that Timberland pressured American not to sublease to Cascade because Timberland did not want a new competitor to gain such an advantageous lease.

Cascade obtained an alternate site, but was **[**4]** unable to take possession until late January and incurred substantial expenses in installing improvements. It fulfilled its order on time, but only by subcontracting out parts of the project at a higher rate than it would have cost had Cascade handled those portions of the project itself. Cascade claims that American's refusal to lease the Kirkland facilities has damaged it in the amount of \$500,000.

Cascade filed this action in federal district court against Timberland, Skutle and his wife, American, and McDonald and his wife. It alleged a concerted refusal to deal and attempted monopolization in violation of [sections 1 and 2](#) of the Sherman Act. Cascade also alleged pendent state claims for violation of Washington antitrust, contract, and tort law. A summary judgment of dismissal as to all claims was entered in favor of the defendants, and Cascade filed a timely notice of appeal. Cascade appeals only the federal antitrust claims. Our jurisdiction rests on [28 U.S.C. § 1291](#).

II

We must determine whether the conduct by Timberland and American in denying Cascade an advantageous lease violated the Sherman Act. **[**5]** [HN1](#)[↑] Summary judgment is appropriate when the moving party demonstrates that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *E.g., Mutual Fund Investors, Inc. v. Putnam Management Co.*, [553 F.2d 620, 624 \(9th Cir. 1977\)](#) (*Mutual Fund Investors*). [HN2](#)[↑] We must view the evidence in the light most favorable to the party opposing the motion for summary judgment. [Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau](#), [\[*1370\] 701 F.2d 1276, 1281 \(9th Cir. 1983\)](#) (*Klamath-Lake*).

III

We begin by analyzing Cascade's claim under [section 1](#) of the Sherman Act. [Section 1](#), which prohibits concerted activity "in restraint of trade," has been analyzed under both the "rule of reason" and the "per se" rule. [HN3](#)[↑] The rule of reason, "as its name suggests, . . . requires the factfinder to decide whether under all the circumstances of the case the restrictive practice **[**6]** imposes an unreasonable restraint on competition." [Arizona v. Maricopa County Medical Society](#), [457 U.S. 332, 343, 102 S. Ct. 2466, 2472, 73 L. Ed. 2d 48 \(1982\)](#) (footnote omitted). [HN4](#)[↑] The per se rule's conclusive presumption of illegality is not applied to a challenged practice until "experience with [the] particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Id. at 344, 102 S. Ct. at 2473*. [HN5](#)[↑] The Supreme Court described the per se violations of the Sherman Act in [Northern Pacific Railway v. United States](#), [356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 \(1958\)](#), as "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." Cascade challenges the defendants' conduct [**7] under both the rule of reason and the per se rule.

A.

Thus far, [HN6](#)¹ the Supreme Court and this court have applied the per se rule to four categories of restraints: horizontal and vertical price fixing, horizontal market division, group boycotts or concerted refusals to deal, and tying arrangements. [A.H. Cox & Co. v. Star Machinery Co., 653 F.2d 1302, 1305 \(9th Cir.1981\)](#); [Gough v. Rossmoor Corp., 585 F.2d 381, 386 \(9th Cir.1978\)](#), cert. denied, 440 U.S. 936, 99 S. Ct. 1280, 59 L. Ed. 2d 494 (1979).² Cascade argues that the defendants' conduct constitutes a concerted refusal to deal.

American did refuse to deal with Cascade in the [**8] sense that it refused to lease Cascade the Kirkland facilities, and we may assume, for purposes of this appeal, that a concert of action between Timberland and American caused this refusal to deal. Cascade and Timberland agree that they are horizontal competitors; Cascade concedes that American is not a horizontal competitor of either Timberland or Cascade. Concerted activity between Timberland and American thus does not fit within the limits of a conventional boycott:

In a conventional boycott, traders at one level (let us say wholesalers) seek to protect themselves from competition from nongroup members who are competing or who are seeking to compete at that level. They do this by taking concerted action aimed at depriving the excluded wholesalers of some trade relationship which they would need to compete effectively at the wholesale level.

L. Sullivan, *Handbook of the Law of Antitrust* 230 (1977).

In prior cases, we limited the per se rule against concerted refusals to deal to concerted activity between two or more horizontal competitors and refused to apply the rule to concerted activity between vertically related companies, even though one of them [**9] may have been the plaintiff's horizontal competitor. For example, in *Gough v. Rossmoor Corp.* a single horizontal competitor (Crestmark) of the plaintiff (Rosen) in the market for selling carpets to residents of Rossmoor Leisure World, a housing development for retired adults, conspired with the publisher of the Leisure World News, a [*1371] community newspaper, to prevent Rosen from advertising in the paper. Although the plan was clearly intended to harm Crestmark's competitor, we analyzed the practice as follows:

Such concert of action may suffice to create a conspiracy but it cannot suffice to constitute such a concerted refusal to deal as has so far been held to be *per se* unreasonable. In all cases so far holding such restraints to be *per se* unreasonable, there has been some horizontal concert of action taken against the victims of the restraint. In [Mutual Fund Investors v. Putnam Management Co., supra](#), this court rejected the contention that the refusal to deal there under fire constituted a *per se* illegal group boycott, stating "At issue is an alleged conspiracy among vertically integrated organizations and [**10] agreements among them are not *per se* illegal." [553 F.2d at 626](#).

[585 F.2d at 387](#) (footnote omitted).

Not surprisingly, defendants rely on *Gough v. Rossmoor Corp.* Although we have stated that vertical concert of activity is not *per se* unreasonable, some recent cases have carved out a limited exception to this rule. Recently, we stated that "to establish a *per se* violation of [section 1](#) [for refusal to deal], a plaintiff *generally* must show that the defendant engaged in concerted anticompetitive activity with others at the same level of market organization." [General Business Systems v. North American Philips Corp., 699 F.2d 965, 978 \(9th Cir.1983\)](#) (*General Business Systems*) (emphasis added). The word "generally" is significant because we then stated that a refusal to deal instigated by a single horizontal competitor and a vertically related company, in appropriate circumstances, may come within the *per se* rule:

² For a list of the Supreme Court precedents in each category, see [Gough v. Rossmoor Corp., 585 F.2d 381, 386](#) nn. 3-6 (9th Cir.1978), cert. denied, [440 U.S. 936, 99 S. Ct. 1280, 59 L. Ed. 2d 494](#) (1979).

HN8 [↑] Restraints solicited by a distributor but implemented [**11] by a manufacturer are not automatically per se violations. [\[A. H. Cox & Co. v. Star Machinery Co., 653 F.2d at 1302, 1306 \(9th Cir. 1981\)\]](#). Restraints of this type come within the per se rule only if they "clearly had, or [were] likely to have, a pernicious effect on competition and lacked any redeeming virtue." [Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, 637 F.2d 1376, 1386-87](#) (9th Cir.), cert. denied, 454 U.S. 831, 102 S. Ct. 128, 70 L. Ed. 2d 109 (1981), see, e.g., [Betaseed, Inc. v. U & I Inc., 681 F.2d 1203, 1235 \(9th Cir. 1982\)](#).

[General Business Systems, 699 F.2d at 978.](#)

The per se rule should never be applied automatically when the concerted refusal to deal is vertical rather than horizontal. See [A. H. Cox & Co. v. Star Machinery Co., 653 F.2d at 1306](#). Indeed, generally, it will not be applied. [General Business Systems, 699 F.2d at 978](#). To determine whether a case fits within the limited exception to the general rule, we must ask whether the particular restraint has such a "pernicious effect on competition and [is so lacking] [**12] of any redeeming virtue." [Northern Pacific Railway v. United States, 356 U.S. at 5, 78 S. Ct. at 518](#), that the conclusive presumption of the per se rule is warranted.

Following the guidelines we established in [Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030](#), Slip op. at 910 (9th Cir. 1983) (*Northrop*), we conclude that it is inappropriate to apply the per se rule to the circumstances of this case. **HN9** [↑] The critical inquiry in deciding whether to extend per se condemnation to conduct which does not fit easily within the limits of previously recognized per se categories is whether the "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." [Northrop, 705 F.2d at 1052](#), Slip op. at 936, quoting [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 1562, 60 L. Ed. 2d 1 \(1979\)](#). In conducting this inquiry, we follow the Supreme Court's admonition that "**HN10** [↑] [**13] departure from the rule-of-reason standard must be based upon demonstrable economic effect . . ." [Northrop, 705 F.2d 1052](#), Slip op. at 936, quoting [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 2562, 53 L. Ed. 2d 568 \(1977\)](#).

[*1372] It is at this juncture that Cascade fails in its bid to establish a per se violation of [section 1](#) of the Sherman Act. Cascade has failed to show any adverse effect upon competition. It is undisputed that Cascade was able to enter the market for modular kitchen cabinets and even completed its first contract on time. Although Cascade claims damages as a result of the conduct of American and Timberland, injury to a single competitor does not constitute injury to competition. E.g., [Klamath-Lake, 701 F.2d at 1292](#); [Gough v. Rossmoor Corp., 585 F.2d at 386](#); cf. [Murphy Tugboat Co. v. Crowley, 658 F.2d 1256, 1259 \(9th Cir. 1981\)](#) (holding that plaintiff's injury was not the result of conduct forbidden by the antitrust laws), cert. denied, 455 U.S. 1018, 102 S. Ct. 1713, 72 L. Ed. 2d 135 (1982). Cascade does not [**14] allege that it was unable to lease other commercial space or that Timberland interfered with its attempts to lease other space. Indeed, Cascade does not allege that Timberland had market power in the real estate market. To apply the per se rule, we would have to conclude that Timberland's successful effort to prevent Cascade from leasing the Kirkland plant is the kind of restraint that "facially appears to be one that would always or almost always tend to restrict competition and decrease output." [Northrop, 705 F.2d at 1052](#), Slip op. at 936, quoting [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. at 19-20, 99 S. Ct. at 1562](#). We cannot make such a generalization, particularly in a case in which no harm to competition is shown.

Even if Cascade had shown that the restraint had injured competition, we would be reluctant to apply the per se rule because of the lack of judicial experience with the challenged conduct. "It is only after considerable experience with certain business relationships that courts classify them as per se violations." [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. at 9, 99 S. Ct. at 1557](#); [**15] quoting [United States v. Topco Associates, Inc., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 1133, 31 L. Ed. 2d 515 \(1972\)](#).

Cascade argues that it need not prove anticompetitive effect and that it is sufficient to show anticompetitive purpose. We have stated that "**HN11** [↑] the critical question in refusal to deal cases is 'whether the refusal to deal, manifested by a combination or conspiracy, is so anticompetitive, in purpose or effect, or both, as to be an unreasonable restraint of trade.'" [Mutual Fund Investors, 553 F.2d at 626](#), quoting [Alpha Distributing Co. v. Jack Daniel Distillery, 454 F.2d 442, 452 \(9th Cir. 1972\)](#). Cascade, however, misperceives the meaning of this statement.

When the plaintiff establishes that the defendants engaged in conduct clearly falling within one of the categories to which the per se rule applies, it is not necessary to show actual anticompetitive effect; such effect is presumed. See *Northern Pacific Railway v. United States*, 356 U.S. at 5, 78 S. Ct. at 518. Thus, in establishing that the challenged [**16] conduct fits within one of the per se categories, it is often enough for the plaintiff to show that the defendants acted with anti-competitive purpose or, in other words, that the defendants intentionally engaged in conduct which, if carried out as planned, would always or almost always adversely affect competition, thus warranting application of the per se rule. Cf. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76-78 (9th Cir. 1969) (interpreting anticompetitive purpose as acting with the objective to accomplish some anticompetitive effect), cert. denied, 396 U.S. 1062, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970). Although Timberland may have acted with the motive of making things difficult for Cascade, such subjective intent does not constitute anticompetitive purpose within the meaning of our prior cases.

None of the cases cited by Cascade supports application of the per se rule to these circumstances. The group boycott in *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404 (6th Cir. 1982), injured competition by eliminating one of the companies who wanted to compete on the bid for a school project. *Id. at 409*. [**17] The conspiracy alleged in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959), also was shown to have an adverse effect on competition because it effectively eliminated the plaintiff from the relevant market. Likewise, in *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), the court found that the refusal to deal eliminated a competitor at the retail level of the relevant market and that the motivating factor of the conspiracy was to reduce price competition. *Id. at 168*.

B.

Conduct that is not conclusively presumed to be illegal under the per se rule must be proved to be unreasonable under the rule of reason test. **HN12**[¹⁵] Rule of reason analysis calls for a "thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition." *Northrop*, 705 F.2d 1050, slip op. at 934. Cascade argues that material issues of fact remain and that the district court erred in granting summary judgment against [**18] it on its *section 1* claim under the rule of reason. Because no competitive benefits can be asserted on behalf of a conspiracy to deny a new competitor an advantageous lease, Cascade argues that the competitive evils of the restraint outweigh the competitive benefits and that it was therefore entitled to have the jury rule on its *section 1* claim under the rule of reason. We rejected this very argument in *Gough v. Rossmoor Corp.*:

HN13[¹⁶] The fact that no competitive benefits are advanced in favor of a restraint . . . does not automatically constitute it unreasonable under the Sherman Act. As we have already noted, it must first be established to be a restraint on competition and this involves a consideration of the impact of the restraint on the competitive conditions within the field of commerce in which the plaintiff was engaged and upon those commercially engaged in competition with it.

585 F.2d at 389. The balancing process of the rule of reason is not applied to a particular agreement or practice until after the plaintiff has established that the challenged [**19] conduct constitutes a restraint on competition. *Id.* **HN14**[¹⁷] To establish a cause of action for an unreasonable restraint of trade in violation of *section 1* under the rule of reason, the plaintiff must show the following elements: "(1) an agreement among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition." *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1296 (9th Cir. 1983).

Cascade's attempt to establish a rule of reason violation fails for the same reason as its attempt to establish a per se violation: there is no evidence of injury to competition. Although Cascade complains of its business losses, economic injury to a competitor does not equal injury to competition. See *Klamath-Lake, 701 F.2d at 1292*; *Mutual Fund Investors, 553 F.2d at 627*. We have stressed that "it is injury to the market, not to individual firms, that is significant." *Klamath-Lake, 701 F.2d at 1292*. We hold that [**20] Cascade has failed to produce sufficient evidence to prevent summary judgment against it on its *section 1* claim.

IV

Cascade's final argument is that the district court erred in awarding summary judgment against it on its claim for attempted monopolization in violation of *section 2* of the Sherman Act. *HN15* [↑] In order to establish a claim for attempted monopolization, a plaintiff must show (1) a specific intent to control prices or destroy competition in the relevant market, (2) predatory or anticompetitive conduct directed to accomplishing this unlawful purpose, and (3) a dangerous probability of success. *Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 543-44 (9th Cir.1983)* (*Foremost*); *Janich Brothers, Inc. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir.1977)*, cert. denied, 439 U.S. 829, 99 S. Ct. 103, 58 L. Ed. 2d 122 (1978) (*Janich Brothers*).

[*1374] Cascade attempts to prove the required specific intent by direct evidence as well as by inference from the challenged conduct. Cascade's direct evidence does [**21] not show that Timberland had a specific intent to control prices or destroy competition. Although the facts, viewed most favorably to Cascade, show that Timberland may have been motivated by a desire to prevent a new competitor from leasing its abandoned plant, such an intent falls short of the requisite intent to monopolize. The single act of excluding Cascade from the vacant Kirkland facilities did not prevent Cascade from entering the market.

The conduct element of an attempted monopolization claim is closely related to the other two elements. Certain types of conduct may be relied upon to imply the necessary intent and dangerous probability of success. *Foremost, 703 F.2d at 544*; *Janich Brothers, 570 F.2d at 853-54*. *HN16* [↑] In the absence of direct evidence of specific intent to monopolize, however, the level of proof required to establish the conduct element increases. In this situation, the "plaintiff must introduce evidence of conduct amounting to a substantial claim of restraint of trade or conduct clearly threatening to competition or clearly exclusionary. [**22]" *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1030 (9th Cir.1981)* (footnote omitted), cert. denied, 459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61, 103 S. Ct. 58 (1982). Our analysis under this standard proceeds generally under the standards developed in Sherman Act *section 1* cases.³ As we have already pointed out, Cascade has failed to establish a substantial claim of restraint of trade. Thus, even if the challenged practice could satisfy the conduct element of attempted monopolization, it cannot supply an inference of the other two elements. Summary judgment was therefore appropriate.

[**23] In conclusion, we find no genuine issues of material fact relating to Cascade's antitrust claims under the Sherman Act. The antitrust laws were not intended to reach the type of conduct of which Cascade complains. The Sherman Act was enacted to protect competition in the marketplace. See *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962)*; *Murphy Tugboat Co. v. Crowley, 658 F.2d at 1259*. It was not designed, and has never been interpreted, to reach all business practices, unfair or otherwise, damaging to individual companies. The district court correctly granted the defendants' motion for summary judgment.

AFFIRMED.

³We depart from the standards under *section 1* to the extent necessary to evaluate the conduct of a single firm that would escape liability under *section 1* because of that section's limitation to concerted or contractual activity. When, as here, the plaintiff challenges concerted activity, and we hold that the conduct does not amount to a substantial claim of restraint of trade under *section 1*, our holding precludes us from finding that the conduct is the type of conduct necessary to support an inference of the other two elements of an attempted monopolization claim under *section 2*. See *Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 544 (9th Cir.1983)*; *California Computer Products, Inc. v. IBM Corp., 613 F.2d 727, 736 (9th Cir.1979)*; *Janich Brothers, Inc. v. American Distilling Co., 570 F.2d 848, 853-54 (9th Cir.1977)*, cert. denied, 439 U.S. 829, 99 S. Ct. 103, 58 L. Ed. 2d 122 (1978).

End of Document



Colorado High School Activities Asso. v. National Football League

United States Court of Appeals for the Tenth Circuit

July 5, 1983

No. 81-2278

Reporter

711 F.2d 943 *; 1983 U.S. App. LEXIS 26122 **; 1983-2 Trade Cas. (CCH) P65,484

COLORADO HIGH SCHOOL ACTIVITIES ASSOCIATION, an unincorporated association, BOULDER VALLEY SCHOOL DISTRICT NO. RE-2, a body corporate, and JEFFERSON COUNTY SCHOOL DISTRICT NO. R-1, a body corporate, Plaintiffs-Appellants, v. NATIONAL FOOTBALL LEAGUE, an unincorporated association, PETE ROZELLE, in his official capacity as Commissioner of the National Football League, CBS INC., a corporation, NATIONAL BROADCASTING COMPANY, INC., a corporation, McGRAW-HILL BROADCASTING COMPANY, INC., a corporation, and GENERAL ELECTRIC BROADCASTING COMPANY OF COLORADO, INC., a corporation, Defendants-Appellees

Prior History: [\[**1\]](#) Appeal from the United States District Court for the District of Colorado.

Core Terms

site, football, played, games, professional football, Broadcasting, telecasting, antitrust

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Sports > Sports Broadcasting Act

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Sports Broadcasting Act

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

[**HN1**](#) **Sports, Sports Broadcasting Act**

See [15 U.S.C.S. § 1293](#), in part.

Antitrust & Trade Law > Regulated Industries > Sports > Sports Broadcasting Act

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Sports Broadcasting Act

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

[**HN2**](#) **Sports, Sports Broadcasting Act**

See [15 U.S.C.S. § 1291](#).

Governments > Legislation > Interpretation

HN3 Legislation, Interpretation

In determining the scope of a statute, the court looks first to its language. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.

Governments > Legislation > Interpretation

HN4 Legislation, Interpretation

A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.

Governments > Legislation > Interpretation

HN5 Legislation, Interpretation

The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.

Counsel: Gerald A. Caplan, (Alexander Halpern), of Caplan and Earnest, Boulder, Colorado, for Plaintiffs-Appellants.

Gordon G. Greiner, (Peter C. Houtsma), of Holland & Hart, Denver, Colorado, for CBS Inc. and McGraw Hill-Broadcasting Company, Inc., for Defendants-Appellees.

Jeffrey H. Howard and Donald E. Phillipson of Davis, Graham & Stubbs, Washington, District of Columbia, for Defendants-Appellees National Football League and Pete Rozelle.

James C. Ruh of Ireland, Stapleton & Pryor, P.C., Denver, Colorado, and H. Richard Schumacher of Cahill Gordon & Reindell, New York, New York, for Defendant-Appellee National **[**2]** Broadcasting Company, Inc.

Judges: Seth, Chief Judge, Seymour, and Timbers, * Circuit Judges.

Opinion by: SEYMOUR

Opinion

[*944] SEYMOUR, Circuit Judge.

Plaintiffs Colorado High School Activities Association, Boulder Valley School District No. RE-2, and Jefferson County School District No. R-1 (hereinafter collectively referred to as CHSAA) brought this action alleging that defendants' television broadcasts of particular professional football games in 1977, 1978, and 1979 were antitrust

* Honorable William H. Timbers, Senior Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

violations under [section 2](#) of the Sherman Act, [15 U.S.C. § 2 \(1976\)](#), and the Colorado Restraint of Trade and Commerce Act, [Colo. Rev. Stat. § 6-4-101](#) (1973). Defendants are the National Football League, Commissioner Pete Rozelle, CBS, National Broadcasting Company, McGraw-Hill Broadcasting Company, and General Electric Broadcasting Company of Colorado (hereinafter collectively referred to as the NFL). The district court granted the NFL's motion for summary judgment, concluding that CHSAA had failed to state a claim under the federal statute. [Colorado \[**3\] High School Activities Association v. National Football League, 524 F. Supp. 60, 63 \(D. Colo. 1981\)](#). We affirm.

The disposition of this case requires us to construe a term found in a statutory limitation to the antitrust exemption for joint professional football television broadcast agreements.¹ The antitrust exemption, [15 U.S.C. § 1291 \(1976\)](#),² enables the member clubs of a professional football league "to pool their separate rights in the sponsored telecasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network, without violating the antitrust laws." S. Rep. No. 1087, 87th Cong., 1st sess., *reprinted in* 1961 U.S. Code Cong. & Ad. News 3042, 3042. However, this exemption is limited by [15 U.S.C. § 1293 \(1976\)](#), which was enacted to prevent such package contracts from impairing "college football gate receipts through network telecasts of professional football games at times when college games are normally played." *Id.* The limitation in [section 1293](#) was extended to cover interscholastic high school football games in 1966. [**4] [Section 1293](#) provides in relevant part:

HN1[] "The first sentence of [section 1291](#) of this title shall not apply to any joint agreement described in such section which permits the telecasting of all or a substantial part of any professional football game on any Friday after six o'clock postmeridian or on any Saturday during the period beginning on the second Friday in September and ending on the second Saturday in December in any year from any telecasting station located within seventy-five miles of the *game site* of any intercollegiate or interscholastic football contest scheduled to be played on such a date if --

...

[*945] (2) in the case of an interscholastic football contest, such contest is between secondary schools, both of which are accredited or certified under the laws of the State or States in which they are situated and offer courses continuing through the twelfth grade of the standard school curriculum, or the equivalent, and

(3) such intercollegiate or interscholastic football contest and such *game site* were announced through publication in a newspaper of general [**5] circulation prior to August 1 of such year as being regularly scheduled for such day and place."

¹ For a general discussion of the events culminating in the enactment of this legislation, see [WTWV, Inc. v. National Football League, 678 F.2d 142, 144 \(11th Cir. 1982\)](#).

² [Section 1291](#) provides:

HN2[] "The antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730) [[15 U.S.C. 12](#)], or in the Federal Trade Commission Act, as amended (38 Stat. 717) [[15 U.S.C. 41 et seq.](#)], shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under [section 501\(c\)\(6\) of the Internal Revenue Code of 1954](#) [[26 U.S.C. 501\(c\)\(6\)](#)], combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto."

15 U.S.C. § 1293 (emphasis added). At issue in this case is the construction of the term "game site" as used in this statute.

[**6] In 1977, CHSAA attempted to comply with the requirements of section 1293(3) by timely publishing an announcement that the Colorado state 4A football championship would be played "in Denver" on the second Saturday in December. In fact, the game was played in Boulder. In 1978 and 1979, CHSAA announced that the "game site" would be "in the Denver metropolitan area." The 1978 game was held in Boulder and the 1979 game in Lakewood, both on the second Saturday in December. Professional football games were telecast in the Denver area on all three Saturdays.

CHSAA contends that it identified the game site with sufficient specificity to invoke the limitation provided in section 1293, and that the broadcasts of the professional football games were therefore not exempt from the antitrust laws under section 1291. It points out that the championship games have traditionally been played on the home field of one of the finalists. Under the CHSAA playoff system, the championship finalists are not known until shortly before the final game is to be played. Thus CHSAA argues that it gave the best game site designation possible by August 1 of the relevant years. It vigorously asserts that a statutory [**7] construction requiring a more specific game site identification than CHSAA is able to give would frustrate the Congressional purpose of protecting high school football gate receipts.

Defendants contend that the plain meaning of "game site" is the particular location where the game is to be played. They argue that this meaning is required by the function that "game site" plays in the statutory scheme, and that there is no legislative history supporting a contrary construction. The district court agreed, holding that "the term 'game site' is as plain, common and clear as the term 'construction site' in a mechanics lien case or 'work site' in a labor dispute." 524 F. Supp. at 62.

This is a case of first impression. Resolution of the issue is governed by well-established principles of statutory construction. "In HN3[[↑]] determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" United States v. Turkette, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981) [**8] (quoting Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980)). "A HN4[[↑]] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979).

"Site" is defined as "the scene of an action . . . or specified activity," *Webster's Third New International Dictionary* 2129 (1976), or "the area or plot of ground on which anything has been or is to be located." *The Random House College Dictionary* 1230 (rev. ed. 1980). Therefore, the common sense, unambiguous meaning of "game site" is that particular football field or stadium where the game is to be played. This construction fulfills the function which "game site" is to perform in the statutory scheme, i.e., to provide a specific, fixed point from which to establish the 75-mile blackout radius.

We find no clearly expressed legislative intent contrary to this plain meaning. [**9] Indeed, the legislative history does not address the issue, presumably because Congress [^{*946}] did not consider the peculiar facts now before us. We note that "the HN5[[↑]] plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. " Ex Parte Collett, 337 U.S. 55, 61, 93 L. Ed. 1207, 69 S. Ct. 944 (1949) (quoting Gemsco, Inc. v. Walling, 324 U.S. 244, 260, 89 L. Ed. 921, 65 S. Ct. 605 (1945)); see TVA v. Hill, 437 U.S. 153, 184 n.29, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).

In sum, we are not inclined to ignore the plain meaning of the statute and readjust the balance of competing interests struck by Congress. See, e.g., TVA v. Hill, 437 U.S. at 194-95. The judgment is affirmed.



United States v. W. Elec. Co.

United States District Court for the District of Columbia

July 8, 1983

Civil Action No. 82-0192, Misc. No. 82-0025 (PI)

Reporter

569 F. Supp. 1057 *; 1983 U.S. Dist. LEXIS 15562 **; 220 U.S.P.Q. (BNA) 113 ***; 1983-2 Trade Cas. (CCH) P65,536; 1983-2 Trade Cas. (CCH) P65,756

UNITED STATES OF AMERICA, Plaintiff, v. WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Defendants; UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants

Subsequent History: [**1] As amended July 28, 1983 and August 5, 1983.

Core Terms

decree, reorganization plan, patents, carriers, interexchange, network, costs, facilities, divestiture, equal access, competitors, traffic, switch, intra-LATA, Modification, intervenors, inter-LATA, provisions, sublicense, functions, logo, licenses, assigned, entities, marketing, customer, manufacturers, Regional, official service, telecommunications

LexisNexis® Headnotes

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Telephone Services > Long Distance Telephone Services > General Overview

HN1 [down arrow] **Telephone Services, Local Exchange Carriers**

The court accepts a definition of "equal access" as access whose overall quality in a particular area is equal within a reasonable range that is applicable to all carriers.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

HN2 [down arrow] **Regulated Industries, Communications**

Contingent liabilities are liabilities that are attributable to pre-divestiture events, but do not become certain and are therefore not booked, until after divestiture.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

[HN3](#) [↓] Antitrust & Trade Law, Sherman Act

Since under the law a corporation is not automatically liable for the antitrust violations of its affiliates, there is no basis, it is said, for imposing liability upon entities which have not been or may not be found to have been at fault.

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

Trademark Law > ... > Similarity of Marks > Appearance, Meaning & Sound > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

[HN4](#) [↓] Monopolies & Monopolization, Actual Monopolization

Companies that emerge after the breakup of a large monopoly are generally prohibited from doing business under the name or trademark of that monopoly in a territory where the name or trademark denotes another product.

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Telephone Services > Long Distance Telephone Services > General Overview

[HN5](#) [↓] Telephone Services, Local Exchange Carriers

The principle of universal service mandates that everyone, regardless of income, has access at least to a minimum of telephone service.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Parties > Intervention > General Overview

[HN6](#) [↓] Settlements, Antitrust Procedures & Penalties Act

The Tunney Act requires a court to determine whether certain consent decrees are in the public interest.

Judges: Greene, J.

Opinion by: GREENE

Opinion

[***114] [*1061] Section I(A) of the decree entered on August 24, 1982, provides that "[not] later than six months after the effective date of [the decree], defendant AT&T shall submit to the Department of Justice for its approval, and thereafter implement, a plan of reorganization," and section VIII(J) specifies that the plan of reorganization "shall not be implemented until approved by the Court as being consistent with the provisions and principles of the decree." In accordance with these provisions, AT&T has submitted its plan to the Court following approval by the Department of Justice.¹ The intervenors were thereafter given the opportunity to raise objections; a considerable number of such objections were, in fact, filed with the Court; and AT&T and the Department of Justice, in turn, filed their own responses.

Following receipt of these papers, the [***2] Court designated certain issues for more intensive briefing and for oral argument.² Voluminous briefs were received on these issues, and argument was had thereon on June 2, 1983.

³ [***3] At that hearing, the Court [*1062] also heard testimony from three of the designated chief executives⁴ of the seven newly-established Regional Companies.⁵ Additional documents were submitted after the hearing, including one -- a letter with attachments from AT&T (see slip op. at p. 16 *infra*) -- as late as June 29, 1983.

[**4] The Court has considered all issues raised with respect to the plan of reorganization on [***115] the basis of the written materials, the oral hearing, the testimony, and the entire record herein, and it has concluded that the plan of reorganization will be approved⁶ [***5] provided that certain inconsistencies with the provisions and principles of the decree are corrected.⁷

¹ The Department required certain modifications which AT&T accepted.

² The Court, of course, considered all the provisions of the plan, including those which were not set down for hearing.

³ The four issues addressed by counsel were the allocation of the costs of equal access, the distribution of contingent liabilities arising from antitrust suits against AT&T, assignment of the Bell name and logo, and assignment of patents. Three opponents of the plan of reorganization focused on the first two issues: MCI Communications Corp., the Church of Christ *et al.*, and the National Association of Regulatory and Utility Commissioners (NARUC); three opponents focused on the last two issues: Tandy Corp., Black Citizens for a Fair Media *et al.*, and NARUC. AT&T and the Department of Justice argued in favor of the plan of reorganization on all four issues.

⁴ Zane Barnes, chief executive-designate of the Southwestern Region, testified about the costs of equal access and the assignment of switching systems. William Weiss, chief executive-designate of the Midwest Region, testified about the apportionment of contingent liabilities and the proposed Central Staff Organization. Thomas Bolger, chief executive-designate of the Mid-Atlantic Region, testified about assignment of the Bell name and logo, and assignment of patents.

⁵ The seven Regional Companies will be holding companies for the twenty-two Bell Operating Companies. The Northeast Region will include New England Telephone Co. and New York Telephone Co. The Mid-Atlantic Region will include New Jersey Bell Telephone Co., the Bell Telephone Company of Pennsylvania, the Diamond State Telephone Company, and the Chesapeake and Potomac Telephone Companies of Washington, D.C., Virginia, Maryland, and West Virginia. The Southern Region will include Southern Bell Telephone and Telegraph Co. and South Central Bell Telephone Company. The Midwest Region will include the Ohio Bell Telephone Co., Michigan Bell Telephone Co., Indiana Bell Telephone Co., Illinois Bell Telephone Co., and Wisconsin Telephone Co. The Mountain-Northwest Region will include Northwestern Bell Telephone Co., the Mountain States Telephone and Telegraph Co., and Pacific Northwest Bell Telephone Co. The Far West Region will include the Pacific Telephone and Telegraph Co. and Bell Telephone Company of Nevada. The Southwest Region will include Southwestern Bell Telephone Co. Although the Regional Companies have been identified by geographic designations throughout these proceedings, they will subsequently be adopting formal corporate names. For instance, the Northeast Region has announced that it will call itself NYNEX, while the Mountain-Northwest Region has chosen U.S. West. Except where the distinction appears to be significant, the Regional Companies and the Operating Companies will be referred to herein as the Operating Companies.

⁶ On April 20, 1983, the Court tentatively approved the Local Access and Transport Areas (LATAs) within which the Operating Companies' telecommunications services will be confined. See *United States v. Western Electric Co. and American Telephone & Telegraph Co.*, 569 F. Supp. 990 (D.D.C. 1983). The LATA applications were technically the first phase of the plan of reorganization. The parties proposed, and the Court accepted, that review of the plan of reorganization be undertaken in two

I

Equal Access

The decree requires the Operating Companies to "provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access . . . that is equal in type, quality, and price to that provided to AT&T and its affiliates." Section II(A).⁸ As the stepping stone to increased competition in the field of intercity telecommunications, the decree's equal access requirements and the implementing provisions of the plan of reorganization have generated substantial controversy. Comments filed by Operating Company executives, interexchange carriers, regulatory [*1063] commissions, consumer groups, and telecommunications associations indicate that at this stage of the proceedings⁹ there is a need to resolve three primary questions relating to equal access:¹⁰ what is it, how is it to be achieved, and who will pay for it? [**6]

[**7] A. *What Does "Equal" Mean?*

A number of the Operating Companies propose to connect AT&T's interexchange competitors to the homes or businesses of local telephone subscribers by using facilities built or upgraded specially for that purpose; AT&T, on the other hand, will in numerous LATAs gain access to subscriber lines through different facilities, many of which are already extant.¹¹ For that reason, the access provided AT&T's competitors will not be identical to that given AT&T in all places; rather, it will be technically different in certain areas and at certain times.

The Operating Companies assert that any such technical deviations will be so slight as to be imperceptible to all customers, whether [**8] of voice or of data.¹² Accordingly, they [HN1](#) urge the Court to accept a definition of "equal access" as access whose "overall quality in a particular area is equal within a reasonable range which is applicable to all carriers,"¹³ and to reject a more stringent definition which would demand access that yields

stages for the sake of speed and convenience and because the drawing of geographic boundaries naturally preceded any division of assets between AT&T and the Operating Companies. Remaining issues with respect to the LATAs are considered in Part VII *infra*.

⁷ Both AT&T and the Department have filed motions for approval of the plan of reorganization. Those motions will be acted upon after the required modifications are submitted to the Court.

⁸ The equal access obligation takes effect on September 1, 1984, and it will be phased in over a two-year period. By September 1, 1985, the Operating Companies must provide equal access to one-third of their respective access lines, and by September 1, 1986, to the remaining access lines. See Appendix B to the decree.

⁹ Under Section II(C) of the decree, the Operating Companies are not required to file their precise plans for providing equal access until six months after divestiture. That date may be unrealistically late because much of the preparation that must be completed by September 1984 cannot be undertaken by the Operating Companies until they are told whether their initial plans are acceptable. See Response of the United States to Public Comments and Action on AT&T's Proposed Plan of Reorganization, filed March 24, 1983 (hereinafter Department of Justice Response to Comments) at 187-88.

¹⁰ These issues bear, *inter alia*, on the assignment of assets and liabilities between AT&T and the Operating Companies, and they are therefore properly considered as part of the plan of reorganization.

¹¹ In only one of the seven telephone regions will this not occur. In the Northeast Region, which encompasses New York and New England, AT&T and its competitors will be served from the same switches in the same LATAs. Response of the Northeast Region to the Court's May 17, 1983 Memorandum at 2 n. **.

¹² It is asserted that even the interexchange carriers will not be able to detect any qualitative difference.

¹³ Statement of the Operating Companies Supplementing their Responses to the Court's Memorandum of May 17, 1983 Regarding the No. 4ESS Switching Systems (hereinafter Operating Company Supplement) at 2.

identical [***116] technical quality (*i.e.*, identical values for loss, noise, and echo, and identical possibility of blocking).¹⁴

[**9] The Court accepts the Operating Companies' definition and will not insist on absolute technical equality. To do otherwise would necessitate substantial dismantling and reconstruction of local telephone networks without any real benefits either to the consuming public or to AT&T's intercity competitors. This ruling, however, is based squarely upon the Operating Companies' representations that both voice and data customers will perceive no qualitative differences between AT&T transmissions and those of its competitors -- at least with respect to those portions of the transmissions carried by an Operating Company.¹⁵ The Operating Companies are well aware, however, that the Department of Justice will be monitoring the quality of the access they will provide and that the price of falling short of their assurance of equal quality will be enforcement proceedings brought by the Department.¹⁶

[**10] [*1064] The interexchange competitors, as noted, would not be disadvantaged if the Operating Companies meet the standard they have proposed. Their real complaint is that the Operating Companies will be unable to meet that standard in many of the LATAs by the means they propose¹⁷ -- a subject to which the Court now turns.

B. Which Switches Should Be Used for Access Arrangements?

First. Since the initial comments were filed regarding the first, or LATA, phase of the plan of reorganization, a number of intervenors have expressed concern over the kinds of switches the Operating Companies will use to route traffic from an interexchange carrier's point of presence in a LATA to a local Class 5 end office.¹⁸

[**11] The Court initially shared this concern, primarily because so little information about equal access planning for individual LATAs had been made available. In May of 1983, it therefore requested the Regional Companies to report in detail regarding their plans for equal access and their need in this respect for the efficient, state-of-the-art No. 4ESS switches.¹⁹ [**12] The Court asked to be apprised of any instances where an Operating Company

¹⁴ The Operating Companies state that identical per call access would be impossible, even if a uniform access configuration were imposed in each LATA, because of "normal variations of electrical characteristics of facility components and installation line-up variations . . ." Operating Company Supplement at 3.

¹⁵ The Operating Companies are not responsible, of course, for correcting any quality deficiencies that may result from an interexchange carrier's own facilities.

¹⁶ See Department of Justice Response to Comments at 187.

¹⁷ The skepticism of the interexchange competitors relates largely to the kinds of switches the Operating Companies will employ to connect the competing interexchange networks with the local Operating Company networks. See [569 F. Supp. 990](#).

¹⁸ An end office is the plant into which individual subscribers' telephone access lines feed. It is typically the point of concentration of telecommunications traffic closest to the subscriber -- *i.e.*, the point of origination or termination -- and it is decidedly local in character and function. In the Bell System hierarchy of functions, this is the facility which performs the Class 5 function, meaning that from the Class 5 end office a call is either routed directly to another end office through a Class 5 trunk (a "local" call) or it is routed to a Class 4 facility for interconnection with the "toll" network. In a number of sites, the Class 4 and Class 5 functions are located in the same facility. Under the plan of reorganization, all such facilities will be owned by the Operating Companies because of the local nature of the Class 5 function. Plan of reorganization at 16-17.

¹⁹ There are 91 such switches in the Bell System. They were first introduced in 1976 and are large, four-wire digital switches with the capacity to handle almost 700,000 call attempts per hour. Memorandum of the Midwest Regional Holding Company, May 31, 1983, at 3. The DMS-200, DMS-100/200, and the No. 5ESS switches are smaller than the No. 4ESS, but they "provide equivalent transmission and switching characteristics as the No. 4ESS." Response of Donald E. Guinn to the Court's Memorandum of May 17, 1983, at 3 n. *. These four switches are the most advanced of all switches in use today.

* To the extent that network reconfiguration costs relate to the BOCs' provision of other services (such as intra-LATA toll), rather than to carrier access services, the BOCs will be required to include such costs in tariffs for those other services which are filed

believed that a particular switch should be assigned to it for equal access purposes even though that switch would belong to AT&T under the predominant use test.²⁰ The responses [***17] were extremely helpful. Their detail and the varied recommendations made with respect to each region revealed that, contrary to some speculation, the Operating Companies had carefully studied the alternatives for the provision of access within their respective territories, and that they had concluded, independent of pressure from AT&T, which arrangements would be most economical and efficient for them.

Most of the LATAs will be served by four-wire digital tandems, [**13]²¹ [**14] if not in 1984, [*1065] then within two years.²² The Operating Companies are not planning to make as much use of the existing No. 4ESS switches, however, as might have been anticipated. The basis of that choice appears reasonable.

Because of the large capacity of the No. 4ESS switch, the cost to an Operating Company of leasing part of it would be, in most cases, greater than would be that of constructing a smaller-scale switch directly for that company. The other alternative -- vesting ownership of the No. 4ESS switch in the Operating Company, in the expectation that it will be able to lease substantial capacity to AT&T -- is problematic in many cases because AT&T may choose instead to build a new switch (and even if it did not, it would be required in any event under the plan to terminate the lease after eight years). In either event, the Operating Company would thus be left with the expense of stranded capacity.

For these reasons, the Operating [**15] Companies will instead engage in a substantial amount of new construction, and they have persuaded the Court that this is an appropriate decision. In some instances they will thereby be merely accelerating construction which would have occurred in any event, and new construction, as opposed to leasing, will have the advantage of facilitating network separation between AT&T and the Operating Companies.

Given the care which went into the Operating Companies' studies, the Court will not second-guess them by imposing upon them an assignment of switches which they do not endorse. The Court therefore rejects the position

and allowed to become effective in accordance with this proviso, and any amounts thus recovered shall count toward reimbursement of the BOCs' costs of network reconfiguration.

²⁰ Bell System assets will be distributed according to the function they perform. [552 F. Supp. at 206](#). Those assets performing exchange and exchange access functions will be owned by the Operating Companies; those performing interexchange functions by AT&T and its affiliates. Section I(A)(1). About eighty percent of the Bell System's assets perform one function or the other and hence are classifiable with relative ease. The remaining 20 percent are multifunction assets, providing both exchange and interexchange services. The government proposed, and the Court accepted, that the predominant use test be applied to these assets, that is, the asset will be assigned to the entity whose use predominates. [552 F. Supp. at 207](#). The Court noted, however, that in certain cases the test would be inappropriate ([552 F. Supp. at 207 n.317](#)) as where a facility primarily used in connection with interexchange services was necessary for the provision of equal access by an Operating Company. See [552 F. Supp. at 200-01](#); section VIII(G) of the decree.

²¹ These are the advanced switches of the type described in note 19 *supra* and are the switches most readily connected to the four-wire trunks which the interexchange carriers primarily use in their own networks. Pacific and Nevada Bell will use "state of the art digital, four-wire tandems for more than 99 percent of [their] requirements." Response of Donald E. Guinn at 8 n. *. This appears to be true for New York and New England as well. In the remaining five regions, it appears that all switches to be constructed will be four-wire digital tandems. Only in a relatively small number of LATAs do the companies propose to provide access via two-wire switches. This, and the fact that the Department of Justice will continue to study whether two-wire switches can provide suitable access, largely moots the concerns of Satellite Business Systems, Southern Pacific Communications Corp., and MCI Communications Corp. that the Operating Companies would make larger scale use of two-wire switches, necessitating the use of adapters to connect them to the four-wire trunks of the interexchange competitors.

²² AT&T has consistently maintained that requiring interexchange competitors to hook into two-wire switches via adaptors would not impair the quality of the transmissions, a point which AT&T's competitors have just as consistently challenged. Since the Operating Companies have decided to offer mainly four-wire connections, this dispute is largely moot. See note 21 *supra*.

of some²³ that all No. 4ESS switches should be divested from AT&T and assigned instead to the Operating Companies.

Second. The New England Telephone Co. (NET) has suggested that it could provide access more economically if the Court were to override the predominant use test in its territory with respect to three advanced switching systems. [**16] NET wishes to make extensive use of No. 4ESS switches -- which apparently would be more appropriate in its region than elsewhere because of existing population densities -- and it states that it could benefit from the allocation of three existing No. 4ESS switches (in Manchester, New Hampshire; Springfield, Massachusetts; and Cambridge, Massachusetts).²⁴ NET has further informed the Court that if it were to receive the existing switches in these locations, the net present value advantage to it would range from \$20 to \$25 million with respect to the Cambridge switch and from zero to \$8 million [*1066] per switch with respect to the Manchester and Springfield facilities.²⁵

[**17] Although it accepted the predominant use test, the Court has stated that this test would be waived where particular equipment was needed by an Operating Company for the provision of equal access. See note 20 *supra*. Clearly that need is present with respect to [**118] the Cambridge switch,²⁶ and the Court will therefore require that AT&T assign that switch to NET. The matter is not as clear with regard to the Manchester and Springfield switches. If NET wishes to make a formal proposal for the transfer of these switches, it should submit a motion explaining under what circumstances the savings would amount to zero and under what circumstances they would amount to \$8 million,²⁷ [**18] and AT&T and the Department of Justice may respond to the motion. The Court will order no other changes in the assignment of switches.²⁸

C. [**19] How Should the Operating Companies Recover the Costs of Becoming Equal Access Providers and of Reconfiguring Local Networks to Conform to LATA Boundaries?

AT&T estimates that it will cost the Operating Companies \$73 million to reconfigure their networks²⁹ and \$2.47 billion to provide equal access.³⁰ The plan of reorganization does not directly address the issue of who should pay

²³ E.g., Black Citizens for a Fair Media, *et al.*

²⁴ NET states that owning the switches, and presumably leasing space to AT&T, would in these instances be the cheapest alternative. The next best option would be for NET to build its own 4ESS switches, with the most costly alternative being to lease space from AT&T. Response of the Northeast Region, May 31, 1983, at 5-6.

²⁵ Different values are achieved depending upon the assumptions used.

²⁶ The expenditure of \$20 to \$25 million required for the construction of a new switch is not an acceptable alternative.

²⁷ NET should also indicate whether assignment to it of the Cambridge switch would alter its analysis of the impact of a separate Worcester LATA. Specifically, if NET owns the Cambridge switch would it also want to build a Framingham No. 4ESS switch?

²⁸ The Court notes that Bell of Pennsylvania has supplanted its proposal to use a 1AESS switch to offer access in Harrisburg (the "Capital" LATA) with a plan to build a DMS-200, 4ESS or comparable four-wire switch by September 1985. Response of the Mid-Atlantic Bell Telephone Companies, May 31, 1983, at 6 n.6. Bell of Pennsylvania also intends to offer access to the Philadelphia LATA through the existing 4ESS until its own digital switch is in place, assuming that "billing software develops satisfactorily." *Id.* These plans are hereby approved. The Court accepts Pacific Northwest Bell's proposal to build its own digital switch in Seattle and use direct trunking to provide access pending completion of the switch. See Appendix A to Response of Operating Companies in Mountain-Northwest Region to Court's Memorandum of May 17, 1983.

The suggestion of the Department of Justice that the date for the Operating Companies' formal equal access filings be advanced is a sound one. The Department should consult with the Operating Companies with regard to the timing of an accelerated schedule.

²⁹ It is obvious that this figure is somewhat low, as is indicated, for example, by the claim of the Mid-Atlantic Region that the estimate of \$73 million does not include any of the \$30 million it expects to spend on network reconfiguration. Response of the Mid-Atlantic Bell Telephone Companies, May 31, 1983, at 9 n.10.

these costs but seems to proceed on the premise that equal access is exclusively an Operating Company responsibility with which the plan, and AT&T, need not be concerned. That approach is improperly simplistic.

[20]** Section I(A)(1) of the decree states that AT&T shall

transfer from AT&T and its affiliates to the BOCs . . . sufficient facilities [and] systems . . . to permit the BOCs to perform, independently of AT&T, exchange telecommunications and exchange access functions . . . and [which are] *sufficient to enable the BOCs to meet the equal exchange access requirements* of Appendix B (emphasis added).

There can be no doubt, then, that AT&T has a significant responsibility ³¹ to see to it **[*1067]** that the Operating Companies are left in a position, as of divestiture, that will enable them to offer equal access to AT&T's competitors. ³² The only question is what obligations attach to this responsibility.

[21]** The intervenors have proposed various ways to assign the costs of network configuration and equal access directly to AT&T, from requiring AT&T to give the Operating Companies more switches to requiring it to finance all equal access projects. The former has the disadvantage of imposing switch assignments on the Operating Companies which they do not want; the latter is problematic in that it will perpetuate a liaison between AT&T and the Operating Companies where none should exist. AT&T, for its part, **[**119]** while it rejects any suggestion that it should have to pay these costs, in effect concedes that it bears some share of the responsibility since it asserts that the access charges paid by interexchange carriers will reimburse the Operating Companies, and that it, as the dominant interexchange carrier, will pay the lion's share of such charges.

All the parties have agreed that these costs are properly to be recovered from the interexchange carriers, rather than through access charges levied on local ratepayers, because the expenditures represent improvements to the long distance network. AT&T's assurances to the contrary notwithstanding, it is unsettled at present by what methodology **[**22]** the interexchange carriers could be made to bear the costs of equal access and network reconfiguration through interstate access charges. Under existing procedures for allocating property costs, revenues, expenses, and reserves between intrastate and interstate jurisdictions for rate making purposes (see [47 C.F.R. § 67.1](#)), a disproportionately small amount of equal access and network reconfiguration costs would be designated for recoupment through interstate tariffs; most of these costs would be designated for recovery through intrastate tariffs even though, at least initially, most of the benefits of equal access connections will flow to users of interstate, not intrastate, telecommunications services. See Correspondence between Howard J. Trienens and A. Gary Collins, filed June 29, 1983; Response of Mid-Atlantic Bell Telephone Companies, May 31, 1983, at 8-10. ³³

³⁰ AT&T Memorandum, May 23, 1983, at 4 n. **, 5 n. *. This includes putting in place access tandems for interconnection between interexchange carriers' points of presence and the local loops, plus any direct trunks from points of presence to end offices where this is considered more efficient than using access tandems. The exact amount will depend on many factors, including any waivers of the equal access requirements pursuant to Appendix B of the decree.

³¹ The primary responsibility lies with the Operating Companies since as part of the divestiture process they will receive the Bell System's local exchange facilities by which equal access will be provided.

³² It has been clear at least since the decision of the Court of Appeals in [MCI Telecommunications Corp. v. FCC, 188 U.S. App. D.C. 327, 580 F.2d 590 \(D.C. Cir. 1978\)](#) (*Execunet II*) that AT&T was under an obligation to furnish equal or substantially equal access to its intercity competitors. See also, [United States v. Am. Tel. & Tel. Co., 524 F. Supp. 1336, 1356, 1360 \(D.D.C. 1981\)](#).

³³ Indeed, the Mid-Atlantic Region expects to spend \$200 million for equal access through 1986, but anticipates that, under the existing separations procedures, about 60 percent of these costs would be allocated to intrastate, not interstate, rate-making. As the Mid-Atlantic region states:

It may be possible, if regulators agree, to apportion these costs more equitably between the interstate and intrastate jurisdictions. If this does not occur, there is no assurance that state regulators will be able to fix intrastate access rates high enough to recover these costs. If rates are fixed at such level, [interexchange carriers] will have a strong incentive to 'forum shop' between interstate and intrastate tariffs and to by-pass the BOCs for intrastate access. Even if the bulk of the costs

In fact, only after it was pointed out by others did AT&T acknowledge that all equal access and network configuration costs would not be recovered through interexchange carrier charges under the current jurisdictional separations procedures.

[23] [*1068]** Another, equally serious problem is created by the ability of AT&T to make use of the so-called bypass technology ([552 F. Supp. at 175-76](#)) which would allow that company, at its choice, and given the availability of the necessary technology, to bypass the Operating Company circuits altogether and to reach ultimate telephone subscribers directly. To the extent that bypass is a serious threat to the Operating Companies,³⁴ AT&T, because of its size and its well-developed telecommunications technology, is by far the most likely origin of that threat. Use of that bypass technology by AT&T would, of course, permit it to escape the payment of access charges to the Operating Companies, and this, in turn, would jeopardize the recovery of the funds which will be expended by the Operating Companies for the equal access and reconfiguration construction program.

[24]** It is thus not certain that the Operating Companies will be fully reimbursed through carrier access charges for their equal access and network reconfiguration expenditures. Yet because the decree anticipated that AT&T would transfer sufficient facilities to the Operating Companies to ensure equal access; because it now appears that the Operating Companies will instead have to undertake substantial new construction of their own; and because AT&T has throughout this proceeding assured the Court that access charges paid by interexchange carriers would be the instrument which would prevent divestiture from causing increases in local rates, it is appropriate that AT&T should bear the ultimate risk if it turns out that its assurances are overly optimistic.³⁵ That risk will accordingly be assigned to AT&T in the following manner. **[***120]**

[25]** According to the plan of reorganization, the equal access construction program will be completed in five years. Within five years thereafter, that is by January 1, 1994, if the Operating Companies have not recovered the costs of equal access and network reconfiguration, inclusive of financing costs, through their collection of access charges from the interexchange carriers,³⁶ AT&T will be responsible for reimbursing the Operating Companies in the amount of any remaining deficit.³⁷ A preliminary accounting will take place at the close of the construction program on by January 1, 1989, whichever is earlier.

become properly assigned as between interstate and intrastate access, the possibility of by-pass becomes more threatening with each increase in access costs.

Response of the Mid-Atlantic Bell Telephone Companies, May 31, 1983, at 9-10.

AT&T and the Operating Company personnel apparently are working on a proposal to treat equal access and reconfiguration costs as if they were costs of "Special Services Switching Equipment" which, it is asserted, "will avoid the misallocation of costs to the intrastate jurisdiction" and will allocate investment and related expenses on the basis of relative toll minutes, i.e., on the basis of carriers actually using access services. Letter from A. Gray Collins to Howard J. Trienens, filed June 29, 1983, at 2. The FCC would have to approve any such proposal.

³⁴ The Court, unlike the Federal Communications Commission, does not consider bypass to be an immediate large-scale problem. See transcript June 2, 1983 hearing at 25466.

³⁵ However, for the reasons stated in note 31 *supra*, there is no basis for requiring AT&T to pay all of these costs, in addition to the contribution it will make by way of the access charges and the costs of the risks assigned to it herein.

³⁶ AT&T is entitled, in equity, to count toward reimbursement of these costs all carrier access charges, not only the charges collected from it. If only AT&T's contributions were counted, the Operating Companies, AT&T's interexchange competitors, or both, would reap a windfall.

³⁷ The Operating Companies shall keep records to isolate those expenses incurred solely for equal access and network reconfiguration as mandated by the decree from expenses they would have incurred in any event. AT&T and the Regional Companies shall, jointly or severally, submit to the Court prior to January 1, 1984, the accounting method that will be appropriate for isolating these expenses and for determining whether and when the costs of equal access and of network configuring have been recovered.

[**26] If the Operating Companies and AT&T are able to report to the Court on or before January 1, 1994, of their agreement that all costs have been recovered, AT&T will be discharged from any further obligation with respect to the cost of equal access and network reconfiguration. If there is a dispute, the Court will decide, if necessary with the assistance of the Department of Justice and the Federal Communications Commission, whether all costs have been recovered.³⁸

[*1069] II

Contingent Liabilities

Under the plan of reorganization, the contingent liabilities of the Bell System are apportioned among AT&T and the Operating Companies on the basis of their relative net investment [**27]³⁹ as of the date of divestiture.⁴⁰ [**28] Section VIII(H) of the decree allocates to each Operating Company a proportionate share of the System's consolidated debt and equity; and the plan of reorganization provides that the post-divestiture entities will share in the contingent liabilities on the same basis.⁴¹

The intervenors acquiesce in most aspects of the plan's allocation of contingent liabilities,⁴² [**29] and they limit their objections in the main to the allocation of contingent antitrust liabilities. Several intervenors assert broadly that because the Operating Companies were not responsible for AT&T's alleged conduct in violation of the antitrust laws and reaped no benefits from such violations, they should not have to share in the liabilities resulting from any antitrust claims. Others make similar arguments more narrowly with respect only to certain types of antitrust violations, such as those relating to the provision of interexchange services or of customer premises equipment (CPE).⁴³

The contingent liability provisions of the plan assume (1) that prior to divestiture the Bell System operated as a single unit, and (2) that the residual risks of the System's predivestiture operations should be shared by all entities which receive a part of the System's assets. Several intervenors challenge these assumptions. [***121]

A. *Principle of the Division of the Contingent Liabilities*

It is argued by a number of opponents of the plan that for many purposes the Bell System did not operate as a single enterprise. Thus, it is claimed that various Operating Companies charged different rates, operated under

³⁸ This mechanism has several advantages: it avoids any direct financing partnership between AT&T and the Operating Companies; it requires relatively little monitoring; it gives effect to the access charge tool; it encourages AT&T to work for suitable separations procedures; and it minimizes interference with regulatory commissions.

³⁹ HN2 [↑] Contingent liabilities are liabilities which are attributable to pre-divestiture events but do not become certain, and are therefore not booked, until after divestiture. The plan of reorganization defines "net investment" as total assets less reserves for depreciation. AT&T states that it will receive 25 percent of the net investment of the Bell System, and the remaining 75 percent will be assigned to the Operating Companies. AT&T Memorandum, May 23, 1983, at 13 n. *.

⁴⁰ The plan provides special allocation rules for contingent liabilities relating exclusively to interstate or intrastate operations or to tax liabilities. See Plan of Reorganization at 188-89. These special rules have either not been specifically challenged by the intervenors, or they have been opposed for the same reasons discussed *infra* for challenging the general rule for allocating contingent liabilities. See, e.g., NASUCA Memorandum, May 25, 1983, at 10.

⁴¹ Under the plan, AT&T and the Operating Companies will be responsible for the payment of judgments and determinations of liability, regardless whether or not an entity was dismissed from the proceeding by virtue of settlement or otherwise. Plan of Reorganization at 190.

⁴² No objections were raised with respect to the contingent liabilities having to do with the Bell System's rates, contracts, torts, or taxes.

⁴³ CPE is used on subscribers' premises to originate, route, or terminate telecommunications (e.g., telephone sets, answering machines). Section IV(E) of the decree.

different tariffs, were directed by different personnel, and engaged in other practices which differed from company to company. One consequence of this diverse pattern, according to the plan's opponents, is that some Operating Companies were charged with violations of the antitrust laws along with AT&T while others [**30] were not. Further, [HN3](#)⁴⁴ since under the law a corporation is not automatically liable for the anti-trust violations of its affiliates,⁴⁴ there is no basis, it is said, for imposing liability upon entities (*i.e.*, the Operating Companies) which have not been or may not be found to have been at fault. Finally, citing [*Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 68 L. Ed. 2d 500, 101 S. Ct. 2061 \(1981\)*](#), several intervenors argue that the plan violates the "rule" [*1070] against contribution for anti-trust damages.⁴⁵

All of these arguments miss the mark. Until the time the reorganization takes effect, the Bell System is legally a single enterprise, with a single claim to the System's assets and a single responsibility [**31] for the System's liabilities. It is erroneous, therefore, to pose the problem in terms of imposing liability upon parts of the enterprise based upon fault or lack of fault; at the time the acts complained of occurred there was only one entity (the Bell System), and should there be a judgment in any particular case, that entity will have been found to be at fault.

The evidence at the trial of this case did not isolate specifically whether the fault for particular activities which allegedly violated the antitrust laws lay with personnel assigned to AT&T headquarters or with personnel working for an Operating Company; and, of course, there was no adjudicated final judgment by which such fault could have been parceled out. In view of the commingling and transfers of personnel between AT&T's central divisions (*e.g.*, Western Electric) and the Operating Companies, it may be that no such decision could ever have been made.⁴⁶

[**32] This basic problem with the theory advanced by the intervenors is not cured by the circumstance that some Operating Companies are defendants in some of the pending private antitrust lawsuits while others are not. The decisions of antitrust plaintiffs as to which Operating Companies, if any, should be named as defendants in the private suits appear to have most often been dictated by such non-substantive matters as jurisdiction, venue, and ease of discovery.⁴⁷ [**33] Such choices were available to the plaintiffs in the various actions because they knew that the cost of any judgment would be shared by AT&T and all Operating Companies⁴⁸ regardless whether or not a particular Operating Company was a party to the proceeding in which liability was determined. In short, the identity of the particular Bell defendants played no real substantive part in pre-divestiture lawsuits or judgments, and it would make no sense to regard it as the determinative factor with respect to the payment of judgments based on pre-divestiture conduct which are entered or become final after divestiture actually occurs.

More broadly, it is incorrect to view the plan's allocation of contingent liabilities as an attempt to impose upon this Court the responsibility for making findings concerning fault or for imposing liability with respect to lawsuits pending in other forums.⁴⁹ [*34] The plan of reorganization does not purport to assign fault; all that is involved here is that, as part of its review of the decree and of the plan of reorganization of the Bell System, the Court has been

⁴⁴ See, e.g., [*Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 23 L. Ed. 2d 129, 89 S. Ct. 1562 \(1969\)*](#).

⁴⁵ See, e.g., Comments of Southern Pacific Communications Co., May 23, 1983, at 15; Comments of MCI Communications Corp., May 23, 1983, at 9.

⁴⁶ Because of the integrated nature of the Bell System, it is unlikely that the result would be any different in the private cases brought against that System or its components. In any event, as developed below, it is appropriate to assign the responsibility for the payment of possible judgments now, rather than to leave the issue for resolution for later, on a case-by-case basis. Recognizing this reality, few of the intervenors suggest that the matter be left open until judgments are entered; they argue instead for a fixing of liability now, albeit on a basis different than that assigned by the plan. See slip op. at pp. 26-28 *infra*.

⁴⁷ AT&T Reply Memorandum, May 31, 1983, at 18 n. *

⁴⁸ Such sharing would have occurred through the division of revenues process and a general contribution to the expenses of AT&T's General Department, and it is that Department which would have paid any antitrust judgment irrespective of the Bell entity upon which it might have been imposed. *Id.*; AT&T Response to Objections at 333.

⁴⁹ See, e.g., Satellite Business Systems Memorandum, May 23, 1983, at 4.

presented with a proposed **[***122]** contractual arrangement⁵⁰ **[*1071]** whereby the Operating Companies and AT&T will share in the payment of liabilities arising from pre-divestiture operations regardless of fault -- in effect a form of self-insurance. See slip op. at pp. 30-31 *infra*.

The intervenors' reliance upon *Texas Industries, Inc. v. Radcliff Materials, Inc., supra*, as an obstacle to this procedure is misplaced. In that case the Supreme Court held merely that there is no *right* to contribution in antitrust cases;⁵¹ it did not decide, nor was its decision based on the premise, that contribution is contrary to the policies underlying **[**35]** the antitrust laws.⁵² *Texas Instruments* thus does not invalidate either the liability sharing arrangement which presently exists (and has long existed) among the Bell System's components for that System's liabilities or the contractual arrangement proposed for the future by the plan of reorganization.⁵³

[36] B. Method of Apportionment**

The plan of reorganization proceeds on the basis that the residual risks of the Bell System's pre-divestiture operations should be shared by the entities of the System on the same basis as their receipt of the System's assets and equity.⁵⁴ This method of apportionment is challenged by several intervenors who suggest a division of contingent liabilities based on a "benefit" or "line of business" approach rather than the "relative net investment" approach provided for by the plan.⁵⁵ While this suggestion appears abstractly to have some merit, it is faulty if only because it suffers from serious, indeed insuperable, difficulties in administration.

[37]** It may well be doubtful that the Operating Companies benefitted quite as much from the activities challenged in the various pending antitrust suits as AT&T now claims; but it would also surely be incorrect to say that the Operating Companies' past and future lines of business received no benefits. For example, activities which

⁵⁰ The plan provides that in December 1983, the Operating Companies and AT&T will enter into an agreement which will identify all then-pending litigation or other proceedings in which a judgment could result in liability to be allocated under the plan. This agreement will identify whether each contingent liability will be shared by AT&T and the Operating Companies under the net-investment formula or whether it will be treated under one of the special allocation rules. Within one month of the institution of any other action or proceeding against AT&T or an Operating Company based on pre-divestiture events, notice must be given to each entity which may be responsible for payments under the plan. Plan of Reorganization at 189-90, 470.

⁵¹ In that case, the defendant corporation had attempted to file a third-party complaint against other companies seeking contribution should it be held liable under the initial complaint. The Supreme Court upheld the lower court's dismissal of the third-party complaint.

⁵² To the contrary, the Court concluded that it was for the Congress, not the courts, to decide whether there should be a statutory right to contribution in antitrust cases and how such contribution should be structured. *451 U.S. at 646*.

⁵³ Arguing that the agreement between the Operating Companies and AT&T to share contingent liabilities should be deemed void as contrary to public policy, one intervenor cites *St. Paul Insurance Companies v. Talledega Nursing Home, Inc.*, 606 F.2d 631 (5th Cir. 1979). See Southern Pacific Memorandum of May 23, 1983, at 16. The *St. Paul* decision stands only for the proposition that under Alabama law insurance contracts protecting against intentional wrongs are invalid. Not only are such contracts not universally considered void, but any public policy problems from such contracts are avoided here because the agreement among the Bell companies does not relate to future conduct but applies only to liabilities from pre-divestiture events.

Zenith (note 44 *supra*) is likewise inapplicable because the jurisdictional problems there involved are not present here and because of the contractual agreements discussed *infra*.

⁵⁴ On this basis, since AT&T will receive 25 percent of the net investment of the Bell System, it will be responsible for 25 percent of the contingent liabilities. See note 39 *supra*.

⁵⁵ These intervenors assert (1) that AT&T's future lines of business, not those of the Operating Companies, benefitted from whatever anticompetitive conduct occurred, (2) that the potential liability from alleged anticompetitive conduct bears no necessary relationship to the assets being divided, and (3) that the method prescribed by the plan, coincidentally or otherwise, favors AT&T's interest as against that of the Operating Companies.

adversely affected competitors of AT&T in the CPE business probably benefitted not only AT&T "headquarters" but also the Operating Companies' own CPE business, and the effects of these activities may even [*1072] linger so as to continue to provide the local companies with a benefit after divestiture. Further, evidence at the trial of this case indicated significant involvement of the Operating Company personnel in the so-called "procurement" portion of the case, *i.e.*, that dealing, among other things, with CPE.

Likewise, because the Operating Companies received a substantial portion of revenues from interexchange services through the division of revenues process, and because it appears that they stood to lose revenues to the extent that long distance traffic was handled by one of AT&T's competitors, it is difficult [***123] to say that they did not benefit [**38] from Bell System activities claimed to be unlawful which affected the interexchange market.

For these reasons, several intervenors candidly acknowledge that it is not possible, at least not without lengthy proceedings, to conclude that the Operating Companies received no benefit from the conduct challenged in pending antitrust actions ⁵⁶ [**39] or precisely how such benefits might be allocated between them and AT&T.⁵⁷ The Court will go further. In its view, to attempt to trace benefits from conduct challenged in lawsuits not yet decided to lines of business ⁵⁸ which will be engaged in at a later time by entities which do not yet exist would involve the Court in an impossible, almost metaphysical task, and it is one which, for that reason, it will not undertake.

More affirmatively, the assumption underlying the plan's allocation of contingent liabilities that, as a matter of equity, the contingent liabilities should be shared proportionately by all entities which "succeed" to the assets of the Bell System, is not unreasonable. Under the current division of revenues and costs within the [**40] Bell System, antitrust liabilities are liabilities of the entire System. Contingent antitrust liabilities -- just as the other contingent liabilities not challenged by the intervenors -- do not encumber particular assets or particular lines of business; they encumber all of the System's assets and equity. Because the decree provides that the Operating Companies and AT&T will each receive a portion of the consolidated debt and equity of the Bell System,⁵⁹ it is reasonable for each of the post-divestiture entities also to receive a corresponding portion of the System's pre-divestiture business risks which encumber the equity.⁶⁰

⁵⁶ See United Church of Christ Reply, May 31, 1983, at 8 (not possible to determine the extent to which Operating Companies and their ratepayers benefitted from AT&T's policies); General Dynamics Telephone System Center, Inc. Response, May 20, 1983, at 8 (alleged antitrust violations did not necessarily inure to the benefit of the Operating Companies "to the same degree" as they did to AT&T).

⁵⁷ Because of this problem, California suggests that the test for allocating contingent liabilities should be: which line of business "primarily" stood to benefit from the antitrust violation? State of California Memorandum, May 25, 1983, at 19. New Mexico advocates that where ultimately there remains a dispute about which entity receives the post-divestiture benefit, the matter should be submitted to arbitration. State of New Mexico Reply Comments, April 13, 1983, at 5.

⁵⁸ The break-up of the Bell System does not, in a number of respects, involve a neat division of operations and lines of business. For example, the Operating Companies will handle some intercity toll calls -- especially in some of the larger LATA's -- and they will also be able to market CPE.

⁵⁹ The decree provides that AT&T is to divest the Operating Companies with 45 percent debt ratios (55 percent equity). This ratio represents the 1981 (year end) consolidated debt ratio of the Bell System and was also the System's target debt ratio for the end of 1983. See AT&T Reply Comments, June 29, 1982, at 95-96.

⁶⁰ The equity portion of the Bell System's capital structure represents, in effect, the shareholders' reserve against business risks, including contingent liabilities. The possibility that certain contingent liabilities may not become certain or may not be turned into debt does not mean that these contingent liabilities are not business risks which currently encumber equity.

One intervenor (Washington Utilities and Transportation Commission Memorandum, May 25, 1983, at 5) argues that, if the Operating Companies were not assigned any contingent liabilities, they could be considered as receiving too much equity only if all other business risks in the overall Bell System capital structure were equal, and it goes on to state that there is good reason to believe that the Operating Companies will face higher risks because they are removed from certain lines of business by the decree. This argument is too speculative. Even though AT&T will retain some of what have been the more lucrative lines of business in the past, these are the competitive lines of business, and there are some who regard them as riskier than the

[**41] [*1073] The proof of that proposition lies in an examination of the alternatives. If AT&T had decided to settle, insure, or self-insure all contingent liabilities prior to divestiture, the costs of these liabilities would have been reflected now in the Bell System's debt and equity accounts,⁶¹ [**42] and there would have been [***124] no need for making provision in the plan of reorganization for the allocation of contingent liabilities. These other options were apparently considered by AT&T and the Operating Companies,⁶² and the choice was made that each Operating Company would take on a portion of the System's consolidated equity as well as all associated business risks. In furtherance of that decision, all Bell System Companies are, in essence, insuring one another against the possibility that the contingent liabilities will become certain after divestiture. The chief executives of the Regional Companies have informed the Court that, with but one exception, they agree with the choice made in the plan for allocating the contingent liabilities.⁶³

For these reasons, the Court rejects the objections to the treatment accorded in [*1074] the plan of reorganization to the contingent liabilities,⁶⁴ and it will approve that portion of the plan as part of its overall disposition [**43] of the parties' motions.

Operating Companies' monopoly exchange functions. See Fortune, *Breaking Up The Phone Company*, June 27, 1983, at 81-91.

⁶¹ AT&T could have decided to handle the contingent liabilities problem by one of the following methods, all of which would have led to results similar to the apportionment provided for by the plan of reorganization:

- (1) The Bell System could have chosen to pay these liabilities through settlement of the litigation before the decree was entered (or before divestiture occurred), such payment to be funded by debt. The Operating Companies would then be divested with higher debt ratios (perhaps 50 percent) to reflect the higher debt ratio of the Bell System. There would then, of course, be no residual risks to divide.
- (2) The Bell System could have purchased insurance, with the premiums funded by debt. Again, this would have pushed the System's debt ratio closer to 50 percent, and the allocation of contingent liabilities would then have become irrelevant since any judgment would have been paid by the insurer.
- (3) The Bell System could have self-insured the contingent liabilities with a funded reserve of some \$25 billion, which would have been borrowed and held in a separate account. The System's debt ratio would again have risen closer to 50 percent, and whichever entity would have been assigned the contingent liabilities would have received this separate reserve account.
- (4) The Bell System could have self-insured by booking the contingent liabilities through transfer of a portion of its equity to an appropriate liability account. The choice then would have been either for AT&T to take all the contingent liabilities and the liability account, or AT&T and the Operating Companies each could have taken a share of both the contingent liabilities and the corresponding liability account.

In essence, AT&T and the Operating Companies decided to select the last option -- each will receive a share of the contingent liabilities and each will receive more equity than it would have had if one of the other three options had been selected. The only substantive difference between that option and the proposed plan is that the shareholders' equity reserve is not being segregated into a separate liability account. By accepting a share of the contingent liabilities and a higher equity ratio, the Operating Companies are all simply participating in underwriting the System's contingent liabilities. In this way, they are insuring each other, and they will retain any profit which otherwise would have gone to an insurer.

⁶² AT&T Memorandum, May 23, 1983, at 11-12.

⁶³ See testimony of Thomas Bolger, June 2, 1983, transcript at 25603-04; testimony of William Weiss, June 2, 1983, transcript at 25493-94; but see testimony of Zane Barnes, June 2, 1983, transcript at 25487.

The Court notes that it is entirely unlikely that the contingent liabilities could realistically threaten the viability of the Operating Companies. AT&T has suggested that \$25 billion in additional liabilities might become certain after divestiture, but it has since hastened to concede that this possibility is extremely remote. Even if this outside contingency came to pass, the Operating Companies could finance their shares with debt, and their debt ratios would then increase from 45 percent to the 50 percent range -- still the typical debt ratio of independent telephone companies and electrical utilities.

⁶⁴ The Court has also considered the various provisions made in the plan of reorganization with respect to other liabilities, reserves, and equity, including tax reserves, depreciation reserves, and long term debt, and finds the treatment of these matters in the plan to be reasonable.

[**44] III

Bell Name and Logo

The plan of reorganization originally submitted by AT&T provided that upon the divestiture both AT&T and the Operating Companies could continue to use the "Bell" name.⁶⁵ Complex provisions were made with [***125] respect to the Bell trademarks,⁶⁶ [**45] and the plan further provided that if, in light of the Justice Department's opposition to the AT&T approach, the Court were to disapprove it, AT&T "will adopt the alternative . . . [to] retain all uses of the Bell name, including all Bell trademarks, the Bell logo or seal, the blue and ochre stripes, and other graphics and all uses of Bell in corporate names" (emphasis added).⁶⁷ The Department of Justice did not oppose the second alternative,⁶⁸ but with respect to the first it proposed an amendment which AT&T accepted. It is this Department of Justice version (Amendment No. 15), described in more detail below, which is now before the Court.

Under Amendment No. 15, although the Operating Companies would have exclusive rights to the Bell logo in the United States,⁶⁹ they could use it only in connection with the provision of exchange telecommunications services, exchange access services, and printed directory advertising. The Operating Companies would be prohibited from using the Bell logo in connection with the marketing of any customer premises equipment (even that supplied by AT&T and its affiliates). As concerns the "Bell" name, the Operating Companies would be permitted to use it only in connection with [*1075] services other than the sale of equipment and only when explicitly modified by a geographic designation of an area less than national in scope [**46] (e.g., Southwestern Bell); AT&T, on the other hand, could use the name "Bell" on a national basis for all these purposes if preceded by the word "American."⁷⁰

It is appropriate briefly to mention the debt of Pacific Telephone and Telegraph Co., which has been the subject of several submissions both by the Operating Company and by the State of California. Upon consideration of all the documents, the Court has concluded that it will not require a modification of the plan of reorganization with regard to this issue because the plan is not the appropriate vehicle for determining the extent to which the local company's debt problems may have been created by the California regulators -- as was previously assumed by this Court ([552 F. Supp. at 208](#)) as well as by the FCC staff (Staff Analysis of February 11, 1983, at 27-28) and various financial rating services -- or by AT&T.

The debt equalization scheme which is proposed by California would inappropriately result in inter-regional subsidies and create complex problems leading to new and continuing AT&T entanglements with the Operating Companies. In any event, neither the decree nor the plan of reorganization adversely affects Pacific's financial condition; if anything, they improve it. See Second Supplemental Statement of Donald Guinn, April 7, 1983, at 1. Pacific's interest coverage ratio will be above the level necessary to maintain a Standard & Poor's "A" rating. Supplemental Statement of Donald Guinn, January 13, 1983, at 2; AT&T Response to Objections at 300-01. While future developments and perceptions cannot be vouchsafed, it appears that Pacific will be divested in as financially a sound condition as its prior history permits.

⁶⁵ AT&T and the Operating Companies could not use "common corporate names," however.

⁶⁶ The Central Staff Organization to be established by the Operating Companies (see Part VIII *infra*) was to receive the rights to the existing Bell trademarks for use in connection with lawful Operating Company business except for the marketing of "equipment not supplied by AT&T and its affiliates." The trademarks include not only the encircled bell logo but also the blue and ochre stripes, and other trademarks and service marks used on vehicles, telephone directories, and the like. They will generally be collectively referred to as the Bell "logo."

⁶⁷ If only because of the explicit representations made by AT&T's counsel to the Court during the first Tunney Act hearing in June 1982 (see pp. 48-49 *infra*), this alternative cannot be seriously entertained.

⁶⁸ It stipulated, however, that compensation had to be paid to the Operating Companies for the direct costs of revamping their trademarks and trade names.

⁶⁹ AT&T would retain its present rights to trade names and trademarks for use outside the United States.

⁷⁰ AT&T could continue to use the name "Bell Laboratories" without modification. AT&T could also continue to use the descriptive phrase "Bell System," albeit with the modifier "American." The amendment further provides that AT&T would conduct an extensive advertising campaign to distinguish its products, names, and trademarks from those of the Operating Companies.

A. Use of the "Bell" Name by both AT&T and the Operating Companies Would Be Confusing

The Department of Justice apparently considered that the original AT&T plan was unacceptable because it could lead to consumer confusion and mutual promotion (*i.e.*, cross subsidization). The proposal presently before the Court is as flawed in those respects as the first plan -- if **[**47]** not more so -- and it therefore cannot be approved.

There is no question but that the proposal, if implemented, would be confusing as to the relationship between AT&T and the Operating Companies: contrary to fact, it would lead consumers to believe that there is a continuing close connection between these entities or, worse, that they are all still components of the same company. The proposed system -- AT&T's use of the "Bell" name preceded by the word "American" and the Operating Companies' use of the "Bell" name preceded by the designation of some smaller geographic area -- inevitably suggests that each of the Operating Companies provides service in a particular region of the country while AT&T provides the national service which ties all of the components together into one integrated Bell System. As one of the intervenors correctly points out,

for AT&T to suggest that consumers will not likely think that "Illinois Bell" is part of "American Bell" is as preposterous as it is that consumers would not think Illinois to be part of America.⁷¹

[48]** This implication, that there is a continuing link between AT&T and the Operating Companies, would have several significant anticompetitive effects: in the market for intercity telecommunications services it would imply that AT&T is the natural or "official" long distance company to be used in conjunction with the local services provided by the several Bell Operating Companies; in the market for consumer premises equipment it would lead consumers to believe that the local system maintained by a "Bell" Operating Company calls for "American Bell" (*i.e.*, AT&T) equipment, or at a minimum, that American Bell equipment is made for and works better than the equipment of other manufacturers **[**126]** when hooked up to the local Bell network;⁷² and it would suggest that the local Bell Operating Companies will warrant, service, and repair the equipment of the national Bell company (*i.e.*, AT&T).

[49]** It is only to belabor the obvious to record that with respect to each of these areas, AT&T's competitors would, in terms of consumer perception, come off distinctly second best. None of them could claim a similarly close relationship with the local Operating Companies. Sprint and MCI would inevitably be regarded as not as well suited as AT&T to render long distance service in partnership with the local circuits of the Bell Operating Companies; and Tandy and ITT would constantly have to strive to overcome the perception that, even if their equipment could be connected at all to the local Bell Operating Company loops, it **[*1076]** would not operate as smoothly and naturally with them as would AT&T's, and that, again unlike AT&T's equipment, it would not be locally serviced.

The implication of a continuing relationship between AT&T and the Operating Companies is thus inconsistent with the bedrock principles underlying the decree. The principal purpose of the decree was to introduce fair and equitable competition in the telecommunications markets. This was to be achieved by separating the Operating Companies from AT&T so as to ensure that purchasing decisions regarding AT&T's **[**50]** competitive services and equipment would be unaffected by the position of the Operating Companies as the providers of local monopoly exchange and exchange access services.⁷³ It was, in brief, the decree's purpose to give AT&T's competitors the opportunity to compete with AT&T on equal terms without artificial impediments. The proposal for joint use of the "Bell" name substantially, if not fatally, undercuts these objectives.⁷⁴

⁷¹ Reply of Tandy Corporation at 8.

⁷² This confusion would exist regardless whether the Operating Companies would market CPE under the Bell label. Even if there were no such marketing, customers would still be led to believe that the providers of local exchange, exchange access, and directory advertising services are intimately connected with American Bell, and that AT&T's equipment -- the only equipment that would be marked "Bell" -- would be the most adaptable to the local system.

⁷³ It is on a similar rationale that the Court required modification of the decree to dispel customer confusion arising from joint billing. [552 F. Supp. at 199](#).

⁷⁴ One of the intervenors provided the apt example of a newspaper advertisement proclaiming "NOW YOU CAN BUY GENUINE AMERICAN BELL EQUIPMENT THROUGH THE RETAIL OUTLETS OPERATED BY YOUR LOCAL BELL TELEPHONE

[**51] Moreover, as long as AT&T and the Operating Companies both used the "Bell" name, there would also be subsidization between them to the detriment of the other existing and potential competitors. Any promotional efforts by either AT&T or an individual Operating Company would accrue to the benefit of the other, transmitting overtly or subliminally the message that Bell is a single, dominant supplier of telecommunications services and equipment. When an Operating Company advertised under the "Bell" name, it would necessarily also promote the products and services of AT&T marketed under the "American Bell" label, and vice versa. The long-standing consumer association of the "Bell" name with all aspects of the Bell System's local, long distance, and equipment operations would not only persist; it would actually be reinforced.⁷⁵

[**52] The decree is designed to effect a radical separation of the Operating Companies from AT&T;⁷⁶ it will hardly do to continue [*1077] to have the various divested entities of the Bell System⁷⁷ [**53] hold themselves out as if they were all still part of the same complex.⁷⁸ The plan proposed by AT&T would create the impression to the consuming public that the divestiture had never taken place. The Court did not approve a decree breaking up the Bell System to have that system rise again, phoenix-like, in the plan of reorganization.

[**54] For these reasons, the "Bell" name and the Bell logo must belong either to AT&T or to the Operating Companies -- but not to both.

COMPANY." Reply of Tandy Corporation at 5. There can be no doubt that consumers would be led to conclude by such an advertisement that these various "Bell" entities are all part of one giant company, and that their equipment was so designed that it would all mesh better than would some other, "foreign" equipment. This would be so if the Bell System had not become fixed in the national consciousness for a hundred years as a single corporation; it is even more true because of that historical fact.

⁷⁵ [**127] AT&T argues, citing several trademark decisions (e.g., *Gould Engineering Co. v. Goebel*, 320 Mass. 200, 68 N.E.2d 702 (1946); *Gemeinde Brau, Inc. v. Amana Society*, 557 F.2d 638 (8th Cir. 1977)) that different businesses which "share a common heritage" may use the same mark in separable parts of the business. See Response to Comments at 480-90. That argument lacks merit. Trademark law as it has developed in the context of claims of unfair competition between competing concerns is of dubious applicability to a situation -- divestiture under antitrust principles -- where the interests of outside competitors and the public are implicated. Cf. *Ford Motor Co. v. United States*, 405 U.S. 562, 576 & n.11, 31 L. Ed. 2d 492, 92 S. Ct. 1142 (1971). In any event, the lines of businesses of AT&T and the Operating Companies are not separable but related and, in the equipment market, they will be direct competitors. The customer confusion this would foster would delay achievement of a truly competitive CPE industry.

It was for similar reasons [HN4](#)↑ that the various oil companies which emerged from the 1911 break-up of Standard Oil have generally been prohibited from doing business under a Standard Oil name or trademark in a territory where Standard Oil denoted another product. See, e.g., *Standard Oil Co. (Kentucky) v. Humble Oil & Refining Co.*, 363 F.2d 945, 951 (5th Cir. 1966) ("we think long cumbersome records are no longer necessary to prove the public believes that all of the pseudonyms for Standard Oil belong to the same or related companies").

⁷⁶ The various components of the Bell System will, to be sure, be separated from each other in a legal, ownership, and financial sense. But if they were all to support each other in their marketing and promotional efforts, not a great deal will have been gained. Together they would still crowd out all others; together they would still be the colossus of telecommunications.

⁷⁷ Use by AT&T of the terms "Bell System" or "American Bell System" is particularly troublesome, for it implies that the system that will be broken up on January 1, 1984 actually survives in the form of AT&T.

⁷⁸ It is worth noting also that this confusion is actually being encouraged by AT&T's current advertising which features such phrases as "Bell System" and "Genuine Bell." Indeed, AT&T announced its decision to name its equipment marketing subsidiary "American Bell, Inc." after it had learned of the Department of Justice's objection to the use by AT&T of the word "Bell" in any way which could imply a continuing "endorsement or relationship between the BOCs' monopoly local exchange service and the products and services of AT&T and its affiliates" (letter of September 23, 1982, from William F. Baxter to Howard J. Trienens (Exhibit D to Objections of Tandy Corp., filed February 18, 1983)) and after at least one intervenor in the public interest proceeding before this Court (Tandy Corp.) had similarly complained about such use. AT&T advertising focusing on the word "Bell" has proceeded at a crescendo since the divestiture decision was made.

Because of this history, not much faith can be placed in AT&T's promise to undertake an advertising campaign to educate consumers as to the differences between the new entities. An effective campaign along these lines would be directly contrary to AT&T's interests.

B. AT&T Is Not Entitled to the "Bell" Name and Logo as a Matter of Right

Since the concurrent use by AT&T and the Operating Companies of the name "Bell" cannot be approved, it remains to be decided which entity or entities should inherit that name -- and along with it the logo -- as part of the divestiture. Before proceeding to determine whether AT&T or the Operating Companies should, consistently with the decree's principles, be assigned the Bell tradename and trademark, consideration must be given to several preliminary arguments made by AT&T.

First AT&T contends that it owns the "Bell" name,⁷⁹ from which it would presumably follow that it cannot be deprived thereof without its acquiescence. That argument is not well taken.

All of the assets of the combined Bell System are the property of AT&T⁸⁰ yet some -- indeed the majority -- **[**55]** of these assets are being assigned by the decree to the Operating Companies. If AT&T had a veto power stemming from general principles of property law with respect to the "Bell" name, it would have the same kind of power with regard to all other Bell System assets. Obviously that is not so, in the context of a distribution of assets and liabilities stemming from a break-up of the corporation under a court-approved decree.⁸¹ The question actually is a much more simple and direct one: how should the assets represented by the "Bell" name and logo be distributed in order to effectuate the provisions and principles of the decree -- an issue which is considered in Part C below.

[56]** Second. AT&T next claims that the "Bell" name is part of the heritage of AT&T,⁸² and that customers who have purchased Bell telephones and services and who may want to patronize Bell System companies in **[*1078]** the future are entitled to know, post-divestiture, which companies "are historically related to those products and services they have enjoyed for a hundred years."

But not only is that name as much a part of the heritage of the Bell Operating Companies as that of AT&T, but, in the public mind, "Bell" may well be said to stand **[***128]** primarily for the local companies, for that is where the public has traditionally obtained **[**57]** its telephones and its service.⁸³ It was the Operating Company to which one turned with a malfunction, a complaint, a request for new or altered service, a billing inquiry, and the like. The function of a trademark or tradename is to indicate the party which "puts the goods on the market and accepts the responsibility or plaudits for their acceptability or quality." E. Vandeburgh, Trademark Law and Procedure at 34 (2d ed. & 1979 Supplement).⁸⁴ In this instance, that means, more than any other entity, the Operating Companies.

⁷⁹ Plan of Reorganization at 415.

⁸⁰ See [552 F. Supp. at 201-04](#).

⁸¹ See [Ford Motor Co. v. United States, supra, 405 U.S. at 576](#) and n.11. AT&T also "owns" a sizable magnitude of liabilities, including the contingent liabilities the responsibility for which will pass in large part to the Operating Companies (see Part II *supra*), yet it has never taken the position with respect to these liabilities that they constitute its obligation as distinguished from that of the Operating Companies.

⁸² The reference to a "common heritage" is puzzling for another reason as well. It is because that common heritage was allegedly used to violate the antitrust laws, and it is presumably because the "common heritage" was so intrinsically anticompetitive, defying less drastic remedies such as injunctions, that this lawsuit was filed and this divestiture agreement was made and approved.

⁸³ Response to Objections at 486-87.

⁸⁴ AT&T also claims that the trademark and the tradename Bell belongs to the party which manufactured Bell equipment, i.e., Western Electric Co. However, as one commentator put it,

When one says that a trademark must indicate origin of the goods to which it is applied, it is not intended to [imply] that a trademark can only be used by a manufacturer of the goods The origin to which reference is made is the party that introduces the goods on which the mark is used into commerce with the trademark on them and who primarily stands to

[**58] Third. AT&T contends that the name "Bell" is assigned to it by the plan of reorganization and that this assignment should not be disturbed because it allegedly is not inconsistent with the provisions of the decree. It is true that the Department of Justice has capitulated to this argument, stating that it could find no basis for overturning the AT&T decision. But the provisions of the plan drawn by AT&T are entitled to much less weight here than in other circumstances, since it is clear from the submissions of the designated chief executives of the Regional Companies that a number of them oppose the proposed disposition of the Bell name and logo.⁸⁵ Beyond that, as the Court has had occasion to explain a number of times, the plan of reorganization, to be approved, must be consistent not only with the provisions of the decree but also with the underlying principles. For the substantive reasons discussed below, an assignment of the "Bell" name and logo, or either, to AT&T would not be consistent with these principles.

[59] C. Use of the Bell Name and Logo Are More Appropriately Assigned to the Operating Companies than to AT&T**

Both the original plan and the proposed Department of Justice amendment would [*1079] deny to the Operating Companies the use of the Bell name and logo in marketing customer premises equipment (CPE).⁸⁶ The former would have severely limited this use; the latter would preclude it altogether. It is this aspect which has drawn the widest criticism -- from the States, the inter-exchange carriers, the manufacturers of CPE, and the Operating Companies themselves. In the view of the Court, the critics are entirely correct.

The decree as ultimately entered expressly authorized the Operating Companies to market customer premises equipment. The Court fully explained why it required this modification as a condition of its approval of the decree:

As against [the] relatively slight risks to competition from Operating Company involvement in the marketing of CPE must be weighed [**60] the very substantial contribution these companies could make to vigorous competition in the customer premises equipment market The Operating Companies, with their existing relationship to telephone users, are more likely than any other competitive entity to provide an effective counterbalance to AT&T's market strength and thereby to promote a genuinely competitive market. [***129]

552 F. Supp. at 192 (footnotes omitted).⁸⁷

gain or lose by the acceptable qualities of the goods. It is not even necessary that the public or purchasers know who is the manufacturer of the goods

E. Vandenburgh, Trademark Law and Procedure at 35 (2d ed).

Moreover, it is undisputed that AT&T has not supplied to the Operating Companies and hence held out to the public only products made by it or its affiliates. See Amended Certification of Thomas E. Bolger, April 6, 1983, at 4.

While certainly a survey of the public would indicate that the name "Bell" and the Bell logo do not connote the same thing to every single person -- an individual who has written checks monthly to one of the Operating Companies which does not use the name "Bell" in its corporate name may be more likely to think of "Ma Bell" than of a local Operating Company, for instance -- it cannot be gainsaid that the primary connection between the individual and the Bell System occurred between telephone subscriber and local Operating Company. Assignment of Bell name and logo to the Operating Companies is thus consistent with the trademark law.

⁸⁵ See, e.g., Statement of Wallace R. Bunn, May 23, 1983; Reply Memorandum of the Midwest Regional Holding Co., May 31, 1983; Supplemental Statement of Zane E. Barnes, April 12, 1983. Here, again, AT&T cannot have it both ways: it cannot relegate the largest share of the Bell System obligations to the Operating Companies yet purport to speak conclusively on behalf of the entire System with regard to the plan of reorganization even where there is a sharp dispute among the various components. See note 81 *supra*.

⁸⁶ See note 43 *supra*.

⁸⁷ The Court repeated this reasoning in its Memorandum of August 23, 1982, denying the Justice Department's motion for reconsideration (at p. 5):

[**61] To deprive the Operating Companies of the use of the Bell logo and the Bell name in the CPE area would effectively cripple their efforts to become viable competitors in this market. The Court approved the decree in the expectation that the Operating Companies would be able to use their "existing relationship to telephone subscribers" in marketing equipment as a counter to AT&T's market strength.⁸⁸

The various Operating Company officials who provided comments to the Court⁸⁹ on this aspect of the plan of reorganization attested to the fact that their

principal strength in the marketplace for customer premises equipment (and other potential services which may be approved by the Court) [is their] long and solid reputation [**62] for quality products and excellent service. Our ability to trade on that hard earned reputation is important and should not be compromised by denying us the ability to use the Bell logo and marks as legitimate reminders of who we are.⁹⁰

Several executives of the new Regional Companies have stated that they might have to stay out of the equipment market entirely (or limit themselves to the sale of large-scale equipment) if they were prevented from using the Bell name and logo in connection with equipment marketing. See testimony of Thomas Bolger, June 2, 1983, transcript at 25601-02; see also, Wall Street Journal, Some [**63] Bell Companies May Stop Supplying Residential Phones as Competition Grows, June 17, 1983.

It would not be similarly inimical to the purposes and principles of the decree to preclude AT&T from the use of the Bell name and logo. One principle underlying the decree is that both AT&T and the [*1080] Operating Companies shall be in a position to be vigorous competitors with each other and with others in the marketing of customer premises equipment. To that end, the decree sets up a carefully balanced structure, as follows. AT&T will retain all embedded CPE; it will retain the Bell System retail outlets; and it will retain the ability both to manufacture and to market CPE. The decree further took into account in this regard that, by comparison with the individual Operating Companies, AT&T will be a giant, with financial and other resources far overshadowing those of the local entities.

The Operating Companies, on the other hand, will come out of the divestiture with relatively limited CPE-related resources and functions. They will be prohibited from manufacturing CPE; they will be deprived in part of their existing customer base by the assignment of existing CPE to AT&T; they will [**64] lack the ready-made outlet of existing retail stores; and they will not have the benefit of Bell personnel experienced in the marketing of CPE. Insofar as such marketing is concerned, these companies will essentially be limited to their proximity to the local customer base in addition to the goodwill inherent in the "Bell" name and logo (if these are assigned to them). In short, in competitive terms, the assignment of the Bell name and logo to the Operating Companies rather than to AT&T can hardly be characterized as unfair to the latter.⁹¹ The true situation is that, without the name and logo the

Balanced against the remote contingency that the Operating Companies would engage in anticompetitive conduct is the certainty that they would provide healthy competition for AT&T Allowing the Operating Companies to engage in providing CPE will serve as a useful competitive check on AT&T, not only deterring the possibility of anticompetitive behavior but also benefitting consumers by increasing the number of equipment providers in the market place.

⁸⁸ August 23, 1982, Memorandum Opinion at 4 n.7. Since the provision allowing the marketing of CPE was added to the decree at the Court's insistence, it would not be unreasonable to regard the Court's expectations in that regard as the most accurate expression of the decree's "intent."

⁸⁹ A substantial amount of testimony at the June 2, 1983, hearing was devoted to this issue.

⁹⁰ Letter dated April 13, 1983, from Raymond F. Burke, Vice President and General Counsel-designate of the Northeast region; see also, e.g., Supplement to Sworn Statement of Wallace R. Bunn, chief executive officer-designate of Southeast region; Statement of Thomas Bolger at 2-3.

⁹¹ There is some merit to AT&T's point that its employees have an emotional attachment to the Bell name, and that to them the name's passing may mean the loss of an emblem of pride and perhaps life-long association. The same could be said about employees of the Operating Companies, however.

local companies' right, under the decree, to market CPE would be defeated, while AT&T's right to do so would only be minimally affected.⁹²

[**65] It is appropriate, finally, to quote from the representations which were made to the [***130] Court by AT&T's counsel at last year's public interest hearing. On June 29, 1982, counsel stated in response to comments made by an attorney representing a competitor that

. . . The problem is not the logo, the yellow and blue stripes and that sort of thing . . . We do not want to get into that fight and we have already agreed . . . that the Bell that you know, the stripes that you have come to know they will go to the BOCs. Trucks that get repainted will be the Long Lines trucks, [not?] the BOC trucks. The only thing left then is the names. I think Tandy's counsel was very appropriate in saying that after all, you're breaking up the Bell System . . . What he objected to was concurrent use of the same corporate names. I stand before you and say there will be no such concurrent use of the same corporate name after the split.

When the Court suggested that this understanding had best be incorporated in the decree, AT&T's counsel replied that this was not necessary because

the question has been raised about these common names, the Court Reporter is recording this [**66] and there is a record of this hearing that should well outlast all of us, I suppose.

Transcript at 25214-15.

To be sure, it could be argued that these statements are not without some ambiguity.⁹³ Yet the overwhelming sense of the [*1081] representation, particularly when juxtaposed against the arguments made by counsel for one of AT&T's competitors and that of the Department of Justice, was that AT&T was content to have the Operating Companies inherit the Bell logo and name.⁹⁴

[**67] For the reasons stated, the Court will refuse to approve the plan of reorganization unless it is amended to provide for use of the "Bell" name and logo by the Operating Companies (except as provided in Part D *infra*) and for a prohibition on AT&T's use after January 1, 1984,⁹⁵ of the "Bell" name or the word "Bell" in any existing or new

⁹² It is significant also, in antitrust terms, that transfer of the Bell name and logo to the Operating Companies will not eliminate AT&T as a competitor but will yield two competitors where otherwise there might only be one. Cf. United States v. Lever Brothers Co., 216 F. Supp. 887 (S.D.N.Y. 1963).

⁹³ AT&T suggests that it is not, even now, proposing "common corporate names." When the promise was made that there would be no "common corporate names," it would have been difficult to visualize that AT&T promised only that a modifier would be added to the word "Bell" but that otherwise that name would still be used by all of the successor entities of the Bell System. Had not AT&T's counsel hastened to assure the Court that no amendment of the proposed decree was necessary, the Court would have, then and there, insisted upon language which is not susceptible of the current "fine print" argument.

⁹⁴ The assignment of the Bell name and logo to the Operating Companies rather than to AT&T is further consistent with those provisions of the decree which distribute assets on the basis of predominant use. As the Department of Justice points out,

[assignment] of the Bell logo and marks to AT&T would create relatively more transitional costs, due to the relatively greater number of BOC assets upon which the marks and logo appear, in comparison to those retained by AT&T, e.g., on buildings, trucks, phone booths.

Department of Justice Response to Comments at 155.

⁹⁵ The Court will consider postponing the effective date of the prohibition for an additional six months upon a showing by AT&T made by November 1, 1983, that it needs more time to continue a promotional campaign with respect to whatever name it desires to adopt in place of "American Bell." Although to some extent AT&T has created this problem by its recent intensive advertising campaign (see note 78 *supra*), it is nevertheless appropriate to allow it a reasonable period within which to extricate itself from this situation.

corporate name or in connection with the manufacture or marketing of any product or service, or for any other purpose.⁹⁶

[68] D. Limitations on the Operating Companies**

The use which the Operating Companies may make of the Bell name and logo requires additional discussion.

First. Under the current version of the plan of reorganization, the "Bell" trademarks are to be assigned to the Central Staff Organization.⁹⁷ However, if the CSO were to receive the assignment of the name and logo, it might also have to administer centrally a program of quality control, for lack of reasonable "quality control" could be regarded as working an abandonment of the licensor's registration of its trademark. See Lanham Act, [15 U.S.C. § 1051 et seq.; Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 367 \(2d Cir. 1959\)](#). Such monitoring of the Operating Companies by the CSO would run counter to the notion that it is the Operating Companies which control the CSO, not vice versa. Moreover, each Regional Company must have individual responsibility for giving meaning to the products or services it offers under the name Bell, consistent with trademark and [antitrust law](#). Accordingly, the Court will require that the **[***131]** tradename and trademarks shall pass directly to the Regional Companies, without intervention of **[**69]** the CSO.

Second. With respect to exchange telecommunications, exchange access, and directory advertising, the Operating Companies and the Regional Companies will, by definition, be limited to clearly defined geographic areas, and they will therefore use the name "Bell" only in conjunction with a geographic designation indicating the relevant territory. Likewise, in their corporate names, the Operating and Regional Companies will use "Bell" only in conjunction with a geographic prefix. In the marketing of equipment, however, these companies may wish to compete in places beyond their service territories, particularly with respect to the sale of large-scale telecommunications equipment to business customers. There is no reason why such competition should be **[*1082]** precluded by the imposition of territorial restrictions.⁹⁸

[70]** To the extent that an Operating Company sold CPE within its own geographic area, there might be no problem. Confusion would result, however, if hypothetically, Southern Bell, Northwestern Bell, and Pennsylvania Bell all marketed equipment in, say, Chicago, simply as "Bell" products, or if they stamped only the Bell logo on the equipment they sold there. The name "Bell" would in that case have little meaning; both it and the logo might be of dubious legitimacy under trademark law; and each company would run the risk of being sued by Illinois Bell for unfair competition. Accordingly, an Operating Company wishing to trade in another's territory shall not use the name "Bell" without a trade modifier, nor may it use the logo standing alone. See, e.g., [Standard Oil Company v. Standard Oil Company, 252 F.2d 65 \(10th Cir. 1958\); Mister Donut of America, Inc. v. Mr. Donut, Inc., 418 F.2d 838 \(9th Cir. 1969\)](#).⁹⁹

[71] IV**

⁹⁶ AT&T may, however, continue to use the "Bell" name with respect to its Bell Laboratories and its foreign operations. The Laboratories and the foreign operations will not be in competition with the Operating Companies, and use of the "Bell" name in these contexts will not otherwise be confusing.

⁹⁷ See Part VIII *infra*.

⁹⁸ Such restrictions have in other contexts been found to violate the antitrust laws. See, e.g., [Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc., 585 F.2d 821 \(7th Cir. 1978\)](#).

⁹⁹ Whether the use of the word "Bell" with an appropriate prefix could pass muster under the law of trademarks and unfair competition outside a particular Regional Company's territory may be expected to depend upon the particular facts of each use (e.g., the precise configuration of the name and logo, the results of customer surveys, and the like). Any decision now on that issue would therefore not only be entirely speculative and premature but it might also be beyond the Court's jurisdiction, and it will accordingly be left to another day and another forum.

Patents

The issue before the Court is not, as it is with regard to the Bell name and logo, whether the Bell system patents should be assigned to AT&T or to the Operating Companies. AT&T will, in any event, retain ownership of all the patents. The question to be decided is the extent to which the Operating Companies will share in the patents by being granted licenses thereto, and what right these companies should have to grant sublicenses to others.

A. Meaning of the Decree

The plan of reorganization provides that the Operating Companies will be granted royalty-free licenses to use patents ¹⁰⁰ now owned by AT&T or to be issued to AT&T within five years after divestiture, to the extent that they relate to exchange, exchange access, and printed directory advertising services.¹⁰¹ Under the plan, the Operating Companies will not, however, be granted licenses to patents relating (1) to any services which the decree prohibits them from offering (such as inter-LATA service) and (2) to the provision of customer premises equipment. To justify these limitations, AT&T and the Department of Justice rely upon section I(A)(1) of the decree, which provides, *inter alia*, for [**72] the

transfer from AT&T . . . to the BOCs . . . of sufficient . . . rights to technical information to permit the BOCs to perform, [***132] independently of AT&T, exchange telecommunications and exchange access functions and on section VIII(B) which provides that

all facilities, personnel, systems, and rights to technical information owned by [*1083] AT&T . . . which are necessary for the production, publication, and distribution of printed advertising directories shall be transferred to the separated BOCs.

[**73] In the view of these parties, no patent rights need to be granted to the Operating Companies on any basis other than these explicit provisions contained within the "four corners" of the decree. This is erroneous.

When the Court approved the proposed decree on August 11, 1982, it made the approval contingent upon the adoption by the parties of a number of modifications. These modifications, it was made clear at the time, were required only for the most substantial changes or clarifications; with respect to other subjects, the Court stated that it was content to rely upon the parties' representations and promises and its own authority to give them effect during the implementation proceedings, including by its authority to approve or disapprove of the plan of reorganization. Thus, the August 11, 1982 Opinion explained

With respect to a number of subjects, the proposed decree establishes merely general principles and objectives, leaving the specific implementing details for subsequent action, principally by the plan of reorganization *The parties have also made informal promises, either to each other or to the Court, as to how they intend to interpret or implement [**74] various provisions.* The Court has decided that its public interest responsibilities require that it establish a process for determining whether the plan of reorganization and other, subsequent actions by AT&T actually implement these principles and promises in keeping with the objectives of the judgment

¹⁰⁰ "Patents" as used in this Opinion includes non-patented technical information. The parties have agreed that the Operating Companies would be granted rights not only to patents but also to all technical information funded by the license contracts. [552 F. Supp. at 177](#). The plan as proposed applies only to United States patents; the Operating Companies would receive no rights to foreign patents. Objections to this aspect of the plan are discussed at note 116 *infra*.

¹⁰¹ AT&T's original proposal, which was modified at the request of the Department of Justice, would not have permitted the Operating Companies to engage in sublicensing on their own at all but would have required them to request AT&T to perform all sublicensing for them. The parties have since agreed to a modification of this part of the plan, and each Operating Company will now have the right directly to sublicense patents to any firm for use in supplying goods or services to that company, regardless whether the sublicensee is then a party to a license agreement with AT&T. See Department of Justice Response to Comments at 141.

For that reason, the Court is requiring that the judgment be modified . . . to provide for a proceeding . . . in which *the Court will determine whether the plan of reorganization is consistent with the decree's general principles and promises* (emphasis added).

552 F. Supp. at 224-25.

One of these promises concerned patents. In its August 11, 1982 Opinion, the Court took note of the fact that

AT&T has proposed granting to the Operating Companies, on a royalty-free basis, *all* existing patents and all patents issued for a period of five years following approval of the proposed decree.

552 F. Supp. at 177 (emphasis added). ¹⁰² This statement was not conjured up by the Court; it reflects repeated representations made to it both by AT&T and by the Department of Justice. For example, the Department stated in its Response to Public Comments [**75] of May 20, 1982 at 132 that

the reorganization plan will require AT&T to grant royalty-free licenses to the BOCs for *all* of its existing patents, and for *all* patents issued for a period of five years following entry of the proposed modification (emphasis added).

See also Department of Justice Response to Public Comments, May 20, 1982, at 38; AT&T Reply to Comments, May 21, 1982, at 123; and see note 105 *infra*.

These various representations, said the Court in its August 11, 1982 Opinion,

are adequate to support the conclusion that the Operating Companies will possess the necessary patent and technical information resources. ¹⁰³

[**76] The arguments now made by AT&T and the Department of Justice in support of their claim that the word "all" in their several representations to the Court did not really mean "all," and that in context they meant something else, are disingenuous to say the least. ¹⁰⁴

Both parties base their narrow interpretations on the circumstance that the representations were made at a time when the [*1084] proposed decree would have limited the Operating Companies to exchange telecommunications and exchange access services. ¹⁰⁵ While this is [***133] an accurate depiction of their timing, it does not in the

¹⁰² The Court further relied on the fact that "the parties have assured the Court that the Operating Companies will have the right to sublicense the AT&T patents and technical information to those providing them with goods and services." 552 F. Supp. at 177.

¹⁰³ 552 F. Supp. at 177. Neither AT&T nor the Department of Justice thereafter contradicted the Court's understanding, whether by a motion for reconsideration or otherwise.

¹⁰⁴ Indeed, the Court is disturbed that representations made by both parties in so clear and unequivocal a fashion are now claimed, after the decree has been entered, to be encumbered by gaping loopholes.

¹⁰⁵ See AT&T May 31, 1983 Memorandum at 24; Department of Justice Memorandum, June 10, 1983, at 3.

The Department of Justice points out that AT&T made the following statement during the Tunney Act proceedings:

The Decree requires that AT&T afford the BOCs sufficient technical information to independently provide exchange telecommunications service and exchange access functions (Decree, § I(A)(I)). In compliance with that provision, AT&T will continue to license to the BOCs on a royalty-free basis existing patents and patents issuing within five years after entry of the Decree. AT&T Reply Comments, May 21, 1982, at 123.

The Department further referred to its May 20, 1982 Response to Public Comments at 38, where it stated:

In addition, AT&T has made a commitment to the Department that it will continue to license to the BOCs, on a royalty-free basis, all existing patents and patents issued within five years of the date of entry of the modification. Such licenses will be

least support the conclusion that the promises were or reasonably should have been regarded as limited to patents which related to these lines of business.

[**77] These promises, whatever their timing, were relevant not only to the question of what resources were required to be transferred to the Operating Companies to implement the exchange telecommunications and access service provisions of section I(A)(1), but also to two other issues -- whether the Operating Companies should receive licenses to patents which they had in substantial part financed, and whether AT&T should be relieved of the obligation, imposed by the 1956 decree, to license its patents to all applicants on a nondiscriminatory basis.

First. There were numerous references throughout the Tunney Act proceedings to the fact that the Operating Companies, by means of the licensing contracts, had contributed substantial amounts to the cost of the research which led to the patents, and this was always regarded by all as at least a possible basis for awarding licenses to the patents to these companies. See, e.g., Department of Justice Response to Public Comments, May 20, 1982, at 38.

Second. The Department of Justice took the position during the Tunney Act proceedings that it was reasonable and in the public interest to relieve AT&T of the patent provisions of the 1956 decree [**78] which required it to grant licenses to all comers, foreign and domestic. One basic argument made to buttress the claim of reasonableness was that the fruits of the Bell System research would not simply be lost to the world because the reorganization plan would still require AT&T to grant royalty-free licenses to the Operating Companies for all of its existing patents and for all patents issued for a period of five years following entry of the decree.¹⁰⁶ The Department explained that the effect of such a grant would be that

the BOCs will have the right to sublicense these patents for their own use, including the manufacture of equipment for the BOCs' purchase. Thus, as a practical matter, many AT&T patents issued within the next several years must also be licensed to AT&T's competitors notwithstanding entry of the proposed modification.

...

Because of the existence of requirements that AT&T license patents heretofore [*1085] issued or issued during the next five years, and in view of the BOCs' sublicensing rights, it is apparent that a significant portion, if not all, of such 'work in progress' patents will be licensed There is no reason to believe [**79] that entry of the proposed modification will result in the removal of 'work in progress' patents from the pool of AT&T patents generally available to industry.¹⁰⁷

This expansive description of the proposed distribution of patent rights was not in any way limited, explicitly or implicitly, to section I(A)(1) of the decree or to intra-LATA services. The Justice Department's reference was to the effect of the proposed decree on the mandatory licensing provisions of the 1956 decree -- and these provisions clearly applied to all Bell System patents (including, of course, the CPE patents).

There is, in view of that history, no reasonable basis for the conclusion that the various references by AT&T and the Department of Justice to "all" patents did not mean just that, or that CPE patents in particular were meant to be withheld from the Operating Companies. Thus, when the decree was modified to authorize [**80] the Operating Companies to provide CPE, there was no need again to specify the patent rights incidental to this [***134]

for the life of the patent and will include the right to grant sublicensee to others to provide the BOCs with goods and services *for the BOCs' own use* (emphasis added).

Department of Justice June 10, 1983 Memorandum at 3.

The Department argues that the "own use" limitation is not consistent with an interpretation that these companies would be granted the right to sublicense patents to manufacturers who provided them with products for resale. But the decree grants to the Operating Companies the right to provide CPE, and these companies obviously need to be supplied with products to use in selling CPE to the general public. See *infra*.

¹⁰⁶ Department of Justice Response to Public Comments, May 20, 1982, at 132.

¹⁰⁷ *Id. at 132-33.*

modification¹⁰⁸ -- rights which were already guaranteed to the Operating Companies by the parties' representations and by the Court's retention of jurisdiction to give effect thereto. As the Court said with reference to patents and technical information,

When [the plan of reorganization] is submitted . . . the Court will evaluate [that plan] to make certain that [the appropriate details] conform to the general principles implied by these assurances.

552 F. Supp. at 177.

[**81] AT&T next contends that, if it were required to license all the Bell System patents to the Operating Companies which would then have the right to sublicense these patents to others, it would be required to "give away *its* technology" (emphasis added).¹⁰⁹ [**82] That formulation misstates the issue. Because of their financing of much Bell System research through the licensing contracts, what the Operating Companies will be receiving cannot fairly be described as AT&T's technology;¹¹⁰ that technology is as much theirs as it is AT&T's. See 552 F. Supp. at 177.¹¹¹ Also, as the Court has already noted (see Part II above) all of the assets and all of the liabilities of the Bell System are being distributed between AT&T and the Operating Companies. AT&T cannot assert that, in the context of that distribution, the patents are "*its*" technology unless it is also prepared to live with the proposition that the liabilities of the Bell System are "*its*" liabilities. In short, it is entirely appropriate under the decree for [*1086] the Operating Companies to receive licenses to the existing patents and to those which will be issued within the next five years.¹¹²

AT&T and the Department of Justice finally argue that under this rule, the Operating Companies would receive licenses to patents for services which the decree currently prohibits them from offering,¹¹³ and that there could be no justification for such an action. It is not true, however, that even with respect to such subjects as inter-LATA services, the Operating Companies will be entirely barred from entry; they will be in these lines of business as of the very [**83] date of divestiture, albeit on a limited scale,¹¹⁴ and they will therefore be able legitimately to make use of the pertinent patents¹¹⁵ and the technology they represent.¹¹⁶ [**84] Additionally, the line of business

¹⁰⁸ The Department of Justice and AT&T also point out that section VIII(B) -- which authorizes the Operating Companies to provide printed directory advertising services (*i.e.*, Yellow Pages) -- specifically provides that the technical information necessary to provide such services should be transferred to the Operating Companies. From this premise they argue that since section VIII(A) -- which authorizes the Operating Companies to provide CPE -- is silent with regard to the transfer of technical information, the conclusion may be drawn that no transfer of CPE patents to the Operating Companies was intended.

This argument is likewise unpersuasive, since there is another, more plausible explanation for the variation between sections VIII(A) and VIII(B). The language in section VIII(B) concerning technical information is part of a larger provision, similar to section I(A)(1), which was intended to result in the transfer to the Operating Companies of all Bell System assets used in the production of printed directories. See 552 F. Supp. at 194 n.263. If this provision had been used in the CPE context, it would have effectively assigned to the Operating Companies the embedded CPE and the existing network of retail outlets, contrary to the Court's intent. See 552 F. Supp. at 192 n.248.

¹⁰⁹ AT&T Response to Objections at 462.

¹¹⁰ That is, "central" AT&T, as distinguished from the Bell System as a whole.

¹¹¹ This is so even if it is assumed, as AT&T asserts, that no expenses have been billed to the Operating Companies for new CPE patents since May 1980. See testimony of Thomas Bolger, designated chief executive of Mid-Atlantic Region, June 2, 1983, transcript at 25594, 25597-98.

¹¹² With regard to all patents, AT&T will retain ownership and the right to use them in any lawful way it sees fit. None of the licensing requirements in the decree or in the plan of reorganization as required to be modified by the Court changes that fact in any way.

¹¹³ [**135] *E.g.*, patents applicable directly to inter-LATA services or to foreign operations.

¹¹⁴ *E.g.*, in the so-called "corridors" and the Official Services (see slip op. at pp. 115 and 91 *infra*).

restrictions which will initially apply might in the future be lifted by the Court pursuant to section VIII(C) of the decree, and the patents would be useful to the Operating Companies at that time.¹¹⁷

B. Sublicensing by the Operating Companies

It is thus clear that, in view of the representations made by the parties and accepted by the Court as part of the decree, as well as in view of the various supporting considerations (e.g., that the Operating Companies in significant part financed the research which produced the patents), the local companies are entitled to licenses to all the patents secured during the course of their association with AT&T and for five years after the association is dissolved.¹¹⁸ This does not mean, however, as AT&T assumes and as some of the intervenors strenuously urge, that the Operating Companies may make direct use of the patents with respect to services which are otherwise forbidden to them by the decree. What must be [**85] firmly kept in mind is that, since the Operating Companies will not be allowed to enter manufacturing, they will be able to make effective use of the patent licenses only to the extent that they will have the power to grant sublicenses to manufacturers. As explained below, that power will exist with respect to some subjects immediately upon divestiture; with respect to others it is inchoate and its actual exercise will depend upon the removal of the line of business restrictions under section VIII(C).

[*1087] The Operating Companies may [**86] grant sublicenses consistently with the decree to the extent that they will use the technology covered by the particular patents in their provision of products and services which they are authorized to sell or render.¹¹⁹ [**87] They may not, however, grant sublicenses with respect to any other patents, for two reasons: first, because they may not, absent special permission, engage in new lines of business (sections II(D), VIII(C)), e.g., the sale of patent rights simply as a business venture unrelated to their own use of the technology; and second, because AT&T's manufacturing competitors are not entitled, as such, to the fruits of the Bell System research ([552 F. Supp. at 176-77](#)).¹²⁰

¹¹⁵ See, e.g., testimony of Thomas Bolger, June 2, 1983, transcript at 25595.

¹¹⁶ With regard to foreign patents, AT&T argues that since the Operating Companies' exchange operations are confined to this country, the rights to AT&T's domestic patents provide all the patent rights the Operating Companies require to conduct exchange and directory advertising operations. AT&T Memorandum, May 31, 1983, at 24 n. **. However, in the CPE area, at least, foreign patents could be helpful to the Operating Companies even though they will not be operating overseas, for rights to foreign patents will enable them to purchase CPE which is manufactured entirely or in part by foreign companies. See testimony of Thomas Bolger, June 2, 1983, transcript at 25600; Memorandum of Mid-West Regional Holding Company, May 23, 1983, at 19; Memorandum of Mid-West Regional Holding Company, May 31, 1983, at 8.

¹¹⁷ The Operating Companies would benefit from these rights if any of the line of business restrictions should be lifted *at any time during the life of the particular patent*, not simply during the five years after divestiture. A lifting of the restrictions, or some of them, during that extended period is certainly conceivable.

¹¹⁸ It may be noted that requests to modify the proposed plan of reorganization so as to broaden the scope of patent rights granted to the Operating Companies were made by the Midwest Regional Holding Company (see Reply Memorandum of May 31, 1983); Thomas Bolger, designated chief executive of the Mid-Atlantic Region (see Second Amended Certificate of June 10, 1983); and Wallace R. Bunn, designated chief executive of the Southeast Region (see Statement of May 23, 1983).

¹¹⁹ See [552 F. Supp. at 177](#) (Operating Companies may grant sublicenses "to those providing them with goods and services"). Likewise, the Plan of Reorganization at 411-12, as modified by Amendment 34, provides that

AT&T will grant to each BOC the right -- which no BOC currently has -- to sublicense such AT&T patents to competing manufacturers for use only in providing the BOCs with goods or services embodying the inventions of the patents, provided that such sublicense does not prejudice AT&T's existing cross license agreements.

¹²⁰ Several intervenors have suggested that the plan be modified to allow the Operating Companies to sublicense patents to manufacturers for the provision of goods and services not only to the Operating Companies but also to other purchasers, arguing that such broader sublicensing rights would result in increased royalty payments to the Operating Companies and, due to greater economies of scale, to the reduction in cost of all goods produced by independent manufacturers. See, e.g., Reply of

On the basis of these principles, it is convenient to consider the sublicensing issue with respect to two distinct categories of products or services -- those which the Operating Companies will be allowed to market immediately upon divestiture, and those which they will not be permitted to market at that time.

The first of these categories includes, of course, customer premises equipment.¹²¹ In an effort, accordingly, [**88] to resolve whether the grant of sublicenses to CPE patents by the Operating Companies to manufacturers of CPE would be used by the local companies in their provision of CPE -- and whether therefore these companies may sublicense Bell System patents to such manufacturers -- the Court has received and considered evidence (in both oral and affidavit form) from the chief executives of the Regional Companies. This evidence indicates that the Operating Companies will use the end products of the sublicenses in several respects.

First. The Operating Companies must have the right to sublicense [**89] CPE patents to manufacturers of their choice if they are to develop a CPE product line distinct from that of AT&T. As Thomas Bolger, designated chief executive officer of the Mid-Atlantic [***136] Region, has pointed out, if the Operating Companies were not granted rights to CPE patents, "the selection of the vendor to use Bell technology to supply a BOC would be taken from the BOCs and left to AT&T [which] might, or might not, cross-license the vendor with whom BOCs wish to deal."¹²² [**90] Under such circumstances, the reliance [*1088] of the Operating Companies upon Western Electric equipment would be perpetuated, thus impeding competition in the telecommunications equipment markets. It follows, of course, that without CPE patent rights and the ability to market a distinctive product line, the Operating Companies would not be able to provide the "effective counterbalance to AT&T's market strength" in CPE marketing, which the Court sought to establish in modifying the decree. [552 F. Supp. at 192](#).¹²³

Second. If the Operating Companies are able to sublicense CPE patents, they will probably be able to negotiate lower equipment purchase prices and thus to share in the benefits from the Bell System [**91] research which they supported for so long.¹²⁴ This, in turn, will facilitate greater CPE sales and higher Operating Company revenues,

Wang Laboratories, April 13, 1983. The Court will not order such a modification, however, since it would, in effect, permit the Operating Companies to enter the patent licensing business.

¹²¹ AT&T contends that the Operating Companies need not be granted rights to CPE patents in view of the Court's observation that the Operating Companies will enter the CPE market "from a zero base." AT&T Response to Objections at 465 n.* (citing [552 F. Supp. at 192](#) & n. 248). There is nothing in the Court's language to support AT&T's conclusion; it merely justified the assignment to AT&T of the embedded CPE and the retail outlets.

¹²² Second Amended Certificate of Thomas Bolger, June 10, 1983, at 6. When questioned by the Court at the June 2, 1983 hearing as to whether the Operating Companies would use the CPE patents other than merely as a source of revenue, Bolger responded:

I would use them in order to allow me the freedom to make arrangements with suppliers, if I wanted to and if I found that it would be valuable for me to do so, so that I would have additional flexibility to procure CPE for my requirements. . . . I'm not going to sell the technology. I want to use it to help me enter the CPE market.

Transcript at 25596.

¹²³ The logic underlying the licensing of all patents to the Operating Companies was to assure their independence from AT&T by providing alternative sources of supply for goods and services which they would use in the businesses which they were authorized to conduct. These companies had long been a captive market for Western Electric, both for telecommunications equipment and for CPE. Operating Company independence from AT&T is therefore crucial to CPE marketing, just as it is with respect to exchange and exchange access functions. With regard to both businesses the Operating Companies will be free to purchase equipment (or services) from suppliers which do not require licenses under AT&T patents; with regard to both businesses it is important, however, that they be able to purchase from alternative sources equipment (or services) which would not be available without sublicenses under AT&T patents.

¹²⁴ As indicated, the Operating Companies will be permitted to sublicense CPE patents only in order to enable a manufacturer to provide goods for resale by the Operating Companies. See *infra*. Thus, any royalty received by the Operating Companies under such sublicenses will, in all probability, be in the form of a reduced wholesale price paid by the Operating Companies to the manufacturer.

and contribute in the long run to the financial viability of the Operating Companies (and indirectly to stable local telephone rates).¹²⁵

Third. The sublicensing of patents will permit the Operating Companies to benefit from increased competition among their suppliers -- another development which would tend to reduce the price of CPE purchased by the Operating [**92] Companies for resale. To the extent that greater competition among CPE manufacturers¹²⁶ and lower wholesale prices paid by the Operating Companies will result in lower retail prices for consumers, the public will benefit as well.

For these reasons, the Court concludes that the sublicensing of CPE patents to manufacturers of CPE would be a legitimate part of the Operating Companies' CPE marketing business.

In contrast to the substantive benefits which would inure to the Operating Companies from the ability to license CPE patents, only one possible adverse effect has been suggested.¹²⁷ The Department of Justice contends that Operating Company sublicensing of such patents would be a "step into the manufacturing area," contrary to section VIII(A) of the decree. Such sublicensing, according to the Department, would give the Operating [**93] Companies an interest in the success of their manufacturer-sublicensees, and this, coupled with the proprietary interest in the particular technology covered by the sublicense, would create an incentive for anticompetitive acts.¹²⁸

In substance, this argument is but a variation of the claims made by the Department when it opposed the Court's decision [*1089] to permit the Operating Companies to enter the CPE market. The Court then rejected the [***137] Department's assertion¹²⁹ that Operating Company marketing of CPE would result in anticompetitive conduct,¹³⁰ because it concluded that the subsidization by the Operating Companies of their retail CPE operations with monopoly-derived [**94] revenues was entirely improbable.

There is no good reason -- and the Department has offered none¹³¹ [**95] -- why the Operating Companies would have a greater incentive or opportunity to engage in such subsidization merely because they will be able to

¹²⁵ See Statement of Wallace Bunn of May 23, 1983 at 5-7; Testimony of Thomas Bolger, June 2, 1983, transcript at 25596.

¹²⁶ There is no reason why an Operating Company would sublicense a particular CPE patent to only one manufacturer. See testimony of Thomas Bolger, June 2, 1983, transcript at 25597.

¹²⁷ To be sure, another consequence would be that AT&T would acquire additional competitors in the CPE business, but this could hardly be regarded as an "adverse" effect in the context of this antitrust decree designed, in part at least, to open the CPE market to competition.

¹²⁸ Department of Justice Response to Comments at 143-44.

¹²⁹ At the same time, as the Court made clear, there are abundant reasons why the marketing of CPE by the Operating Companies is in the public interest ([552 F. Supp. at 191-92](#)).

¹³⁰ See [552 F. Supp. at 192](#); Memorandum of August 23, 1982.

¹³¹ The Department has not attempted to explain how the grant to the Operating Companies of the right to sublicense CPE patents would increase the potential for cross-subsidization. The Department has, however, given three reasons why in its view discrimination among manufacturers could occur: (1) the sublicensing of patents would increase the Operating Companies' incentive to discriminate against certain vendors because the companies would have an incentive to market only the products of manufacturers operating under the sublicenses; (2) the Operating Companies would have the ability to extract concessions from manufacturers, thus undermining the potential for variety and merit purchasing; and (3) a financial interest in the success of a particular technology would enhance the incentives of the Operating Companies to develop standards through the CSO, which they own and control, to favor such technology. Department of Justice Memorandum, May 31, 1983, at 12-13.

The principal difficulty with these arguments is that there will be no reason for the Operating Companies to sublicense to only one particular manufacturer (and thus to favor that manufacturer's products) and a number of reasons why sublicenses will be granted to a number of manufacturers. See notes 126 *supra* and 134 *infra*. Additionally, the type of "concessions" the Operating Companies would extract from their sublicensing rights would be lower wholesale prices, which is hardly anticompetitive or

sublicense CPE patents to independent manufacturers.¹³² Such an ability would no more facilitate coordination between separate corporations likely to lead to cross-subsidization than the purchasing contracts themselves, nor would the sublicensing of patents make anti-competitive activities any less detectable.¹³³ **[**96]** See [552 F. Supp. at 191-92](#).¹³⁴

Finally, it is surely not without significance that the manufacturers of CPE -- **[*1090]** whom the Department of Justice is ostensibly attempting to protect -- uniformly support the grant of sublicensing rights to the Operating Companies.

The Court concludes that the Operating Companies may sublicense their Bell System patent rights to manufacturers of CPE where the equipment produced under the sublicenses will be sold to the Operating Companies.

The same rule applies to the services which the Operating Companies will be authorized to perform. Clearly, they may sublicense **[**97]** patents for the manufacture of products which will assist them in providing intra-LATA service. Further, although prohibited from providing inter-LATA service generally, they will be in two relatively small areas of that market: corridor services¹³⁵ and Official Services.¹³⁶ Under the rationale applied to CPE, **[***138]** sublicenses may therefore be granted to manufacturers for the provision of equipment for the Operating Companies' own use in these two authorized inter-LATA services.¹³⁷

Finally, section VIII(C) of the decree provides that the Court may, in the future, allow the Operating Companies to enter lines of business presently prohibited to them.¹³⁸ While, of course, the Operating Companies could not, immediately upon divestiture, sublicense patents **[**98]** useful with respect to such lines of business (see note 120

contrary to the selection of vendors based on merit. Finally, if the Operating Companies were able to sublicense Bell System technology, more manufacturers would have access to this technology than if it were tightly controlled by AT&T, and it would be less likely rather than more so that the CSO would set standards that favored only AT&T and Western Electric products. See Independent Data Communications Manufacturers Assoc., Inc. Reply Memorandum, May 31, 1983, at 9 n. 19.

¹³² Irrespective whether a sublicense is involved, the Operating Companies will share no common facilities with manufacturers. Further, sublicensing of CPE patents by the Operating Companies is no more a step into manufacturing than is the sublicensing of exchange and exchange access patents designed to provide goods and services to the Operating Companies for their exchange operations -- yet the Department of Justice does not object to the latter. If Operating Company sublicensing of CPE patents were considered a form of manufacturing violative of the decree, then so presumably would the sublicensing of any patent by an Operating Company to a manufacturer -- and the promises of AT&T and the Department of Justice made during the Tunney Act proceeding would be reduced to a nullity.

¹³³ See Memorandum of Midwest Regional Holding Co., May 23, 1983, at 20 n. 20. It is difficult to see how sublicensing of patents would be a "step into manufacturing" likely to produce anticompetitive conduct also because the Operating Companies will, by necessity, have to negotiate with independent equipment manufacturers over a variety of contractual terms (e.g., specification and design terms, volume contracts, trademark licenses) in order to obtain a distinctive line of products for resale.

¹³⁴ The Operating Companies will have no economic incentive to engage in discriminatory conduct merely because they will have the ability to sublicense. As they enter the CPE market with a zero market share, their overriding incentive will be to enter into arrangements with as many vendors as is necessary to produce the highest quality, lowest priced products for resale to the general public. And the Operating Company executives have given every indication to the Court that this is precisely what they intend to do.

¹³⁵ See slip op. at pp. 115-16 *infra*.

¹³⁶ See slip op. at pp. 91-101 *infra*.

¹³⁷ The Operating Companies will be responsible for ensuring that those to whom sublicenses are granted do not exceed the scope of the activities allowed hereunder.

¹³⁸ This may be done under that section, if it is demonstrated that "there is no substantial possibility that [an Operating Company] could use its monopoly power to impede competition in the market it seeks to enter."

supra), the patent licenses assigned to them at the time of divestiture will become valuable through the automatic availability of the right to sublicense to the extent that section VIII(C) is successfully invoked in the future.¹³⁹

C. General Considerations

Two **[**99]** additional considerations applicable both to the patent issue and the "Bell" name and logo questions deserve brief mention.

First. The Department of Justice¹⁴⁰ has been opposed to the marketing of CPE by the Operating Companies from the very outset. It was the Department which insisted on a provision in the proposed decree prohibiting such marketing. See, e.g., Brief of the United States, June 14, 1982, at 30. When the Court on August 11, 1982, informed the parties that it would not approve the proposed decree unless that prohibition was eliminated, the Department sought reconsideration -- the only issue with respect to which it made such an effort. See Memorandum, August 23, 1982. Finally, when the Court denied reconsideration, the Department, on the very date of filing the modified decree, submitted a memorandum in which it expressed "substantial doubts" that the modification allowing the Operating Companies to market CPE was "properly within the Court's authority under the public interest standard or [was] supported by the antitrust theory and the record in these cases."

[100]** The decree entered in this case allows the Operating Companies to market CPE. That decree was signed by the two parties, and it was entered as a judgment of this **[*1091]** Court. Whatever may be the views of the Department of Justice or some of its officials regarding the wisdom of the CPE provision, it will be enforced. And the Court will not allow this provision to be stripped of its vitality by artificial restraints which would undermine the competitive position of the Operating Companies in the CPE business vis-a-vis AT&T.¹⁴¹

Second. The Court has previously taken note of the recent decision of the Federal Communications Commission concerning access charges. See 1983-1 Trade Cas. P 65,333 at 66,973-75 (April 20, 1983). Briefly, the Court was advised prior to the entry of the decree that whatever subsidy from long distance rates might in the **[**101]** past have been inherent in the local rate structure could and would be preserved by means of access charges levied on interexchange carriers.¹⁴² However, in December of last year, the FCC decided to levy such charges also on individual subscribers.¹⁴³

This access charge decision undermines one of the assumptions underlying the Court's approval of the decree¹⁴⁴ - that there would be no impairment of [HNS](#)[↑] the principle of universal service¹⁴⁵ -- that is, that everyone,

¹³⁹ Until the occurrence of such an event, if ever, the particular patent licenses in the possession of the Operating Companies will simply lie dormant. AT&T will not be injured by the grant to the Operating Companies of licenses to patents which, ultimately, these companies may never utilize. There is also no need, therefore, to fear that the Operating Companies will use their patent rights to "peddle" AT&T technology. AT&T Memorandum May 23, 1982, at 23.

¹⁴⁰ Whether or not AT&T sought the Bell name and patent restrictions or was required or persuaded by the Department of Justice to agree to them, there can be no doubt that they are advantageous to AT&T, for they would, as a practical matter, eliminate competition from the Operating Companies or significantly curtail the effectiveness of such competition.

¹⁴¹ I.e., restraints which would unnecessarily and improperly deprive the local companies of the necessary and appropriate patent and trademark rights.

¹⁴² That is, charges levied upon the carriers as a prerequisite to their obtaining access to the local loops and hence to the local subscribers.

¹⁴³ See *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72 Phase I (adopted December 22, 1982). The FCC also decided to begin this program on January 1, 1984, the date of the reorganization of the Bell System. This effective date makes it appear that the imposition of this burden on consumers is related to the decree herein -- which clearly it is not (see note 292 *infra*).

¹⁴⁴ See [552 F. Supp. at 169, 224 n. 376](#).

[**102] regardless [***139] of income, would have access at least to a minimum of telephone service, in recognition of the fact that this service is a necessity rather than a luxury.¹⁴⁶ The FCC's decision unnecessarily¹⁴⁷ jeopardizes this objective.

[**103] Whatever its authority or lack of it with regard to this development,¹⁴⁸ the Court may certainly take it into account, as further support for conclusions which are sound for other reasons. In passing upon the trademark, trademark, and patent issues, as well as on various other questions, the Court has done just that (see slip op. at pp. 151-52 *infra*). In each instance, the Court's decision is fully justified by other, specific considerations cited in the text, but in each such instance the Court also found that its decision was buttressed by the need to cope with the threat posed to universal, low-cost, local telephone service.

V

Employees

A. *Pension Plan*

Two challenges are made to the employee pension provisions of the plan of reorganization.

[*1092] 1. *Union Challenge*

The Communications Workers of America (Union)¹⁴⁹ claims that the plan's proposal to divide the Bell System Pension Plan (BSPP) into nine separate plans will materially alter [**104] the terms and conditions of employment within the Bell System, and that the plan therefore impermissibly interferes with the Union's right to bargain over pension benefits.

The two current pension plans, the BSPP covering nonmanagement employees and the Bell System Management Pension Plan (BSMPP) covering management employees, have existed in their present form only since 1980. Prior to that time, the many separate companies which constitute the Bell System administered separate pension plans. In October 1980 the plans were aggregated,¹⁵⁰ and even though a formal separation between management and nonmanagement personnel was maintained, the assets of both the BSPP and BSMPP have since 1980 been pooled for investment purposes into one Bell System Trust. The plan of reorganization would divide each integrated plan into nine plans to correspond to the nine entities which inherit AT&T's assets and functions after January [**105] 1, 1984.¹⁵¹

¹⁴⁵ Universal service has been mandated by the Congress, and until December of last year it had been a principal policy goal of the Federal Communications Commission.

¹⁴⁶ One might consider, for example, such uses as the ability to reach fire, police, and other emergency services; the need of the elderly to reach physicians, close relatives, or others who might give them aid; and the desire of those in isolated areas of the country for contact with others.

¹⁴⁷ That decision, at bottom, rests upon the proposition that novel bypass technologies may erode the financial health of the Operating Companies, and that increased support from the residential ratepayers will allow these companies to remain competitive. There is no reason to believe that bypass on a large scale is imminent. Further, evolving technology may be expected to result overall in reduced costs. Rather than to serve as a basis for imposing a new burden on local ratepayers, such technology and such reduced costs would better be channelled to benefit all segments of the public, including the local subscribers.

¹⁴⁸ See slip op. at p. 154 *infra*.

¹⁴⁹ Other labor unions are also involved, but they did not submit comments to the Court.

¹⁵⁰ The Union states that the decision to merge the various plans was a subject of collective bargaining, but AT&T disputes this assertion. AT&T Response to Objections at 399.

¹⁵¹ For pension purposes, these nine entities are AT&T, the Central Staff Organization, and the seven Regional Companies.

The Union, which is concerned specifically with the BSPP, offers eight changes it believes this division would cause, but upon examination they reduce to three general categories. First, the Union complains that the plan would phase out the "interchange" provisions in the BSPP governing the portability of service credit from one Bell System company to another. Second, it speculates that each of the nine plans will be financially more risky than the existing central plan,¹⁵² with the result that an employee's benefits may be reduced. Third, the Union maintains that the post-divestiture plans -- as described in the plan of reorganization -- would treat former employees who are rehired differently [**106] from the way they now are treated for pension purposes.¹⁵³

In approving the divestiture and rejecting the Union's request that the decree be modified to provide that it would not preclude [***140] continued national bargaining in telecommunications, the Court stated last August:

There is no need [**107] for such a modification. There is nothing in the proposed decree or in general principles of law which would preclude or interfere with such bargaining, and there accordingly is no reason whatever why, following the entry of the decree and the reorganization, such bargaining cannot continue as in the past.

The settlement of the lawsuits . . . do[es] not involve AT&T's labor relations and, more particularly, [it has] nothing to do with the Communications Workers of America or its relationship with the Bell System. [citations omitted]. It follows that the union, on the one hand, and AT&T, and the divested Operating Companies, on the other, will be entirely free to arrange their mutual labor relationships as the Bell System and the union did in the past, irrespective of the structural [*1093] changes that may be brought about by the decree

552 F. Supp. at 210.

The Union cites this language, the labor exception to the Sherman Act, federal labor policy, and the lack of relation between the Bell System Pension Plan and AT&T's alleged anticompetitive conduct as reasons why the Court should not approve the plan's proposed treatment of the BSPP but should commit [**108] the future of the BSPP to the results of collective bargaining.

First. The Court observes that the plan of reorganization does acknowledge the role of collective bargaining over pension benefits. AT&T states that

the provisions of this section [regarding pensions] are based on the Bell System's plans and trusts as they currently exist. These plans and trusts may be modified during 1983 or thereafter as a result of collective bargaining or other requirements.¹⁵⁴

Thus, it does not appear that AT&T is attempting to ride roughshod over the bargaining rights of its employees.

Second. Although AT&T could not materially alter pension benefits [**109] unilaterally (see [NLRB v. Katz, 369 U.S. 736, 8 L. Ed. 2d 230, 82 S. Ct. 1107 \(1962\)](#), [Bastian-Blessing, Division of Golconda Corp. v. NLRB, 474 F.2d 49 \(6th Cir. 1973\)](#)), this principle and the cases which support it are inapplicable here.¹⁵⁵ We are not dealing here

¹⁵² For example, the union posits that gains in one Operating Company's assets would no longer be available to compensate for losses in another Company's assets.

¹⁵³ A fourth criticism -- that the distribution of the Trust's assets may be out of synchronization with the distribution of its liabilities, i.e., the accrued benefits of employees -- is plainly without merit. Elaborate actuarial studies will be performed after employee assignments have been finalized to ensure that pension assets in the appropriate amounts follow each employee. A company would therefore not receive a disproportionate number of employees near retirement without also receiving a proportionately greater amount of pension assets.

¹⁵⁴ Plan of Reorganization at 281 n. 317. Moreover, AT&T and the Union have already bargained over certain effects of divestiture on employees' pension and health benefits, and the results of this bargaining are reflected in the Amended New Entities Arguments dated March 26, 1982, March 30, 1982, and April 5, 1982. See AT&T Response to Objections at 397.

with unilateral employer action in the sense in which it is condemned by the labor laws, but with a break-up of the employer company as part of a comprehensive settlement of a complex antitrust action. See [Newspaper Guild of Greater Philadelphia, Local 10 v. NLRB, 636 F.2d 550, 560 \(D.C. Cir. 1980\)](#).

[**110] Furthermore, contrary to the Union's assumption, the decree in this case requires far more than a separation of AT&T's telecommunications functions; it requires the complete economic separation of the various components of the Bell System. See, e.g., sections I(A)(1); I(A)(3). It would be entirely inconsistent with the decree to perpetuate a unified pension plan, with the result that employees of the independently owned and functioning Operating Companies would continue to look to AT&T for their pension benefits. As it is, equipment manufacturers are concerned that they may not receive equitable treatment from Central Staff Organization employees due to their alleged emotional ties to their former parent company. Such claims would acquire considerable plausibility if CSO and Operating Company employees believed that they had a continued economic stake in AT&T in the form of their retirement benefits.

At a minimum, the decree requires that the pension assets of employees follow them to their new assignments, and that the Regional Companies develop, as soon as possible, self-sufficient pension plans.¹⁵⁶ [**112] Union-employer [***141] [*1094] bargaining for a continued, unified pension [**111] plan is thus not a viable option. This is a structural matter covered by the decree that is not inconsistent with federal labor policy, for there will be no "changes in coverage, levels, or administration of the plan." [Connecticut Light & Power Co. v. NLRB, 476 F.2d 1079, 1082 \(2d Cir. 1973\)](#).¹⁵⁷

The phasing out of unlimited portability¹⁵⁸ [**114] is likewise a natural consequence of divestiture, for it would surely be inconsistent with the independence of the Operating Companies from AT&T and from one another to

¹⁵⁵ In *Katz*, the Supreme Court held unlawful an employer's unilateral establishment of new systems of wage increases, sick leave provisions, and merit raises at a time when it was negotiating with the union regarding the same subjects. *Bastian-Blessing* likewise involved the unilateral termination by the employer of a health insurance plan which had been the subject of collective bargaining. Neither case even remotely resembles the facts of the instant situation.

¹⁵⁶ AT&T proposes to continue to administer the pension plan of any Regional Company that requests such "full service" assistance for a transition period during which the Company would acquire the skills and resources to manage its own pension plan. Regional Companies that request this option would receive their share of pension assets no later than 1987. Plan of Reorganization at 297. The Court approves of AT&T's continued management of a Regional Company's pension plan with the expectations that the Regional Companies choosing this option will have as much authority over their respective plans while they are technically under AT&T's administration as they desire, and that the transition periods will be kept to a minimum. It would be impractical to insist that assets be immediately transferred to a company that does not believe it can prudently manage them. At the same time, continued linkage between AT&T and the Regional Companies is not to be encouraged. In this regard, AT&T proposes to continue managing the Bell System Trust's real estate investments, which amount to approximately \$3.1 billion. The Court approves this aspect of the plan, although reluctantly, in view of the nonliquid nature of these assets and the allowance for a Regional Company or AT&T to buy out of the arrangement.

¹⁵⁷ AT&T and the Department of Justice represent that this will be the case: benefit amounts and entitlement and eligibility requirements will not change. The financial performance of the individual plans may vary but the Union has offered nothing but speculation that any such variation would have an actual effect on the level of benefits, particularly since the fair market value of the BSPP and BSMPP trusts exceeds the present value of accrued benefits. Plan of Reorganization at 295 n. 332.

¹⁵⁸ Under the plan, unlimited portability would remain in effect for one year after divestiture, except that employees in certain specified job categories who work on facilities shared by the Operating Company and AT&T would be granted longer portability entitlements. See *infra* at slip op at pg. 88. Portability would continue after the one-year "true-up" period among the Operating Companies controlled by each Regional Company.

The Union objects to the elimination of unlimited portability insofar as it overrides a benefit secured previously through collective bargaining. AT&T agrees with the Union that "many of the employee protections to be provided during the true-up period are subject to collective bargaining" (AT&T Response to Objections at 382 n. 1) but argues that the decree requires the parties and the Court to set a definite time limit for the true-up period. The Court agrees that the decree's separation between AT&T and the Operating Companies requires the establishment of a fixed true-up period for employee transfers, and it finds that the one year

allow employees to rotate among them as freely as if these companies were related entities.¹⁵⁹ The Court therefore approves AT&T's proposals which would divide the two existing plans into nine separate plans, and the provisions governing the division of pension assets through actuarial studies -- both before and after divestiture -- to ensure that the assets will be equitably distributed. [**113]

Third. There is merit in the Union's position that the Court need not and should not involve itself in the specific terms of the post-divestiture pension plans beyond their structure. Unlike the threshold issues of the pension plans' division and the elimination of unlimited portability, the precise terms of the pension plans admit of several resolutions each of which would be consistent with the decree.¹⁶⁰ However such nonstructural aspects of the pension plans may have been resolved in the past, their resolution is not cast in concrete. Accordingly, they are open for further decision, whether by collective bargaining when the contract governing the current pension plan expires in August 1983, or otherwise as AT&T and the Union see fit. The Court's approval of the plan of reorganization is therefore not to be regarded as an endorsement of whatever AT&T may be planning with respect to post-divestiture pension benefits. To put it another way, there is nothing in the Court's approval of the plan of reorganization [**115] (other than the structural and portability matters discussed above) which would in any way impair the obligation of AT&T to bargain in good faith with the Union.

[*1095] 2. State Objections

The State of Maine and the Maine Public Utilities Commission argue that the plan of reorganization improperly allocates certain pension assets to AT&T. Under the plan, the assets of BSPP and BSMPP would be divided and allocated among the nine post-divestiture entities so that the accrual rates¹⁶¹ for each of the new plans after divestiture would be approximately the same as will be the rates under the AT&T plans immediately prior to divestiture.

[**116] The allocation would be accomplished in two steps: first, there would be coverage of an amount equal to the present value of accrued benefits for each participant; second, all remaining [***142] assets -- the difference between the present value of assets and liabilities -- would be allocated so that the accrual rates for the post-divestiture pension plans would be approximately the same as the accrual rates in effect for the AT&T plans immediately prior to divestiture. Maine does not quarrel with the first step which, in any event, is required by the Employee Retirement Income Security Act (ERISA) and section 3414(1) of the Internal Revenue Code. However, in its view, the assets in excess of those needed to cover accrued benefits¹⁶² should be allocated in proportion to the contributions which produced the excess rather than on the basis proposed by AT&T.

[**117] Maine claims that because some 10 to 20 percent of present Operating Company employees will be transferred to AT&T,¹⁶³ it is likely that excess assets originally contributed to the pension plans by the Operating Companies will improperly be transferred to the AT&T plan (thus reducing proportionately its pension liabilities).¹⁶⁴

proposed in the plan is reasonable. To the extent that it might be thought that this provision affects collective bargaining rights, such rights are superseded by the Court's power to enforce its decree. Cf. *Franks v. Bowman Transportation Co., 424 U.S. 747, 47 L. Ed. 2d 444, 96 S. Ct. 1251 (1976)*.

¹⁵⁹ See, e.g., Comments of Satellite Business Systems, filed Feb. 15, 1983, at 65.

¹⁶⁰ There is nothing in the provisions of the decree governing, for example, the treatment by the post-divestiture plans of former employees who are rehired, or what rules ought to determine when an employee's pension rights become vested.

¹⁶¹ An accrual rate is the percentage of total payroll that must be contributed to a plan periodically in order to meet future pension liabilities.

¹⁶² According to AT&T's 1982 Annual Report (p. 38), the fair market value of the pension assets exceeded the present value of accrued benefits by more than \$11.5 billion.

¹⁶³ This is due to the separation of interexchange and CPE operations from the Operating Companies. Plan of Reorganization at 456 n. 430.

It may well be true, as Maine contends¹⁶⁵ that the law does not affirmatively require that excess assets must follow the transferred employees from the Operating Companies to AT&T since there is no requirement that employees receive the benefit of excess assets.¹⁶⁶ **[**119]** What is flawed, however, is **[**118]** the State's argument that it is improper for the plan of reorganization to allocate the excess funds in accordance with future payment obligations and contribution levels, and that these funds must be allocated instead in accordance with the contributions made in the past. What this argument overlooks is that while the Operating Companies would be losing excess assets associated with the transferred employees, they would also be losing liabilities, i.e., the benefits the employee will accrue in the future. Under Maine's proposal, entities with higher liabilities after divestiture than before would have fewer pension fund assets to meet their future obligations, requiring a higher funding rate. Conversely, those companies which will have lower pension liabilities after divestiture than before would enjoy a windfall. The most important consideration is the interest of the participants and beneficiaries,¹⁶⁷ and they are best served by the proposed plan.¹⁶⁸

[*1096] B. Employee Transfers

In addition to the one-year true-up period¹⁶⁹ immediately following divestiture during which any employee may be transferred between AT&T and an Operating Company¹⁷⁰ **[**120]** without loss of seniority rights or other benefits,¹⁷¹ the plan further provides that employees in four specific job categories¹⁷² **[**121]** may be transferred without loss of benefits **[***143]** after the one-year period.¹⁷³

¹⁶⁴ To the extent that some entities (either AT&T or an Operating Company) had proportionately more excess than others, the plan would equalize the extent of any such excess regardless of which Operating Company was the source of the overfunding.

¹⁶⁵ Reply of Maine and Maine PUC, April 13, 1983, at 19.

¹⁶⁶ See, e.g., *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1982); *Rev. Rul. 83-52*, 1983-13 I.R.B. 7; see also ERISA § 4044(d)(1).

¹⁶⁷ See ERISA, § 404(a)(1); *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982).

¹⁶⁸ There is also no evidence to support the assumption that the Operating Companies will have contributed to excess funds in greater proportion than has AT&T.

¹⁶⁹ See note 158 *supra*.

¹⁷⁰ It may be noted that all the transfers during the true-up period will be the result of arm's length negotiations between AT&T and the Operating Companies, and there is thus no occasion for either a "post-divestiture re-evaluation plan," judicial involvement, or the appointment of special Operating Company representation, as some have suggested. *E.g.*, Comments of the State of Michigan and Michigan Public Service Commission, Feb. 11, 1983 at 30; Comments on AT&T's Plan of Reorganization of the Public Service Commission of the State of Missouri, February 15, 1983, at 14. It is unclear what representation could be provided by the Court for companies which, after divestiture, will be independent entities. If the true-up process is not being conducted in accordance with the decree and the plan, ample means will be available for corrective action.

¹⁷¹ The Court expects, as AT&T represents, that the one-year true-up period will not be used for frequent personnel transfers but as a "time for correcting mistakes that are bound to occur in a reorganization of this magnitude." AT&T Response to Objections at 378.

¹⁷² These categories are (1) Operating Company service center employees who will write inter-LATA orders for AT&T under a sharing contract until such time as the contract ends and they are reassigned to AT&T, but no later than 5-1/2 years after divestiture; (2) AT&T operators who will provide inter-LATA Call Completion and Assistance services until Operating Companies establish such systems and they are reassigned to the Operating Companies, but no later than 10-1/2 years after divestiture; (3) Operating Company personnel who will provide circuit provisioning functions for AT&T until AT&T assumes this responsibility, but no later than 5-1/2 years after divestiture; and (4) employees providing installation and maintenance services for "special services" both by AT&T for Operating Companies and vice versa, until the companies provide their own services, but no later than 5-1/2 years after divestiture. AT&T claims that, for various reasons, it would be inefficient for AT&T and the Operating Companies to provide these functions independently immediately upon divestiture. See AT&T Response to Objections at 388 n.*.

Section I(A)(2) of the decree provides that AT&T and the Operating Companies may continue to share certain facilities, and the plan implements that provision by specifying that the entities "intend to cease sharing network facilities as promptly as is reasonably feasible." Plan of Reorganization at 56. The plan's employee transfer provisions are justified by AT&T on the basis that the job functions of these employees will begin with one entity but will need to be transferred to another as transitory arrangements for the sharing of multifunction facilities are phased out. Response to Objections at 382-83.

The principal objections raised to the plan's grant of [**122] transfer rights to the employees are that this may result in fraternization between AT&T and Operating Company personnel, the disclosure of equal access network information to AT&T employees, the perpetuation of loyalty to the Bell System, and the provision by Operating Company personnel of certain inter-exchange services to AT&T but not to other interexchange carriers. See, e.g., Comments of Satellite Business Systems, February 15, 1983, at 65-66, 91.

The intervenors' concerns are not frivolous; however, given the necessity for some sharing of multifunction facilities, the solution adopted in the plan is, in general, a reasonable one. The basic alternative to the provisions for transfers without loss of benefits is a lay-off of the affected employees by one entity to be followed by a (possible) rehire by the other. The Court has no intention whatever of unnecessarily imposing such a hardship on these employees. [*1097] Moreover, the entire matter must be kept in perspective; the individuals involved will not be managers or other policy makers but relatively low level employees. It is thus unlikely that manipulation or the disclosure of sensitive information to AT&T [**123] will occur. The loss of employment security and the unusual and unnecessary inefficiencies which would be the consequence of a rejection of most of the transfer provisions can therefore not be justified.

There is, however, one exception to this principle. AT&T has not demonstrated why Operating Company personnel should write inter-LATA orders for AT&T for up to 5-1/2 years after divestiture. Such order-writing is purely an interexchange function; it is performed by persons, not "facilities" as that word is used in section I(A)(2); and this service would not be available to any interexchange carrier other than AT&T. Indeed, such order-writing by Operating Company personnel for AT&T could provide the latter with a significant competitive advantage. The Court will not permit sharing of this function, and it will require the deletion of references to such sharing from the plan of reorganization (at pp. 253, 254, 279-80, and 287), unless the benefits are made available to all interexchange carriers.

The Union, unlike the other intervenors,¹⁷⁴ suggests that the Court require modification of the plan to permit unlimited transfers of employees among the post-divestiture Bell System [**124] entities. As noted *supra*, such a provision would be flatly inconsistent with section I(A) of the decree and with the underlying rationale of the judgment -- that the economic integration among the various Bell System entities must cease. That proposal, too, will therefore be rejected.

VI

Official Services and Other Facilities

With one major exception, the division of network facilities and other assets is reasonable and fully consistent with the decree.

A. Official Services

¹⁷³ Under the plan, the duration of the transfer is limited to the period necessary to accomplish the change of multifunction facilities to exclusively AT&T or Operating Company facilities. This will occur not later than five years and six months after divestiture, except for operator services personnel who may be transferred up to ten years and six months after divestiture. Plan of Reorganization at 287-88. See note 172 *supra*.

¹⁷⁴ However, the State of New York would permit all employees in shared services to have and exercise transfer rights, as distinguished merely from the four categories of employees listed in the plan.

The Court will not approve the decision made in the plan of reorganization with regard to so-called Official Services. These services represent communications between personnel or equipment of an Operating Company located in various areas and communications between Operating Companies [***144] and their customers.¹⁷⁵ [**126] The plan of [**125] reorganization provides that Bell System facilities used in whole or in part for Official Services will be assigned according to the same rules applicable to other transmission facilities; meaning that, if facilities are used solely or predominantly to perform inter-LATA functions, they will be assigned to [*1098] AT&T even if the functions constitute Official Services.¹⁷⁶ Additionally, the Department of Justice has indicated to one or more Operating Companies¹⁷⁷ that it would object if they constructed and operated their own inter-LATA facilities to administer Official Services.¹⁷⁸ In the view of the Court, neither the plan's treatment of Official Service facilities nor the position of the Department of Justice is consistent with the principles underlying the decree.

Each Operating Company conducts its authorized operations in several LATAs. In order to achieve operational efficiencies, the four basic categories of Official Service systems¹⁷⁹ [**127] have been designed to serve geographical areas which are usually larger than individual LATAs. For example, the so-called "Operational Support System Networks" (see note 179 *supra*) typically cover an entire state or major portion of a state, permitting the monitoring and controlling of trunks and switches and the routing of traffic from a centralized location.

¹⁷⁵ There is some dispute as to whether Official Services are limited to Operating Company internal communications or whether they include communications between an Operating Company and its customers. See AT&T Response to Objections at 95-96 n. *; Supplemental Affidavit of William Weiss, April 12, 1983, at 9; letter from Raymond Burke, April 13, 1983, at 2 n. *.

The Court concludes that for purposes of the discussion and decision herein "Official Services" must properly include customer communications. As Raymond Burke points out (April 13, 1983 letter at 3 n. *),

no charges apply to communications which AT&T classifies as 'official' service . . . [and] even where there is a charge for such services as directory assistance, any inter-LATA administrative facilities involved are not 'for hire.'

Similarly, Thomas Bolger notes (Amended Certification of April 6, 1983, at 5-6),

a customer in Salisbury, Maryland actually speaks to a directory assistance operator in Baltimore, but that is done solely to facilitate the conduct of these exchange operations in efficient work groups. The customer does not care where his call is answered and he pays no charge for the referral of his call from a local central office to a distant company location for this purpose.

¹⁷⁶ See AT&T Response to Objections at 95-96.

¹⁷⁷ The several communications from the Department of Justice to the Operating Companies may not be entirely consistent with regard to this subject, however.

¹⁷⁸ See Amended Certification of Thomas Bolger, April 6, 1983, at 5; letter from Raymond Burke, April 13, 1983, at 1.

¹⁷⁹ The Operating Companies manage their business through the following complex networks for the transmission of voice and data communications:

(1) The Operational Support System Network is a network of dedicated voice and data private lines used by the Operating Company to monitor and control trunks and switches. These communications links are vital to the proper operation of the network since, for example, they enable Operating Company personnel to measure the maintenance status of trunks and switches and instantly to control equipment and reroute traffic.

(2) The Information Processing Network is a network of dedicated data lines linking the Operating Companies' information system computer. It is used to transmit data relating to customer trouble reports, service orders, trunk orders from interexchange carriers, and other information necessary for carrying out the Operating Companies' business.

(3) Service Circuits comprise a network of largely dedicated voice lines used to receive repair calls and directory assistance calls from Operating Company customers. These communications ensure the maintenance of telephone service and they provide directory assistance to Operating Company customers.

(4) Voice communications are used by the Operating Companies for hundreds of thousands of calls relating to their internal businesses.

Directory assistance, repair service offices, and business offices likewise serve geographical areas which are larger than individual LATAs.¹⁸⁰

For the reasons stated below, it makes no sense to prohibit the Operating Companies from using, constructing, and operating on their own the facilities they need to conduct Official Services, whether they be intra-LATA or inter-LATA in character, and to require them instead to lease such facilities from AT&T.¹⁸¹

[128] [*1099]** The Department of Justice recognizes "that the BOCs may have constructed their internal data processing and operational support systems on the assumption that communications links between their facilities would be over BOC-owned facilities,"¹⁸² and further that to require such communications to be "placed on commercial facilities might abruptly increase the BOCs' cost of providing service."¹⁸³ Yet, relying solely on the curt rationale that such traffic is correctly classified as inter-LATA, the Department supports the assignment of all existing inter-LATA Official Service facilities to AT&T. This solution is both unwise and unnecessary.

[129]** Only two alternatives would be available to the Operating Companies under the current plan, both of them undesirable. One option would be for the companies to redesign their Official Service systems so that none of their internal communications crosses LATA boundaries. This would result in a loss of the operational and cost efficiencies produced by the centralization which currently exists in the local phone system.¹⁸⁴ In effect, a separate, self-contained Operating Company would be created for each LATA -- a result clearly not contemplated by the decree.

The other option would be to have the Operating Companies' Official Service communications carried by AT&T or another interexchange carrier. See **[**130]** note 181 *supra*. This alternative would not only be very costly¹⁸⁵ but it suffers from a number of other infirmities. As William Weiss, chief executive-designate of the Midwest Region, points out:

Speed and reliability are critically important with respect to the BOCs' monitoring and controlling of their switches and trunks. BOC operating personnel and computers must have continuous, instantaneous

¹⁸⁰ As Thomas Bolger, designated chief executive of the Mid-Atlantic Regional Company, has pointed out:

In order to reduce costs and maximize efficiency, the BOCs have computer processing centers which receive billing and other data from company locations in a number of LATAs. Similarly, calls from Operating Company customers seeking such services as directory assistance are currently routed between BOC offices to centralized locations in other LATAs.

Amended Certification of Thomas Bolger, April 6, 1983, at 5.

¹⁸¹ **[**145]** The Department of Justice suggests that where Operating Company facilities are transferred to AT&T under the assignment process, it would be appropriate for AT&T to lease back to the Operating Company those circuits currently dedicated to Official use. However, an Operating Company's ability to lease existing Official Service facilities from AT&T would be limited to the duration specified in the plan of reorganization for shared facilities -- that is, eight years. See Department of Justice Response to Comments at 35; AT&T Response to Comments at 115; Amended Certification of Thomas Bolger, April 6, 1983, at 5. After this eight-year period, the Operating Companies would have to hire the services of AT&T or other interexchange carriers to meet all their inter-LATA Official Service needs.

¹⁸² Department of Justice Response to Comments at 35. Indeed, ironically, in spite of the fact that most Operating Company Official Service communications are presently conducted over facilities "owned" by these companies themselves, many such facilities would now, under the plan, be assigned to AT&T. Supplemental Affidavit of William Weiss, April 12, 1983, at 10.

¹⁸³ Department of Justice Response to Comments at 35. However, that is precisely what will happen in eight years under the Department's scheme. See note 181 *supra*. Even during this eight-year period, any Official Service demands which cannot be satisfied by existing circuits leased from AT&T would have to be "placed on" commercial facilities of an interexchange carrier.

¹⁸⁴ In recent years, many of the Operating Companies have achieved significant cost savings through the modernization of their internal management processes. Supplement to Sworn Statement of Wallace Bunn, April 7, 1983, at 5 (47,000 internal computer terminals in operation throughout Southeast region alone).

¹⁸⁵ It has been estimated that for the Mid-Atlantic region alone, the total expenditures for all types of inter-LATA Official Services would be approximately \$125 million annually. Amended Certification of Thomas Bolger, April 6, 1983, at 6.

information regarding traffic loads and the operating status of equipment. When traffic overloads or equipment malfunctions occur, they must have the capability to immediately control equipment and reroute traffic. Forcing the BOCs to rely on third parties for official service communications . . . could seriously jeopardize the BOCs' fulfillment of their responsibilities to provide intra-LATA communications and exchange access

Moreover . . . [in] many instances, the BOCs could more efficiently conduct these communications over inter-LATA facilities constructed and owned by the BOCs. The BOCs' ability to deploy new transmission technologies is at least as good and probably better than that of third parties who might provide us with inter-LATA services. The [**131] cost of building facilities utilizing those new technologies might be far less than the cost of leasing facilities employing older, and thus higher-priced technologies.

. . . The critical point is that the BOCs should be free to conduct their official services communications in the optimal [*1100] manner, selecting whichever option is the most reliable and cost-efficient.¹⁸⁶

[**132] Such significant burdens should not be imposed on the Operating Companies unless this is clearly required by the decree. An [***146] examination of the decree's provisions shows, however, that a prohibition on the maintenance of inter-LATA Official Service facilities by the Operating Companies is required neither by its spirit nor by its letter.

The Operating Companies are prohibited from engaging in intercity, inter-LATA services in order to prevent a recurrence of the alleged anticompetitive practices of AT&T, which was claimed by the government to have used its local monopolies to disadvantage its intercity competitors in a variety of ways. That rationale is wholly inapplicable to the provision of inter-LATA service by each Operating Company for its own internal, official purposes.¹⁸⁷ Only by a highly abstract distinction between services that are once and for all labelled "competitive" or "monopolistic" could that prohibition be applied to the Operating Companies' Official Services. Moreover, it is ironic that a prohibition which grew out of AT&T's dominant competitive position and its alleged misuse of that position is now sought to be applied in such a way as to afford AT&T a substantial [**133] financial benefit by giving it the opportunity to carry, for a profit, the Operating Companies' own internal, official communications which these companies are perfectly able to carry themselves and have, indeed, carried themselves in the past.¹⁸⁸

[**134] Nor is so illogical a result required by the strict terms of the decree. While the Operating Companies are prohibited by section II(D)(1) from providing "interexchange telecommunications services," section IV(P) defines "telecommunications services" as "offering for hire of telecommunications facilities" (emphasis added). Obviously,

¹⁸⁶ Supplemental Affidavit of William Weiss, April 12, 1983, at 13-14. An increasing number of private corporations with operations dispersed over large geographic areas, such as oil companies and electric power utilities, have opted to construct and operate their own circuits by which their administrative communications are transmitted. Letter from Raymond Burke, April 13, 1983, at 2; see also, Amended Certification of Thomas Bolger, April 6, 1983, at 6; Supplement to Sworn Statement of Wallace Bunn, April 7, 1983, at 6.

¹⁸⁷ The Operating Companies are prohibited from providing inter-LATA telecommunications services under the decree for two reasons: the possibility of discriminatory interconnection practices and the possibility of subsidization of interexchange services with revenues from local exchange services. See [552 F. Supp. at 188-89](#). Neither of these reasons is implicated by the ownership and operation by an Operating Company of its own inter-LATA Official Service network.

¹⁸⁸ There is also a distinct possibility that AT&T might be able to gain competitive advantages from its control over Operating Company official circuits. Compare [552 F. Supp. at 181](#) (possible advantage to AT&T from control of electronic publishing business).

In arguing that the Operating Companies should be able to construct and operate their own inter-LATA Official Service facilities, Raymond Burke wrote on April 13, 1983, at 4:

Indeed, to the extent that the BOCs would need to purchase materials from facilities vendors in order to construct microwave, fibre, and other facilities for their administrative use, it would appear that competition in such markets would be enhanced. In contrast, the Department's interpretation may create a situation in which the BOCs may, practically speaking, be able to obtain their administrative facilities from only one interexchange carrier -- AT&T.

the Official Services are not "for hire." Similarly, the decree prohibits the Operating Companies from engaging in "information services," but it expressly permits them to engage in such services "for the management, control, or operation of a telecommunications system or the management of a telecommunications service." Section IV(J). Further, section I(A)(1) mandates

the transfer from AT&T and its affiliates to the BOCs . . . of sufficient facilities [to permit them] to perform, independently of AT&T, exchange telecommunications and exchange access functions, including the procurement for, and engineering, **[*1101]** marketing and *management* of, those functions. (emphasis added).¹⁸⁹

[135]** In light of these provisions, it is thus not surprising that, contrary to its present position, the Department of Justice stated in its competitive impact statement filed with the Court on February 10, 1982, that the Operating Companies will continue to perform those functions which are "inherent" in exchange communications and exchange access, such as "the ability to engage in the . . . management of retained functions." Competitive Impact Statement at 29. Because each Operating Company will perform its authorized services in several LATAs, an inherent part of the management of those services includes official communications which cross LATA boundaries.

For these reasons, the Court rules that an Operating Company shall receive inter-LATA facilities which are used solely or predominantly for the performance of its own Official Service functions. If the use made by an Operating Company of a multifunction facility for the provision of exchange telecommunications, exchange access, and Official Services, predominates in the aggregate (including **[**147]** all such functions) over that made of such facility by AT&T, the multifunction facility is required under section VIII(G) of the decree to be **[**136]** assigned to the Operating Company.¹⁹⁰ The Court further confirms that the decree does not prohibit the Operating Companies from providing their own Official Services, including, if necessary, by the construction of the appropriate inter-LATA facilities.¹⁹¹

B. Other

The network assets are being assigned on the basis of whether they provide an exchange function (in which event they are assigned to the Operating Company) or an interexchange function (in which event they go to AT&T); where an asset performs both functions, the assignment depends essentially upon predominant use. Sections **[**137]** I(A)(2), VIII(G); see note 20 *supra*.

A number of intervenors have objected to one aspect or another of the division of assets provided for under the plan (or to the failure to complete such division in advance of the approval of the plan of reorganization) but the Court finds all such objections (other than those related to Official Services allocations discussed *supra*) to lack merit.

1. Several intervenors claim that the plan improperly disregards the predominant use test required by the decree. To be sure, the decisive role of that test can most clearly be discerned in the assignment of switching systems, and its role is not as apparent where less complex equipment is involved. That result, however, is not surprising: it would be technically and administratively impossible to assign ownership of each of the thousands of relatively small items in the central offices on the basis of predominant use. What AT&T has proposed instead is to assign equipment bays containing related items of equipment to work areas which, in turn, are assigned to AT&T or the

¹⁸⁹ AT&T argues to the contrary that section VIII(G) calls for the assignment to it of facilities which perform both intra-LATA and inter-LATA functions if the use for inter-LATA functions predominates. AT&T Response to Objections at 97. However, that section does not speak at all of inter-LATA and intra-LATA functions but states more simply that

facilities . . . which serve both AT&T and one or more BOCs shall be transferred to the separated BOCs if the use made by such BOC or BOCs predominates over that of AT&T (emphasis added).

¹⁹⁰ It may be that this provision will not have a significant effect on the assignment of assets because Official Services use may not often tip the scales as between inter-LATA and intra-LATA use. See AT&T Response to Objections at 99.

¹⁹¹ The Court reaches this question now, rather than after divestiture, so that the Operating Companies may be able to continue their essential network and operational planning.

Operating Companies on the basis of predominant use. In the absence of a showing that the assignment of the general work [**138] areas as such is not being made on this basis -- which has not been forthcoming [*1102] -- the Court will accept these provisions of the AT&T plan.¹⁹²

2. The assignment of the private line facilities and other specialized functions (e.g., call completion and local directory assistance) proposed in the plan is likewise consistent with the decree and otherwise appropriate, and it will therefore also be approved.¹⁹³

[**139] 3. One type of facility about which there has been particular controversy is 800 Service Directory Assistance which several of AT&T's competitors claim properly to belong to the Operating Companies. It is abundantly clear, however, that this particular directory assistance is an interexchange, inter-LATA service which is appropriately assigned to AT&T. If this enhanced service were assigned to the Operating Companies in spite of the fact that it performs interexchange functions, it could be done only on the basis that AT&T's competitors should be afforded the ability, through the medium of the Operating Companies, to offer this service without having to pay for it.¹⁹⁴ [**140] If the other interexchange carriers wish to offer long distance directory assistance, they will have to construct the necessary facilities. It is not the purpose of the Court's review of the plan of reorganization to "punish" AT&T or to provide advantages to its interexchange competitors to which they are not legitimately entitled.¹⁹⁵

[**141] The assignment of the network facilities and other assets provided for in the plan of reorganization will accordingly be approved.

VII.

LATA Issues

In its April 20, 1983 Opinion on the proposed LATAs (see note 6 *supra*) the Court requested further information with regard to certain specified LATAs as well as assurances with regard to intra-LATA equal access. Also to be resolved at this time are issues which have been separately briefed respecting traffic between the LATAs and areas served by non-Bell, or independent telephone companies.

¹⁹² The Court likewise finds not unreasonable AT&T's decision to consider predominant use as of January 1, 1984, rather than as of some earlier date, as several intervenors have suggested. Network changes are, of necessity, occurring all the time, and most of them appear to have been planned, and partially implemented, for some time, in some instances for years. The suggestion that the January 1, 1984 date gives AT&T an undue opportunity for manipulation is unrealistic and unwarranted.

¹⁹³ Several intervenors had originally objected to the plan's assignment of Digital Dataphone Service (DDS) facilities to AT&T. Subsequently AT&T accepted the Department of Justice's position with respect to such facilities, and it now appears that all DDS hubs, which were the focus of the intervenor's objections, will be assigned to the Operating Companies. See Department of Justice Supplemental Response, June 1, 1983, at 7. Additionally, the Department has made a commitment to review the contracts for the sharing of DDS facilities to ensure that the Operating Companies will have the ability to afford equal access to these facilities to all interexchange carriers. *Id.* at 8 n. *. The Court, therefore, finds the assignment of DDS facilities to be consistent with the decree.

¹⁹⁴ [**148] Unlike with respect to some other subjects (e.g., the Cambridge switch discussed at slip op. at pp. 12-13 *supra*) there is no reasonable basis for departing from the predominant use rule.

¹⁹⁵ It should also be noted that the plan of reorganization initially assigned "Charge-A-Call" public telephones to AT&T on the ground that they are used predominantly for inter-LATA communications. However, a number of intervenors, along with several designated chief executives of the Regional Companies, objected to this assignment, arguing that despite the inter-LATA nature of the calls placed over these telephones, they are exchange facilities, having been installed by the Operating Companies as part of the service they provide to the public. The Department of Justice concurred with these objections, and required the plan to be modified to assign Charge-A-Call public telephones to the Operating Companies. See Department of Justice Response to Comments at 82-83. This modification was agreed to by AT&T and has been incorporated into the plan of reorganization. The Court concurs with this modification. Pursuant to the plan as so modified, the Operating Companies will be able to provide users with access to several interexchange carriers, while under the original plan AT&T would have limited access through these public telephones to its own long distance network.

[*1103] A. Individual LATAs

1. Vermont, Maine, New Hampshire

The Court in its April 20, 1983, Opinion declined to approve New England Telephone's proposed departure of the Maine, Vermont, and New Hampshire LATAs from state boundaries because some 26 border communities would otherwise have been placed in "out-of-state" LATAs.¹⁹⁶ The regulators in these states had expressed concern that these stateline crossings could result in discriminatory treatment of telephone users in these communities, and they requested that these areas be redrawn so that each LATA would correspond precisely to the borders of the particular state. NET has since informed [*142] the Court that it withdraws its request for stateline crossings and proposes instead LATA boundaries which conform to state borders. These new LATAs are approved.¹⁹⁷

NET requests additionally that it be allowed to phase in the new LATA boundaries, so that, in order to minimize costs, the necessary network modifications may be undertaken in conjunction with other system improvements.¹⁹⁸ [*143] That request is likewise approved.¹⁹⁹

2. Worcester

NET has drawn a separate Central Massachusetts LATA in conformity with the Court's April 20, 1983, Opinion, separating Worcester and its surrounding communities from the Boston area and creating a total of three LATAs in Massachusetts. LATA is in the public interest. NET contends that the establishment of a third LATA will prove costly to local ratepayers; will disrupt service in nine towns divided by the new LATA boundary;²⁰⁰ will decrease the viability of various optional intrastate billing plans which depend upon volume and distance,²⁰¹ and many preclude use of a No. 4ESS switch as an access to tandem to the possible detriment of AT&T's interexchange competitors. The [*149] Massachusetts Department of Public Utilities also urges the Court to reconsider the division of the Eastern Massachusetts [*144] LATA into an Eastern and a Central LATA, arguing additionally that the growth of the high technology industry beyond suburban Boston westward toward Worcester has created a single community of interest in central and eastern Massachusetts. The Department of Justice, on the other hand, continues to maintain that the contribution three LATAs would make to a competitive telecommunications environment in Massachusetts outweighs the inconvenience and cost involved in the creation of a third LATA.

The Court has carefully reviewed [*145] the filings addressed to eastern Massachusetts, [*1104] and it has decided to grant the request of NET for a single LATA for that area. Although NET continues to overestimate the cost to ratepayers of separating the LATA,²⁰² the other grounds it advances are persuasive. In its most recent

¹⁹⁶ These communities are presently served by NET facilities located outside the particular state, and NET requested the stateline crossings in order to continue these serving arrangements.

¹⁹⁷ The network reconfiguration costs and other network considerations are not so significant as to outweigh the discriminatory treatment of and the inconvenience to residents in these communities.

¹⁹⁸ The regulatory commissions support this request. Additionally, Vermont wishes the Court to declare that these costs ought to be recovered through carrier access charges rather than through local rates. This is, of course, a matter for the regulatory commissions to execute, but the Court's views ought to be apparent from part I supra.

¹⁹⁹ NET maintains that all necessary modifications could be completed within five years, but Maine's observation that some localities may require less time and others more is sound. NET should submit a detailed request for exemptions to the state regulators and to the Department of Justice.

²⁰⁰ A larger number of municipalities would be divided, but in all but nine communities EAS routes would enable NET to continue to carry traffic across the border from one side of town to the other.

²⁰¹ This factor alone is not significant since it may be expected that interexchange competitors will respond to consumer demand for special billing plans, e.g., for reduced rates on frequently called routes, in substitution or in addition to those offered by the local monopolist.

filings, NET describes in considerable detail the impact on subscribers whose towns would be split by the new border between the Eastern and Central LATAs. The Court has also been persuaded by the NET and the PUC submissions that the population of this area is sufficiently concentrated and the local telephone network sufficiently integrated that the expense, effort, and customer inconvenience associated with dividing the network would be very substantial, even if NET's estimate of the expense is somewhat exaggerated.²⁰³

The detail provided by New England Telephone in its May 5 and May 23, 1983, submissions stands in stark contrast to the paucity of supporting documentation in the Department of Justice's filing. The Department offers only its bare conclusion that "the competitive benefits of separating Worcester from Boston outweigh the costs of separation." The Department does indicate [**146] that it would consider exceptions to the new boundary to allow NET to continue to serve the divided communities, but NET persuasively counters that since calls within these municipalities are carried by the toll network -- but billed as if the calls were local -- "it is not clear what exemption could solve [the] problem."

The Court concludes that the palpable expense and inconvenience of separating the LATA outweigh the Department's speculation about benefits to competition,²⁰⁴ and it will therefore approve the consolidation of Boston and Worcester in a single LATA.

[**147] 3. New York

The Court accepts the Operating Company's proposal to consolidate Glens Falls and Albany into a single LATA and also to consolidate Utica and Syracuse into a single LATA.²⁰⁵ [**148] To be sure, New York Telephone Co. failed to provide the Court with new information except the revised, lower count of telephones in Glens Falls,²⁰⁶ but the Department of Justice has advised the Court that it does not believe that the competitive purposes of the decree would be significantly advanced by creating four LATAs rather than two. In view of the Department's general tendency to err on the side of separation in close cases -- as evidenced, for example, by its position on the proposed Eastern Massachusetts LATA -- its [*1105] failure to advocate such separation here, and the relatively

²⁰² Most of these costs will be reflected in interexchange carrier access charges, not in the local rate base. Moreover, there costs could be spread over a number of years.

²⁰³ Moreover, one of the factors cutting in favor of separating the LATA--the benefit to interexchange carriers of not having to compete with the Operating Company for calls between the Worcester area and the Boston/New Bedford region--is undermined somewhat by technical access considerations which previously were not entirely clear. If Worcester is in the same LATA as Boston and New Bedford, NET will offer access to interexchange carriers by means of No. 4ESS switch to be constructed in Framingham. If Worcester is placed in a separate Central Massachusetts LATA, two smaller switches will be built in Framingham and Worcester. NET insists that the existing cross bar switch in Worcester could not be upgraded to serve as an access tandem, and although this assertion is challenged by Southern Pacific Communications Corp., the Court is not prepared to override the Operating Company on so technical a point.

²⁰⁴ Supporting the Department's position is the fact that the access provided for calls within a single LATA would not include a presubscription option while calls between Worcester and Boston, were each city in a separate LATA, would include such an option. The choice is thus between access via a No. 4ESS switch (see note 203 *supra*) and a larger area in which presubscription will not be available, on the one hand, and access via an inferior switch and greater availability of presubscription, on the other. Based on the comments the Court has received, it is reasonable to expect that the former would do more for competition than would the latter.

²⁰⁵ The various requests for exceptions contained in the October 4, 1982 applications also are granted, except that New York Telephone will not be serving Wells, Vermont. See slip op. at pp. 104-05 *supra*.

²⁰⁶ The revised count is 97,000, as opposed to 200,000.

small size of Utica²⁰⁷ [**150] and Glens Falls, the Court is reluctant to impose on New York Telephone Co. total estimated costs of \$8.6 million in network reconfiguration.²⁰⁸

4. Pennsylvania

Pennsylvania Bell pledges (1) to build a No. 4ESS switch in the Philadelphia LATA and lease access capacity from AT&T in the meantime, (2) to offer access in the Pittsburgh LATA through a DMS-200 switch,²⁰⁹ and (3) to construct a DMS-200 switch in Harrisburg. Based upon these assurances, the Court will approve the Pennsylvania LATAs.

[149] 5. Baltimore**

Chesapeake & Potomac Telephone Co. and the Department of Justice ask the Court to make explicit its approval of exceptions requested by C&P to allow eight exchanges in the Baltimore LATA to continue using "Metro FX" service. This service allows telephone subscribers in these exchanges to pay rates for calls to and from Washington, D.C. as if the exchanges were located in the Washington LATA. The exceptions are approved.

Some of the affected exchanges are located in Calvert County, Maryland, whose Chamber of Commerce wrote the Court in late April 1983, concerned that the County's inclusion in the Baltimore LATA would mean disruption of economically necessary discount calling into Washington. The express approval of all FX exceptions requested by C&P should alleviate the County's concerns, for in view of that approval the placement of Calvert County in the Baltimore LATA will not affect its subscribers' rates.

The Court finds, however, that the County's placement in the Baltimore LATA, as initially proposed by C&P and accepted by the Court on April 20, 1983, is reasonable in light of C&P's representation that it would cost over \$3 million to reconfigure the County's [**150] local network to render it suitable for inclusion in the Washington LATA. According to C&P, this also would "leave idle about \$500,000 in facility capacity between these exchanges and Annapolis," Annapolis being the location of the toll center which connects Calvert County exchanges to the long distance network.

6. Winchester

For the reasons stated in the Department of Justice's filing,²¹⁰ the Court reconsiders the consolidation of the proposed Winchester and Louisville LATAs; approves the Louisville LATA as originally proposed; and approves the association of the Winchester LATA with the independent area around Lexington served by GTE.

[151] 7. Birmingham/Huntsville**

South Central Bell's division of the Birmingham LATA into two separate LATAs, as required by the Court's April 20, 1983, Opinion, is approved.

²⁰⁷ The Utica area contains 110,000 phones, according to New York Telephone, down from the 120,000 the Company previously reported.

²⁰⁸ The Court also approves the boundaries of the new Poughkeepsie LATA as proposed by New York Telephone Co.

²⁰⁹ A small portion of the Pittsburgh LATA, the Greensburg area, will be accessed by a 1AE5S, 2-wire machine. This is satisfactory since AT&T and its competitors will all be served by means of this switch, so that there will be no quality differences among them.

²¹⁰ The Department informs the Court that South Central Bell and GTE agree to an association of GTE's Lexington 264,864 main stations and South Central Bell's 165,000 Winchester stations. This association will ensure that the Winchester area will be attractive to interexchange carriers -- the primary concern that prompted the Court to require the consolidation of the Winchester and Louisville LATAs. The Louisville LATA has more than enough stations -- 430,000 -- to enable it to stand on its own.

[*1106] 8. *Midwest*

The Court approves the inclusion of Kankakee in the Chicago LATA;²¹¹ the Detroit LATA as proposed;²¹² the Grand Rapids LATA;²¹³ [*152] the inclusion of Sikeston and Cape Girardeau in the St. Louis LATA;²¹⁴ the borders between the Cleveland and Akron-Canton LATAs;²¹⁵ the Southeast, Wisconsin [***151] LATA as proposed;²¹⁶ and the division of the Davenport LATA.²¹⁷

9. *Minnesota*

Northwestern Bell and the Minnesota Public Utilities Commission request the Court to consolidate the Fargo (North Dakota) and Brainerd (Minnesota) LATAs. The LATAs are now separated by the North Dakota/Minnesota border. Previously the Commission and the Operating Company had been at odds over five communities on the Minnesota side of the border which Northwestern Bell desired to place in the Fargo LATA rather than the Brainerd LATA.

The requested consolidation will be approved. Although it requires an exception to the decree's presumption against LATAs that cross state lines, it will accomplish the Minnesota Public Utilities Commission's objective of ensuring a LATA of adequate population to be attractive to interexchange carriers without requiring [*153] Northwestern Bell to incur \$9 million in network reconfiguration costs, as would the previous proposal of the Minnesota regulators.²¹⁸ The resulting LATA would be of moderate size -- 216,000 subscribers not including those of Independent companies -- and it would be consistent with the community of interest that spans the Minnesota/North Dakota border.

10. *Seattle*

The Court approves the inclusion of Bellingham in the Seattle LATA for the reasons stated in the May 5, 1983, filing of Pacific Northwest Bell,²¹⁹ and since leasing space on AT&T's No. 4ESS switch would cost the Operating Company approximately \$1.2 million more than installing a switch [*154] of its own, the Court approves Pacific Northwest Bell's request to provide access in the Seattle LATA through a new 4-wire digital switch.

11. *Oregon*

Pacific Northwest Bell requests the Court to reconsider its decision to require the establishment of the two LATAs initially proposed for Oregon, and to allow instead a single LATA for the entire state. The State, through its

²¹¹ The Court accepts the reasons for this action provided by Illinois Bell, the Illinois Commerce Commission, and the Department of Justice.

²¹² The Court agrees in this regard with the reasoning of the Michigan Telephone Company, the Michigan Public Service Commission, the State of Michigan, and the Department of Justice.

²¹³ This approval is granted for the reasons stated in the Court's April 20 Opinion and the filing of the Department of Justice. The approval is conditioned, however, upon Michigan's undertaking to implement its plans to have certain Michigan Bell exchanges home on the new GTE Three Rivers switch.

²¹⁴ This approval is in accordance with the recommendations of Southwestern Bell and the Department of Justice.

²¹⁵ This division was required by the Court's April 20 Opinion.

²¹⁶ The Court accepts the reasoning of the Wisconsin Telephone Company.

²¹⁷ This division was likewise required by the April 20 Opinion.

²¹⁸ Northwestern Bell currently serves the five Minnesota border communities from facilities located in North Dakota. Under the previous proposal of the Minnesota Public Utilities Commission, the communities would have been included in the Brainerd LATA, obliging Northwestern Bell to rewire the communities to facilities on the Minnesota side of the border.

²¹⁹ The Department of Justice has withdrawn the reservations it initially expressed over inclusion of the Bellingham area in the Seattle LATA, noting that although the independently served expanse between Bellingham and Seattle is large geographically, it contains only about 20,000 subscribers.

Governor, endorses the request, as does the Oregon Public Utility Commission. Pacific Northwest Bell explains [*1107] its change of position as having resulted from a realization that it had proposed two LATAs based on a "conservative" reading of the decree's requirements. The Department of Justice maintains that a single LATA in Oregon [**155] would be unreasonable, and the Court agrees. Because of the distance between Eugene and Portland, the two major cities in Oregon, two LATAs configured around these cities are clearly warranted under the general standards applicable to the entire country, and the Court will not reverse its earlier determination.

12. California

The Court approves a tenth LATA in California composed of San Luis Obispo County as a reasonable response to its order of April 20, 1983 that the County's exchanges not be included in the Los Angeles LATA.

13. Pennsylvania-New York-New Jersey Corridors

The Court gave tentative approval to two unique serving arrangements for metropolitan regions which cross state lines -- the "limited corridors" running from New York City into five northern New Jersey counties and from Philadelphia into three southern New Jersey counties.

In response to questions posed by the Court, the Operating Companies and the Department of Justice provided additional information about the setting of access charges and customer rates with respect to corridor traffic. Some of the potential competitors of the Operating Companies object to the local companies' plans not to pass [**156] on to their end user customers the costs of facilities they do not use in serving them, that is, the costs of the circuits used to connect competitors' points of presence to the local loops. In the case of the corridors, which were sanctioned specifically to preserve for interstate callers in these areas the advantages of the existing local networks, the Operating Companies' policy is reasonable. [***152] As New Jersey and Pennsylvania Bell observed, "[to] do otherwise would require the Operating Companies to compete on the basis of their competitors' costs rather than their own."

The International Communications Association registers a different complaint about the corridors. Rather than to ask for more competition within the corridors, it wants to ensure that the Operating Companies' efficiencies will be passed on to consumers in the lowest rates possible, and it argues that this would more assuredly be accomplished if the corridor areas became LATAs (so that all traffic within a corridor would be intra-LATA). It is difficult to understand what difference this would make since the area would still be interstate and the rates would therefore still be subject to the jurisdiction of the [**157] Federal Communications Commission.²²⁰ Furthermore, if the corridor areas were configured into separate LATAs, this would force a reassessment of a number of other LATA boundaries, such as those between Long Island and New York City and New York City and Westchester, or else huge New York-New Jersey and Philadelphia-New Jersey-Delaware LATAs would have to be established -- both undesirable developments.

For these reasons, the Court approves the two proposed corridors subject to the equal access provisions discussed *infra*.

B. Intra-LATA Equal Access

With the exception of the New York and Pennsylvania corridors, the Court accepts as reasonable the commitments made by all of the Operating Companies as required by the April 20, 1983, Opinion (1983-1 Trade Cas. P 65,333 at 69,980) to provide equal [**158] access for intra-LATA service.

First. Pursuant to the Operating Company commitments, the access offered to interexchange carriers for intra-LATA toll [*1108] calls²²¹ will be equal in technical quality to the access provided to these carriers for inter-LATA

²²⁰ Moreover, to the extent that the rates are set above cost, the presence of competitors in the corridors will exert pressure on the Operating Companies and the FCC to reduce the price of corridor service.

²²¹ The intra-LATA equal access requirement does not apply to non-toll calls.

calls, meaning that both types of access connections will be performed by the same exchange access facilities (be they access tandems or direct trunks between end offices and interexchange carrier points of presence). The access will be equal also in another respect: subscribers of AT&T and its interexchange competitors alike will not be able to select in advance either AT&T or one of its competitors as a transporter of intra-LATA toll calls -- the so-called "presubscription" or "preselection" option. Rather, if a subscriber wishes to place an intra-LATA call through AT&T, MCI, Sprint, Micotel, or one of the other competitive services, he will have to add four digits at the time of dialing (*i.e.*, an access code of "10XX"). If an access code is not dialed, the intra-LATA call will automatically be carried by the Operating Company.

[**159] What that means, of course, is that, with respect to intra-LATA traffic, there will be inequalities between all interexchange carriers, on the one hand, and the Operating Companies, on the other. Telephone users will be able to access an Operating Company as they do now, simply by dialing a seven or ten-digit number (depending upon whether an area code is used).²²² To access an interexchange carrier, on the other hand, a telephone user would consciously have to select that carrier and dial the appropriate four-digit access code. Additionally, the Operating Companies (with their proliferation of direct trunks between Class 5 end offices and the concomitant ability to transport calls without the need for switching) may be able to carry their intra-LATA toll calls with higher quality and at less cost than can the competitors carry theirs.

A number of interexchange [**160] carriers attack this scheme both on account of the absence, to them, of the presubscription option, and because of the inequalities in facilities between the Operating Companies and their potential intra-LATA toll competitors.

The Court has concluded that, in light of all the circumstances and competing considerations, the position of the Operating Companies is not unreasonable. In approving the consent decree as in the public interest, and in directing the Operating Companies to provide intra-LATA access, it was not the Court's intention to require the decimation of the local telephone networks or to deprive customers of the conveniences and cost benefits which the Operating Companies have succeeded in making available to them.

It would cost approximately \$1 billion and take several years to modify the 3,000 Bell end offices so as to permit a telephone user to presubscribe for one carrier for intra-LATA [***153] toll calls and another carrier for inter-LATA calls.²²³ In the absence of such an expenditure -- which the Court will not require -- what will be available to the customer in the near future is the option to preselect one telephone company, and one only. If such a customer could [**161] select in advance either an interexchange carrier or an Operating Company for intra-LATA calls, many, if not most, telephone users would preselect the former rather than the latter. This is so because of the overriding fact that, under the decree and the plan of reorganization, the interexchange carriers are allowed to carry all toll calls (both inter-LATA and intra-LATA) while the Operating Companies may carry only intra-LATA calls -- a significant drawback with respect to convenience. Thus, to require the Operating Companies to provide the presubscription option to the interexchange carriers would place the local companies at an almost insuperable disadvantage. This the Court will not do.

[*1109] Even if a subscriber cannot or does not presubscribe, he may still designate a particular [**162] carrier at the time he makes the actual call (by dialing a specified access code). What if a customer does not do so -- which carrier will get that business? Some suggest that all intra-LATA toll calls should be required to be designated.²²⁴ That, too, will not be required.

²²² The latter would also have to be accompanied by a prefix "1" in those areas where an area code must be distinguished from a local exchange code.

²²³ This is because the end office would require revised computer software that could determine when a call was designated for a termination point within its LATA and when it was destined for a point in another LATA.

²²⁴ Micotel, Inc. argues that

with equal access should come a more uniform starting point for intra-LATA competition. We have no illusion that the BOCs will not continue to enjoy significant competitive advantages arising from their historical relationship with customers

[**163] To require all callers to use a four-digit access code, in addition to the number to be called, for all intra-LATA toll calls -- including those carried by the local Operating Company -- would have the perverse consequence of making intra-LATA, or local toll calls more cumbersome to dial than inter-LATA, or long distance toll calls.²²⁵ This is totally inappropriate. The alternative -- which the Court will allow -- is to route all undesignated intra-LATA toll calls to the Operating Company.

This conclusion is buttressed by the consideration that affirmatively to forbid such an arrangement would inappropriately override state regulators' authority to decide what intrastate calling arrangements are best suited to the public interest within their states. In a state [**164] such as Florida, where the Public Utilities Commission has sanctioned intrastate competition by granting Microtel a license,²²⁶ the Commission might well decide that intra-LATA competition should be further encouraged by requiring access codes alike for the Operating Company and its competitors, but the Court should not force this outcome. With respect to a state where the future of intra-LATA competition is more uncertain than in Florida, the Court would be even less justified in ordering the Operating Company to make intra-LATA telephone calling inconvenient for everyone -- by adding four more digits to every intra-LATA toll call -- for only speculative offsetting gains. Such a decision ought to be reserved for the state regulators, as several of them have urged.²²⁷

[**165] The unevenness resulting from the Court's decision between the Operating Companies and their competitors does not offend the competitive principles of the decree. The decree mandates that the Operating Companies have primary responsibility for exchange services, and it is appropriate [*1110] therefore that they should enjoy the non-access code arrangements with their exchange customers. The competitors are merely secondary suppliers of intra-LATA service, and while they may operate in that market on that basis, they should hardly be given what, in view of the considerations discussed above, would amount to a preferred position. However, if they should truly offer a better price or a better service than the Operating Companies, they should be able to educate their potential customers that it is worth the extra four numbers to take advantage of their offering.

Second. The reverse is true with respect to the so-called corridors.²²⁸ These corridors traverse not only LATA boundaries but also state boundaries, and they thus represent dual exceptions to the decree. They were permitted by the Court in heavily populated metropolitan areas not out of a desire to "[maintain] the [**166] position of the

and their dominant position in the . . . market. But those advantages should not be solidified by an additional head start arising from carriage of undesignated intra-LATA traffic.

Opposition dated May 16, 1983, at 14. There is some merit to that argument, particularly in states where the Court approved large LATAs on the expectation that there would not be significant barriers to intra-LATA competition. Microtel's primary state of operation, Florida, is a case in point. The Court allowed the consolidation of three SMSAs to form the Southeast LATA (Miami, West Palm Beach, and Ft. Pierce) with the understanding that there would be intra-LATA competition for calls between these cities.

²²⁵ Due to the availability of presubscription in inter-LATA calls, someone who had preselected an interexchange carrier would not have to dial an access code and he therefore could dial across the country with fewer digits than within his own LATA.

²²⁶ [***154] The Commission has under review whether also to license MCI for intrastate telecommunications traffic.

²²⁷ See, e.g., Comments of Maine. The situation may well be different with respect to undesignated inter-LATA calls. It would seem to be inconsistent with the decree for AT&T automatically to receive inter-LATA calls dialed either mistakenly or ignorantly without an access code (for those calls not dialed pursuant to a presubscription). The Operating Companies in that event would have two options: they could prevent an undesignated inter-LATA call from being completed (by obliging the caller to dial again using a proper access code) or they could allocate undesignated calls among all interexchange carriers on the basis of some formula. This subject is not dealt with at all in the plan of reorganization; moreover, the Operating Companies have not yet formulated their own policies, and they have not advised the Court as to the practical implications of various options. The Court will therefore defer a decision on this subject. If the Operating Companies should improperly discriminate among carriers with respect to undesignated calls, remedies will be available through the Department of Justice and the Court.

²²⁸ The corridors, as indicated at slip op. pp. 115-16 *supra*, run from the five boroughs of New York City into five northern New Jersey counties, and between five Eastern Pennsylvania counties into three southern New Jersey counties.

Operating Companies in the corridor," as New Jersey Bell and the Bell Telephone Company of Pennsylvania assert, but to maintain for consumers the benefits of what were represented to the Court to be particularly efficient network arrangements.

The decree presumes that the interexchange carriers -- not the Operating Companies -- will be the primary transporters of interstate, inter-LATA telecommunications. One of the reasons underlying the Court's tentative approval of the corridors -- which would allow the Operating Companies, too, to operate in the markets the corridors represent -- was that these routes would be fully open to competition. To implement that purpose, the Operating Companies will have to offer complete inter-LATA access to competitors which [**167] carry inter-LATA traffic within the corridors,²²⁹ with all that this implies, including the option of presubscription,²³⁰ and the requirement that all calls must be designated. The Operating Companies may choose whether they will develop the software that will allow presubscription of more than one carrier, or whether they will offer presubscription to one carrier only.

[168] C. Bell-Independent Traffic**

On February 17, 1983, the Operating Companies²³¹ submitted their proposed classifications of traffic between areas they serve and those served by independent telephone companies (Independents)²³² as either inter-LATA or intra-LATA.

[**169] The need for such a process came about because of the proximity of many Bell and Independent areas, and the consequent joint Operating Company/Independent service arrangements which are currently in effect around the country (that is, the Operating Company typically switches traffic [*1111] between its end offices and the offices of the Independent, which then routes that traffic to its final destination). If all that traffic were considered to be inter-LATA under the decree, the Operating Companies would be prohibited from participating in such arrangements, and significant, costly network rearrangement would have to be undertaken in order to have all Bell-Independent traffic carried by an interexchange carrier.²³³ To avoid such disruptive [***155] effects, the Operating Companies were asked to identify those areas where, consistent with the decree's purpose of limiting Operating Company participation in the long distance competitive markets, they should nevertheless be permitted to continue to provide joint service offerings with adjacent independent companies.²³⁴ In addition to determining whether the particular Operating Company may carry such traffic or whether it should be [**170] precluded from doing so, the

²²⁹ As evident from the filings, the Operating Companies intend to charge competitors inter-LATA access tariffs even though they would not be receiving inter-LATA-type access.

²³⁰ In the case of the corridors, it is appropriate that the Operating Companies undertake the responsibility for advertising what they claim to be their less expensive, exceptional service and instructing business and residential users on how to take advantage of it. Since many of the users of these routes are businesses, which may be expected to be very cost conscious, the Operating Companies should presumably have little trouble in inducing them to dial four additional numbers (in the event that, as many assume, that Operating Company will not be the one preselected by the user) if that would save them money.

²³¹ AT&T states that the Operating Companies alone classified the traffic between their respective LATAs and adjacent independent territories, without interference from AT&T. AT&T Response to Comments, March 25, 1983, at 5 n.**.

²³² There are some 1425 independent telephone companies which provide local phone service in 11,000 of the 18,000 local exchanges in the United States. Objections of the United States Independent Telephone Assoc., March 15, 1983, at 2. The geographic areas where the Independents provide service are, in total, larger than those where the Bell Operating Companies provide local service; although the Independent territories are generally more sparsely populated, encompassing only 20 percent of the telephones in the nation.

²³³ This would be so even where highly integrated communities are involved.

²³⁴ Under the terminology used by the parties, if a particular Independent territory is considered to be "associated" with the adjacent Operating Company LATA, then telecommunications traffic between these two areas is regarded as intra-LATA and may be handled by the Operating Company. If, on the other hand, a particular Independent territory is considered to be "not associated" with an Operating Company LATA, then the Operating Company would be prohibited under section II(D) of the decree from carrying traffic between the two areas, as this would be regarded as an inter-LATA service.

classifications will also be the basis for deciding whether Bell System facilities and assets connecting Bell and Independent territory should be assigned to AT&T or to an Operating Company.

On February 23, 1983, the Court issued an order establishing procedures for the review of the classifications prepared by the Operating [**171] Companies. Subsequently, a number of interested parties submitted comments, and AT&T and the Department of Justice filed their own responses.

The classifications, although made by the Operating Companies, are based upon principles and criteria furnished to these companies by the Department of Justice. The fundamental governing principle used by the Department and hence by the Operating Companies was that, for the purpose of determining whether the traffic between an Operating Company and adjacent Independent territory is to be regarded as inter-LATA or intra-LATA, Independent territory was treated as if it were Bell territory. Traffic is thus classified as intra-LATA if it would have been included within a LATA had it been exclusively Bell territory; it is classified as inter-LATA if it would have required the establishment of a separate LATA.

On November 17, 1982, the Department of Justice set forth the criteria by which it would judge the Operating Company determinations.²³⁵ The following types of Bell-Independent traffic were designated as clearly intra-LATA:

- (1) traffic within local calling areas and non-optional extended area service (EAS) areas;
- (2) intrastate [**172] traffic for states with a single LATA;
- (3) traffic within a single statistical area; and
- (4) traffic between a LATA and Independent exchanges serving non-statistical areas.

The following types of Bell-Independent traffic were designated by the Department as "possibly" intra-LATA:

- (1) traffic between a LATA and Independent territory in an adjacent SMSA which includes fewer than 100,000 main or equivalent main stations, or the distance between the core cities of the two areas is less than 25 miles;
- (2) traffic between a LATA and Independent territory without a Class 4 switch (or other network considerations); and
- (3) traffic between isolated Bell exchanges and an Independent dominated SMSA, provided that the Independent [*1112] makes a commitment to provide equal access.

The remaining traffic is regarded under the criteria as inter-LATA.

Reliance upon these criteria by the Department, [**173] and hence the Operating Companies, would have the following impact in the two factual circumstances which are predominant with respect to Bell-Independent traffic: (1) an Operating Company LATA may not be associated with an Independent area if the latter constitutes a market of sufficient size and distance from other markets to attract multiple interexchange carrier entry; (2) if, to the contrary, the Independent area has relatively few access lines or if the distance between the Bell and Independent core communities is insubstantial, an association between the Operating Company LATA and the Independent area will be permitted. In a few instances, particularly in Oregon and Washington, traffic was classified as inter-LATA by the particular Operating Company because it elected not to serve the relatively small Independent area in question.²³⁶ [**174] In a [***156] number of other instances, where the Operating Companies and the Independents

²³⁵ Letter from James P. Denvir to Jim G. Kilpatrick, November 17, 1982, at 3-7.

²³⁶ The Department of Justice as well as the states involved oppose these classifications on the ground that even though the decree cannot impose a requirement that an Operating Company actually provide service to an area which it is permitted to serve, the purpose of the classifications is to define areas which the Operating Companies *may* serve. In that view, the particular traffic should be classified as intra-LATA and it would then be left to the state and federal regulators to determine whether the Operating Companies or any other carriers should be *obligated* to serve particular areas. See Department of Justice Response to Comments, April 4, 1983, at 8; State of Oregon Comments, March 15, 1983, at 3-5. The Court finds the position taken by the Department of Justice in this regard to be correct, since it will best ensure that the decree does not unnecessarily intrude upon the jurisdiction of the regulatory commissions to determine service responsibilities within their jurisdictions. Accordingly, the Operating Company classifications are hereby required to be modified to conform to the Department's position.

agreed that there will be no Operating Company service despite an absence of a prohibition in the decree, the traffic was also classified as inter-LATA for purposes of the division of Bell System facilities.²³⁷

The two principal objections²³⁸ which have been advanced with respect to the Bell-Independent traffic classifications are first, that in certain instances either too many or too few Independent areas have been associated with Operating Company LATAs; and second, that **[**175]** the classifications unduly curtail the business freedom of the Independents.

First. The Court has considered the various Bell-Independent traffic classifications on the same basis as its earlier consideration of the LATAs.²³⁹ Although it is possible to disagree with particular decisions that were made by AT&T and the Department of Justice in this process, the Court has concluded that in no instance have the **[*1113]** intervenors made a case sufficiently compelling that it **[**176]** calls for a rejection of the classification.²⁴⁰ The Department's guidelines are reasonable and consistent with the principles of the decree, and these guidelines were properly applied by the Operating Companies.²⁴¹

[177]** Second. The "business freedom" claim is largely based upon a misunderstanding concerning the substantive scope of the classification decisions. Contrary to the assumption of some intervenors, the classification of particular traffic as intra-LATA does not have as its consequence that interexchange carriers may not offer service with respect thereto or that the Independents may not directly provide access arrangements to these carriers.²⁴² The intra-LATA or inter-LATA classifications -- in this context as in the context of service within the Bell territories -- bind only the Operating Companies and affect only their ability to provide service; they do not bind the interexchange carriers or the Independents and they will not in any way affect their ability to provide service. **[***157]**

²³⁷ However, for the purpose of determining whether the Operating Company may serve these areas, the traffic between the two areas will be classified as intra-LATA. Thus, if in the future an Operating Company wishes to provide service to such Independent areas, it will be free to do so. This minor category of classifications is, in essence, simply a request by the particular Operating Company for an exception to the general rule that it be assigned Bell System facilities devoted to intra-LATA service. Instead, AT&T will be assigned these facilities which the Operating Companies do not intend to use. See Department of Justice Response to Comments, April 4, 1983, at 9-10. No objections have been raised with respect to this exception to the general rule for the division of Bell System assets, and it is, therefore, approved.

²³⁸ It has also been argued that the Court should require that an opportunity be afforded the intervenors to seek reclassification of Bell-Independent traffic after divestiture. There is no basis for such a request, and it will be denied along with all other demands for systematic post-divestiture proceedings. See Part IX *infra*. However, the Bell Operating Companies may, under the decree, subsequently petition the Court for reclassification or for exceptions in regard to service between their own areas and Independent territory.

²³⁹ It is questionable whether, in view of the relatively limited impact of these classifications upon the intervenors (see *infra*), a level of scrutiny comparable to that employed with respect to the LATA classifications themselves was required.

²⁴⁰ No objections were raised to the vast majority of Independent exchanges that have been classified as "associated." It is to be noted that only 940 out of the 11,000 Independent exchanges are classified as "not associated" to any Bell Operating Company LATA. Objections of the United States Independent Telephone Assoc., March 15, 1983, at 4 n.*.

²⁴¹ In the few instances, such as those discussed in note 236 *supra*, where the Department of Justice and the Operating Companies took different positions with respect to whether particular traffic should be classified as intra-LATA or inter-LATA, the Court agrees with the position of the Department, and the classifications should, accordingly, be modified to conform to that position.

²⁴² Several intervenors argue that, although the associations being decided now have limited purposes under the decree, they will be "frozen in time" for state and federal regulatory bodies, common carriers, Independents, and ratepayers. See GTE Comments of March 15, 1983, at 3. There is nothing in the plan of reorganization which the Court is approving which has such wide consequences. If others decide to accept the decisions made herein, that would be their decision; it can hardly be a basis upon which the Court would be justified in rejecting the plan. Nothing in the Court's approval of the Bell-Independent classifications is intended in any way to restrict the regulatory bodies in the exercise of their legitimate authority.

[**178] To be sure, where traffic has been classified as inter-LATA, an Operating Company may not be "associated" with the adjacent Independent territory, and to that extent it may be said that the business freedom of the Independents is being restricted.²⁴³ [**179] That, however, is an inevitable consequence of the decree which limits the Bell Operating Companies to intra-LATA service; it cannot be regarded as a defect in the classifications made by the Operating Companies and approved by the Department of Justice. The objections to these classifications, as well as to the classification process, will accordingly be rejected.²⁴⁴

The proposed Bell-Independent classifications will be approved.

VIII

Central Staff Organization

Section I(B) of the decree requires the creation of a central organization jointly funded and utilized by the Regional Companies (1) for the purpose of meeting national security and emergency preparedness requirements and (2) for administering such [*1114] functions and services as can most efficiently be performed on a centralized basis.²⁴⁵ Pursuant to these provisions, AT&T has proposed, and the Department of Justice has approved, the creation of an 8,800-person Central Staff Organization (CSO) which would engage in a number of technical and nontechnical functions²⁴⁶ to replace support which the Operating Companies have until now received from the AT&T General Departments, Bell Laboratories, and Western Electric. [**180]²⁴⁷

A. CSO Responsibilities

Under the plan of reorganization, the CSO will perform technical services to support the Operating Companies in the "construction, operation, and maintenance of their local exchange networks."²⁴⁸ AT&T has listed five such technical functions: (1) network planning, which is described as "a long-range function concerned with recommending to the BOCs the optimal direction in which the local networks should evolve";²⁴⁹ (2) systems engineering, that is, the development of "generic requirements for new systems" which will enable the Operating Companies to "inform vendors of the features and functions that the BOCs want or need in the equipment [**181] they purchase"; (3) applied engineering, that is, the testing and evaluation of the products of potential suppliers to determine whether they meet the generic requirements developed by the systems engineers; (4) applied research, involving "state-of-the-art research in switching, signaling, materials and other elements which provide the underpinning for exchange telecommunications"; and (5) information systems support, which will involve

²⁴³ Moreover, regardless whether traffic is classified as intra-LATA or inter-LATA, Independents will have the option of establishing a relationship with an Operating Company whereby the Independent would be the carrier of traffic between its territory and the Operating Company LATA. See United States v. Western Electric Co., 569 F. Supp. 990, 1010; 1983-1 Trade Cas. P65,333, at 69,982-83 (D.D.C. 1983). If the Independent does not wish to carry such traffic itself, it will alternatively be able to enter into a service arrangement with AT&T (in which case it could continue to interconnect with the same Bell System facilities as are presently used for its interexchange of traffic with Bell territory) or any other interexchange carrier. AT&T Response to Comments, March 25, 1983, at 12.

²⁴⁴ Similarly, GTE's complaints regarding splintering of trunk groups, duplication of facilities, and stranding of existing facilities are basically inevitable consequences of the decree insofar as it does not permit the Bell Operating Companies to carry interexchange traffic.

²⁴⁵ Section I(A)(1) permits AT&T to transfer resources to such an entity.

²⁴⁶ Of the total 8,800, approximately 6,600 staff members would perform technical functions. Plan of Reorganization at 239.

²⁴⁷ The employees would be transferred from AT&T and its affiliates, transferred from the Operating Companies, or newly hired.

²⁴⁸ AT&T Response to Objections at 505.

²⁴⁹ The network planning group within the CSO will also recommend internal network requirements and technical interface standards.

"maintaining and enhancing a number of computer-based operations and administrative systems integral to the exchange business."²⁵⁰

Among the non-technical functions will be the provision to the Operating Companies of [***158] procurement support services,²⁵¹ and such other assistance as legal services,²⁵² regulatory support services, marketing (including billing [**182] and sales support) services, financial services, human resources development, and employee relations.

The criticisms leveled at the CSO proposal fall essentially into two categories.²⁵³ First, intervenors representing [**183] regulatory and consumer interests contend that AT&T has presented inadequate justification for what is contended to be an overly large and costly organization. Second, potential [*1115] equipment suppliers of the Operating Companies claim that the CSO may, in effect, exercise control over many procurement decisions, discriminate in favor of Western Electric products, and, over time, become a second-generation AT&T. After careful consideration, the Court has concluded that these objections are not sufficiently weighty to warrant either the rejection or the modification of the CSO provisions of the plan of reorganization.

[**184] B. CSO Size

There is substantial evidence that the CSO is neither too large nor too costly a burden on the Operating Companies. Since these companies will be controlling the CSO -- not the other way around -- and since most of the costs of the CSO will not be capable of capitalization, the local companies will have strong incentives to avoid wastefulness in the CSO's operation.²⁵⁴ In fact, it appears that the total cost of the CSO to the Operating Companies will be considerably less than what they now pay to AT&T for centralized support.²⁵⁵

[**185] Moreover, and significantly, the chief executives of the Regional Companies, who played an active part in molding the CSO,²⁵⁶ [**186] have given an exceptionally strong endorsement to the size of the organization, its

²⁵⁰ AT&T Response to Objections at 506-12.

²⁵¹ There would be 700 procurement support personnel. Plan of Reorganization at 339. The Court expects that this staff will not make substantive procurement decisions.

²⁵² The Court has some concern that the centralized provision of legal advice on potential antitrust liability might be of questionable propriety and wisdom. William Weiss, designated chief executive of the Midwest Region, testified at the June 2, 1983 hearing that: "I cannot conceive of a corporation the size of mine in the future not wanting to be self-sufficient in areas of liability like antitrust" Transcript at 25497. Although this is not a complete answer, the likelihood of antitrust violations through the central legal staff is not sufficiently substantial that elimination of these functions will be required.

²⁵³ The delegation of national security and emergency responsibilities to the CSO is largely unchallenged. The Court has always insisted that legitimate Department of Defense interests be fully protected ([552 F. Supp. at 208-209](#)), and the CSO provisions of the plan carry out that objective. The security and emergency responsibilities will be executed by a specialized group within the CSO which will set and enforce technical standards to the extent that security and emergency needs demand that telephone equipment be "capable of being interconnected nationwide." Plan of Reorganization at 418-19.

²⁵⁴ Several intervenors complain that the plan makes insufficient provision for an Operating Company's withdrawal from the CSO. Complete withdrawal may only take place with five years' advance notice, and an Operating Company may withdraw from a particular function on one year's notice. The chief executives of the Regional Companies support this approach as necessary to ensure the continuing viability of the CSO, and the Court sees no reason to interfere with their judgment.

²⁵⁵ William Weiss stated that the amount will be three-quarters of the sums previously expended (transcript at 25,500), while AT&T claims that the 8,800 CSO employees should be compared to the 23,000 AT&T employees allegedly now supporting the Operating Companies. Response to Objections at 496 note **.

²⁵⁶ A task force of Operating Company presidents initially recommended the structure of the CSO. Each regional planner on the task force then conferred with his respective chief executive officer, and a "CSO package" was adopted by these officials in October 1982. Since that time, some functions have been added and others eliminated, and negotiations over the CSO's final

cost, and the responsibilities vested in it by the plan of reorganization.²⁵⁷ In short, the concern of some of the intervenors that the CSO is an AT&T tool designed to hamper Operating Company progress rather than to assist these companies is not shared by those most [***159] directly involved.²⁵⁸ On this issue, at least, the opinions of the Regional Company managers are entitled to more weight than those of regulators²⁵⁹ and consumer groups.

Some of the intervenors also question the assignment to the CSO of functions other than those strictly related to national security and emergency preparedness. The decree permits the CSO to perform such functions as "can most efficiently be provided on a centralized basis." Section I(B). [**187] It appears obvious that, with respect to the responsibilities which are vested in the CSO [*1116] by the plan of reorganization, substantial economies will be realized from centralization. To be sure, AT&T has not provided a quantification of efficiencies and economies, but that is not especially surprising since it is unlikely that detailed cost-benefit comparisons could now be made: the seven Regional Companies are at present only planning to operate in this respect, and the territory is somewhat unchartered. It does not require an army of efficiency experts, however, to conclude that it will be more economical for certain support functions to be performed once rather than seven times over. As the Department of Justice has aptly observed, "it is neither necessary nor useful to engage in extensive second-guessing of the [Operating Companies'] decisions as to what activities can efficiently be centralized."²⁶⁰

The Court concludes that the objections [**188] regarding size, scope, and cost of the CSO do not warrant disturbing the CSO proposal.

C. Procurement Functions

The objections relating to the CSO's possible involvement in procurement activities have somewhat more substance. The intervenors complain in this respect primarily that standards may be set by the CSO which will favor Western Electric products over those of competitors, and that the testing of products may be biased against Western's competitors.

It seems beyond debate that uniform standards are necessary to ensure high quality in the telephone system, indeed its very survival as a nationwide network.²⁶¹ Nor are such standards incompatible with competition. Not all characteristics of products to be purchased by the Operating Companies will be specified in advance; there will be ample room for competitors to meet the generic requirements established by the CSO and still produce products drawing upon their special skills, distinctive styles, and other competitive advantages.

[**189] Similar conclusions apply to the testing function to be performed by CSO personnel. AT&T has advised the Court that such personnel will not make product recommendations to individual Operating Companies but will limit

form are continuing, without the participation of AT&T. Response to the Operating Companies in the Mountain-Northwest Region, May 31, 1983, at 5; Southeast Region's Response, May 31, 1983, at 3. According to William Weiss, "the presidents . . . elected to do only certain things in the central staff, those things that they felt could be done to achieve economies of scale. They excluded from the role of that central staff things that they felt either we could do ourselves with our present organizations and the Operating Companies or that didn't need to be done in the longer term future." Transcript at 25500.

²⁵⁷ See, e.g., Response of Operating Companies in the Mountain-Northwest Region, May 31, 1983; Response of the Northeast Region, May 31, 1983; Response of the Mid-Atlantic Bell Telephone Companies, May 31, 1983; Southwest Region's Response, May 31, 1983.

²⁵⁸ The Court has no question that on this subject the chief executives of the Regional Companies communicated to the Court their genuine convictions.

²⁵⁹ Some of the state regulatory commissions complain that they will be unable to exercise effective control over the costs of the CSO, but this was refuted by testimony at the June 2, 1983, hearing to the effect that the Operating Companies will present their respective shares of the cost of the CSO to the state regulators, so that "it will not escape [their] attention." Transcript at 25,501.

²⁶⁰ Department of Justice Response to Comments at 162.

²⁶¹ There are some features, e.g., network signaling protocols, which will be of no use unless they are agreed to by all the Operating Companies. AT&T Response to Objections at 523.

themselves to "a scientific and objective testing function." Test results will be made available to both the Operating Companies and the manufacturers, and the latter will be allowed an opportunity to demonstrate the incorrectness of any adverse findings. And it will be up to the Operating Companies, not the CSO, to determine the weight and significance to be accorded to the test results in the making of final procurement decisions.²⁶² The Court believes that these assurances adequately protect potential vendors.²⁶³

Some intervenors question more broadly whether objective **[**190]** conclusions are at all possible with respect to such activities as standard-setting, testing, and the like,²⁶⁴ and that in practice it may not be possible to distinguish sharply between these functions and procurement decision-making. Another intervenor asks who at the Operating Company level would "undertake an independent and intelligent analysis of the technical and other evaluations sent to [these companies] by the CSO" if, as AT&T asserts, there are not enough qualified technical personnel in the Bell System to staff both the Operating Companies and the CSO.²⁶⁵

Although these objections are not without some force -- particularly those related **[*1117]** to the somewhat shadowy line between standard-**[***160]** setting and procurement -- the Court has decided that, on balance, the advantages to be achieved from the centralization of these various responsibilities outweigh the dangers **[**191]** visualized by the opponents of such a step. The issue reduces itself to an inquiry whether the desirable ends of economy and uniform quality can be achieved without serious risk that the CSO will become an instrument of anticompetitive conduct. In the Court's view, that risk, *i.e.*, the risk of bad faith, is relatively small,²⁶⁶ for a very basic reason.

[192]** There will be no continuing relationship between AT&T and the CSO,²⁶⁷ **[**193]** and therefore no economic incentive for CSO personnel to favor Western Electric products over those of any other supplier. CSO personnel will, at least indirectly, be working for the Operating Companies; their success in their new employment will be bound up with the success of the local companies;²⁶⁸ and the Operating Companies are far more likely to flourish by purchasing the best equipment at the best price than by favoring Western Electric products regardless of quality or price. The employees' economic incentives therefore all run in favor of the Operating Companies and against improper favoritism toward Western Electric. Moreover, the testimony of the regional chief executives and their various filings with the Court establish that they intend to make their own procurement decisions, and that they

²⁶² AT&T Response to Objections at 525-26.

²⁶³ Should it ultimately appear that the CSO deviates from these standards, there will be time enough for the Department of Justice, the Court, or both to take corrective action.

²⁶⁴ See, *e.g.*, Reply of U.S. Telecommunications Suppliers Association at 7; ITT Reply at 15.

²⁶⁵ See GTE Reply at 8.

²⁶⁶ Since the representations made by AT&T in its Response to Objections regarding the limited role of the CSO in setting standards and testing products were critical in persuading the Department of Justice and the Court to approve the CSO as proposed, it is of course essential that the CSO abide by those representations. The Court has considered adopting the suggestion of some (*e.g.*, U.S. Telephone Suppliers Association) that these representations be reduced to a separate contract, but in the interest of avoiding the imposition of yet another set of rules on the Operating Companies, it will not insist on this measure. However, the Court does expect the Operating Companies to use the CSO to further only their own competitive interests, not those of AT&T, and it also expects the Department of Justice to be vigilant in its oversight of the CSO's role in the setting of standards and testing of products.

The plan of reorganization does not limit the CSO to the responsibilities initially entrusted to it. The Court is persuaded that some flexibility is necessary in this regard as well. However, here, too, it expects that the CSO will respect the boundaries between standards and testing, on the one hand, and procurement, on the other. It is in this area particularly that the Court will not hesitate to exercise the powers vested in it by section VIII(I) of the decree should this appear to be warranted.

²⁶⁷ Whatever sharing contracts that will be in effect will be between the Operating Companies and AT&T, not the CSO and AT&T.

²⁶⁸ The CSO will not, on its own, manufacture or market any product or service.

are acutely aware of the spectre of an enforcement action brought by the United States should the CSO act anticompetitively.²⁶⁹

In the absence of an economic incentive, much is made of the emotional attachment of CSO personnel to AT&T -- the former employer of many of them. Such an attachment cannot be entirely discounted, at least with respect to some employees and at least in the short run. But it defies all experience with a mobile work force in the United States to assume that, for any length of time, former AT&T personnel will make decisions which will assist their former employer, but now sometime competitor, simply because they used to work there.²⁷⁰ **[**194]** Certainly the Court would not be justified in vetoing an arrangement agreed to by AT&T, the Operating Companies, and the Department of Justice which is otherwise perfectly sensible and reasonable upon the basis of so speculative an objection.²⁷¹

[*1118] The Central Staff Organization is designed to carry out extremely important responsibilities. Not only will it perform the coordination for national defense and other emergency purposes that is vital to the nation's security, but it will also set the standards which will permit telecommunications to continue to operate in an engineering sense as one national network.²⁷² These responsibilities were in the past performed exceedingly well by AT&T. In the Court's view, it is essential that the break-up of the Bell System and the economic competition which will result from that break-up will not lead to a departure from that high standard or to the development of balkanized regional networks which poorly interconnect **[**195]** with each other to the detriment of all users. The Central Staff Organization **[***161]** will be an important check against deterioration and fragmentation of the existing telephone system.

For these reasons, the Court is strongly committed to the success of the CSO, and it will not weaken that organization, whether in size or in authorized responsibilities, without good cause. The arguments proffered by the intervenors, while they do not, here and there, lack some plausibility, are far from being sufficiently persuasive to provide such a cause. The Court accordingly will approve the Central Staff Organization as it is proposed in the plan of reorganization.

IX

Further Court Proceedings

Several intervenors suggest additional judicial or other proceedings **[**196]** of various kinds beyond those that are expressly provided for in the decree. For example, the State of New Mexico asks that the intervention status of all third parties be continued to permit them to participate in the true-up process following divestiture.²⁷³ **[**197]** The State of California asserts²⁷⁴ more specifically that a true-up procedure is necessary to ensure the achievement of target debt ratios, pointing out that the plan already contemplates such a procedure with respect to a number of other subjects.²⁷⁵ American Satellite Company asks for the submission to the Court of detailed information

²⁶⁹ See, e.g., Transcript at 25502.

²⁷⁰ This conclusion would seem to hold notwithstanding the strong feelings of loyalty which have been fostered and have traditionally existed within the Bell System.

²⁷¹ As for the claim that the very establishment of a CSO might give rise to antitrust problems it is well established that a joint technical organization with responsibility for setting standards does not in and of itself violate the Sherman Act. See [American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 \(1982\)](#).

²⁷² The testimony at the trial demonstrated that the application of nationwide standards has contributed substantially to the overall quality of telephone service enjoyed in this country. See, e.g., testimony of Casimir Skrypczak, transcript at 23854-55.

²⁷³ Reply Comments of the State of New Mexico, April 13, 1983, at 18-19.

²⁷⁴ Further Comments of the People of the State of California, Feb. 14, 1983, at 65-67.

concerning the day-to-day progress in the implementation of the plan of reorganization and requests public disclosure as well as judicial review of all divestiture-related contracts.²⁷⁶ And the State of Maine urges that the state and local public utilities commissions be allowed to participate in the division of assets between AT&T and the Operating Companies by a court-imposed requirement of the distribution to them of the same kinds of information and monitoring rights possessed by the Department of Justice. The Court will deny all of these and similar requests.²⁷⁷

There now is some provision in the decree, albeit on a carefully limited basis, for the retention of jurisdiction by the Court.

Section VII specifies that, upon application of a party or an Operating Company, the Court may issue orders to construe the decree, carry it out, modify it, or enforce it, or to punish violations.²⁷⁸ At the request of [*1119] a number of intervenors, the Court announced the adoption of a procedure which would permit an interested nonparty to initiate enforcement proceedings [**198] on its own. But that opportunity was deliberately kept very narrow²⁷⁹ because, as the Court stated on August 11, 1982, so restricted it strikes a proper balance between the need for some enforcement mechanism not under the direct control of the parties and the necessity of avoiding "constant, unnecessary interference by AT&T's competitors and others with implementation of the reorganization and with the normal operations of AT&T and the divested Operating Companies . . . [as well as the necessity not to burden the Court] with innumerable requests for clarification or modification, and with charges of violations."[552 F. Supp. at 219-20](#).

[**199] The Court will not expand these provisions. The difference between the procedures described above and those presently suggested by the intervenors is that the former are designed to be invoked only sporadically, upon the occurrence of some specific incident regarding the decree, while the latter would involve the Court, the intervenors, or both, on a more or less continuing basis in the divestiture process. The Court has no wish to be engaged on a long-range basis in oversight either of the divestiture or of the operations of the various components of the Bell System; such an oversight role would not be consistent [***162] with the principle of proper judicial restraint; and the kind of interference which it implies would not be fair to those who will manage AT&T and the Operating Companies.

HNG[↑] The Tunney Act requires a court to determine whether certain consent decrees are in the public interest and, in view of the unusual circumstances of this case,²⁸⁰ this responsibility also required the Court to pass upon the validity of the plan of reorganization under the decree and to allow third party intervenors to participate

²⁷⁵ These include a true-up of certain Operating Company accounts (1) to correct faulty estimates of depreciation reserves, of the assignment of assets and liabilities and of personnel assignments, (2) to correct mistaken personnel assignments and inadvertent work force imbalances, and (3) to accommodate personal hardships. Plan of reorganization at 160-62, 233-34, 277-78. See Part V(B) *supra*.

²⁷⁶ Reply Comments of American Satellite Co., April 4, 1983, at 2-4.

²⁷⁷ See note 283 *infra*.

²⁷⁸ The Court subsequently required the adoption of section VIII(I) which permits the Court to undertake the various section VII responsibilities (except that of modifying the decree) *sua sponte*, rather than merely upon request.

²⁷⁹ Such a party may serve upon the Department of Justice a request for enforcement. If the Department refuses to take action in response thereto, an application may be made to the Court for the initiation of "further appropriate proceedings." The process was carefully restricted to complaints accompanied by affidavits alleging facts with particularity which, if true, would demonstrate a bad faith refusal by the Department to enforce the judgment. [552 F. Supp. at 220](#). The Court will in due course issue an implementing order, and it will not entertain enforcement requests which do not follow this route.

²⁸⁰ E.g., the size of the divestiture, the sketchy nature of the decree itself, and, ultimately, the broad implications of the divestiture upon the entire telecommunications industry.

extensively in the review process. But for the reasons outlined above, **[**200]** this direct oversight should end with the approval of the plan of reorganization.

To be sure, the reorganization process is not complete: the division of assets, the transfer of employees and stock, and the upgrading of the Operating Companies to the status of truly equal access providers have yet to occur. Also, as several intervenors point out, it is possible that those within the Bell complex who will actually implement the reorganization will attempt to depart from the spirit if not the letter of the decree. However, notwithstanding some failures,²⁸¹ **[**201]** the parties have not given evidence of bad faith sufficient to impose upon them the rather draconian requirements requested by the intervenors.²⁸²

[*1120] There comes a time, once the basic documents have been approved, when the Court, rather than to superintend on an intensive basis the actual implementation of the reorganization, should, in the interest of keeping judicial involvement to a necessary minimum, leave compliance to the managers of the business interests directly involved, with such oversight as is vested in the Department of Justice by the decree. See, e.g., section VI.²⁸³

[202]** Should the Court's expectations with respect to the good faith and the fidelity of the parties to the letter and the spirit of the decree be disappointed with regard to any particular matter, there will be time enough under section VII, section VIII(I), and the Court's general equity powers, to take appropriate action. Except for such an eventuality, however, the Court's direct oversight role will come to an end with its approval of the plan of reorganization.

X

Conclusion

A. Summary

The Tunney Act imposed upon the Court the responsibility for determining whether the consent decree submitted to it by the parties was "in the public interest." In August of 1982, the Court approved the heart of the decree -- divestiture -- as satisfying that standard. At the same time, it determined that its public interest responsibilities required it to pass also on the plan of reorganization, since that plan was to fill in the decree's many interstices and to describe the precise method by which divestiture was to be accomplished.²⁸⁴ The plan was submitted by the

²⁸¹ E.g., the attempts of the Department of Justice, of AT&T, or both, to disavow commitments previously made with respect to patent and trademark rights to be granted to the Operating Companies (see Parts III and IV *supra*) and the continuing reluctance of the Department to accept as final the decision regarding the marketing of CPE by the Operating Companies. See pp. 73-74 *supra*. That reluctance gives rise to some concern regarding the Department's willingness and ability to enforce fairly the CPE provisions of the decree (rather than to seek, once again, to pursue its own notions in that regard) and this, of course, casts some doubt upon the Department's overall attitude with respect to the implementation of the decree. However, in these respects, too, the various judicial powers enumerated above are adequate to deal with any recalcitrance, whatever form it may take.

²⁸² It should also be noted that independent auditors and actuaries will verify compliance by AT&T and the Operating Companies with the requirements of the plan of reorganization regarding the assignment of assets and liabilities. AT&T Response to Objections at 355-60.

²⁸³ For similar reasons, the Court rejects the request of the State of California that the prices charged by Western Electric be controlled for a period following divestiture (Further Comments of the People of the State of California, Feb. 4, 1983, at 41); the request of the State of Missouri to provide special representation for the Operating Companies in the form of an independent attorney (Motion of the State of Missouri for a Hold Separate Order, April 13, 1983); and the request of New York City for the appointment of a Special Master pursuant to Rule 53 (Comments of the City of New York, Feb. 14, 1983, at p. 4). Suggestions similar to these were considered and rejected by the Court prior to the entry of the decree ([552 F. Supp. at 166, 220-22](#)). No new grounds have been adduced; indeed, the Operating Companies have not been reticent in recent months to advance their views to the Court, often contradicting those of AT&T. As the Operating Companies progress further on the road to independence, they may be expected to be increasingly strong-willed in protecting their rights vis-a-vis AT&T.

[***163] parties, and the Court has since subjected it to thorough scrutiny, on its own and with the assistance of the parties and [**203] over one hundred intervenors.²⁸⁵

To the extent that it has been free to do so,²⁸⁶ the Court, in exercising its Tunney Act [**204] responsibilities, has sought to achieve three principal objectives: (1) promotion of true and fair competition in the telecommunications long distance and equipment markets, (2) preservation of AT&T as a dynamic force, capable of research, manufacturing, and marketing in technologically advanced fields, and (3) protection of the principle of universal telephone service, accessible to all segments of the population regardless of income.

[*1121] In its consideration of the decree, the Court was able to advance all of these objectives -- in part by approving various provisions of the proposal submitted by the parties over vigorous objection from others, and in part by requiring the substantial modification of a number of other provisions.²⁸⁷ [**206] When [**205] it considered the plan of reorganization, the Court again had all three objectives in mind. However, it became apparent in the course of that consideration that the bulk of the actions which the Court had to take to achieve consistency of the plan with the decree tended primarily to promote the vitality of the Operating Companies²⁸⁸ and the principle of universal service.²⁸⁹

²⁸⁴ The 471-page plan is a blueprint for the largest corporate reorganization in United States history. The decree itself describes the reorganization process only in the most general terms.

²⁸⁵ Many of the submissions of the parties and the intervenors (e.g., states, AT&T's competitors, consumer groups) were detailed and voluminous. For example, one intervenor -- MCI -- filed a total of over 850 pages of memoranda, exhibits, and other documents, and AT&T's March 1983 Response alone was 617 pages in length. For the first time in the Bell System reorganization process, the Operating Companies participated in the judicial proceedings in their own right. A hearing was held on June 2, 1983, at which the parties, several intervenors, and the chief executives of the Regional Companies gave their views on several particularly controversial issues. See notes 3 and 4 *supra*.

²⁸⁶ The Court's powers under the Tunney Act are, of course, limited (see [552 F. Supp. at 151](#)) and in passing upon the plan of reorganization, the Court likewise does not write on a clean slate but must conform to the provisions and principles of the decree itself.

²⁸⁷ Among the actions which tended to further the cause of competition were the approval of the divestiture from AT&T of the twenty-two "bottleneck" local companies, the prohibition on the entry of these companies into business ventures where their monopoly status might have given them an improper advantage, and the requirement that these companies must provide equal access to all of AT&T's interexchange competitors. The Court also prohibited AT&T for a period of seven years from entering the electronic publishing market.

Actions designed to preserve AT&T's effectiveness included the rejection of proposals which would have required that company to divest itself of Western Electric and Bell Laboratories, prohibited it from utilizing sophisticated "bypass" technologies, and otherwise limited the scope of its operations. The Court also approved the removal of the restrictions imposed upon AT&T by the 1956 consent decree.

The vitality of the Operating Companies and the goal of universal telephone service were promoted, *inter alia*, by modifications which permitted the entry of the local companies into the printed advertising directory market and customer premises equipment market.

²⁸⁸ These actions will, of course, to some degree affect existing and potential competitors of AT&T, suppliers of products, and others within and without the telecommunications industry. But in passing upon the plan of reorganization, the Court was principally called upon to decide "internal" matters between AT&T and the Operating Companies, and for that reason it is not particularly surprising that the primary impact of the decision is on the local companies and their financial well-being.

²⁸⁹ This is not to say that other objectives were not advanced. Thus, the Court approved much of the AT&T plan, and it rejected proposals which would have improperly saddled AT&T with substantial costs, e.g., the direct costs of providing equal access and reconfiguring the network (Part I(C) of this Opinion) and the sole financial responsibility for the Bell System's contingent antitrust liabilities (Part II). In order further to promote competition in telecommunications services, the Court, *inter alia*, rejected joint use by AT&T and the Operating Companies of the name "Bell" (Part III(A)), required the access the Operating Companies provide to AT&T's competitors to be of sufficiently high quality so that voice and data customers will be unable to detect any difference

[**207] These actions, which are described in detail in the body of the Opinion, include the assignment of the "Bell" name and logo to the Operating Companies (Part III(C) of the Opinion); imposition of the requirement that the Operating Companies be granted licenses to all patents acquired by the Bell System (Part IV(A)), along with appropriate sublicensing rights (Part IV(B)); the grant of authority to the Operating Companies to perform their own Official Services functions rather than to have to lease the necessary facilities from AT&T or other interexchange carriers (Part VI(A)); approval of the establishment [***164] of a Central Staff Organization which will give effective logistical support to the Operating Companies (Part VIII); imposition of the requirement that AT&T stand as the ultimate guarantor of the costs of equal access and network reconfiguration (Part I); and the approval of local access and transport areas (LATAs) which avoid substantial, costly network rearrangements (Part VII(A)).

The fundamental purpose of the decree under the antitrust laws is to create conditions which will reduce the cost of telecommunications service to the public -- individual consumers, business, and government. [**208] ²⁹⁰ [*1122] Competition in the long distance and telephone equipment markets is already bearing fruit in the form of lower prices and wider choices. ²⁹¹ In the view of this Court, it is not necessary that these favorable developments be accompanied by the imposition of higher rates for local service.

One of the Court's principal [**209] aims throughout the public interest process has been to ensure that divestiture would not bring about or contribute to local telephone rate increases. While the parties to this proceeding have acknowledged that this effort was successful and that neither the decree nor the divestiture has caused or will cause local rates to rise, ²⁹² these rates will nevertheless be going up, albeit for reasons unrelated to the reorganization of the Bell System.

As the Court has previously noted, and as it elaborates at slip op. at pp. 74-76 *supra*, decisions [**210] taken by federal regulators regarding access charges will have the effect of increasing the cost of local service to residential subscribers. The Court has no authority to countermand those decisions. ²⁹³ It does, however, have the authority to take them into account -- not conclusively, certainly, but as support for determinations which are indicated in any event. That is what it has done here. The modifications it is requiring to be made in the proposed plan of reorganization should assist in moderating the pressure for local rate increases, whatever their source. ²⁹⁴

The telecommunications industry as a whole has a bright future for, as the Court previously observed, ²⁹⁵ we live in an age in which information and its transmission are central to the commonweal and a [**211] flourishing economy.

(Part I(A)), and required the provision of equal access in the intra-LATA field and the densely populated "corridors" in the New York-New Jersey-Philadelphia areas (Part VII(B)). In the interest of protecting the rights of AT&T employees, the Court made explicit that with respect to various subjects (e.g., pension benefits) the decree does not relieve AT&T of its obligation to bargain collectively. (Part V(A)).

²⁹⁰ Cost reductions need not, and in the Court's view will not, be achieved at the expense of quality and reliability. See Part VIII of the Opinion where the Court approved the setting of uniform standards so as to maintain the quality of the telephone network.

²⁹¹ A number of interexchange carriers and telephone equipment manufacturers and dealers have entered these fields or have vastly expanded their operations. The result has been that the prices of long distance service and customer premises equipment are falling and that telephone and related apparatus are becoming available in unprecedented varieties. These trends may be expected to continue and, indeed, to accelerate.

²⁹² See, e.g., Department of Justice Supplemental Memorandum, June 10, 1983, at 8 (decree will not, and has not, caused adverse effects on local rates); AT&T Response of May 5, 1983, at 10-21 (local rates are going up but not because of divestiture); see also, Response of the Federal Communications Commission, June 13, 1983, at 4 n.5 (FCC decision not a product of divestiture since Commission had proposed customer access charges well before Court accepted decree).

²⁹³ See [47 U.S.C. § 402](#).

²⁹⁴ Requests for rate increases by local telephone companies are apparently sought to be justified in some instances by references to the divestiture. Such reliance is unjustified. See note 292 *supra*.

²⁹⁵ [552 F. Supp. at 164-65](#).

No one can predict which company or group of companies will be able best to take advantage of the opportunities which lie ahead. To a large extent this will depend upon their own efforts and performance,²⁹⁶ and to a lesser degree upon the wisdom of those who will exercise regulatory authority over various segments of the industry at the federal and local levels. As indicated above (Part IX), the Court's own oversight over the Bell System divestiture process will end with the approval of the plan of reorganization.²⁹⁷

[**212] AT&T (including Western Electric and Bell Laboratories) as well as the Operating Companies appear to be led by talented managers, scientists, and engineers; moreover, these entities will continue to command immense personal and material resources. There is no reason to believe that the separate parts of the reorganized Bell System will not prosper in the new environment [*1123] or that they will fail to contribute significantly to the American economy.

B. Action on the Motions

Motions of AT&T and of the Department of Justice seeking approval of the plan of [***165] reorganization are pending.²⁹⁸ These motions will favorably be acted upon after the Court is advised that the following modifications [**213] are agreed to by the parties:³⁰⁰

1. If by January 1, 1994, the Operating Companies in the aggregate have not recovered the costs of providing equal access and network reconfiguration (as defined in AT&T's Consolidated Application filed with the Federal Communications Commission on March 1, 1983), plus financing expenses, through their collection of access charges from the interexchange carriers, AT&T will reimburse the Operating Companies in the amount of any remaining deficit. For purposes of this provision, "costs" shall mean the actual costs incurred by the Operating Companies, as distinguished from the estimates in the Consolidated Application. A preliminary accounting will be provided to the Court at the close of the Operating Companies' equal access and network reconfiguration program or by January 1, 1989, whichever [**214] is earlier, and a final accounting not later than January 1, 1994.
2. Beginning on the date of divestiture, AT&T will cease to use the word "Bell" in its corporate name and in the names of its subsidiaries or affiliates, other than Bell Laboratories and AT&T's foreign subsidiaries or affiliates; and beginning on the same date, AT&T will cease to use the "Bell" name and the Bell trademarks, or either, on any equipment sold by it in the United States after that date, except for equipment manufactured or purchased by AT&T prior to that date. In the event that substantial efforts have been made by AT&T by November 1, 1983, to acquaint the public with a new name to replace the name "American Bell," and for good cause shown, the Court will extend the use of that name by AT&T for an additional six months following divestiture in connection with the sale, but not the manufacture or purchase, of equipment.

The divested Operating Companies, the Regional Companies, or either, may use the "Bell" name and the Bell trademarks in connection with the services they perform and on equipment they use or sell, and they may use the word "Bell" in their corporate names, provided that the "Bell" name [**215] is modified so as to identify the

²⁹⁶ See, e.g., *Fortune, Breaking Up The Phone Company*, June 27, 1983.

²⁹⁷ The Court assumed control of this case in the summer of 1978. Pretrial proceedings were designed and announced in September of that year (**461 F. Supp. 1314**), and they took a little over two years to complete. Trial began in January 1981, and it was within weeks of completion when, in January 1982, the parties settled the case by the consent decree referred to above.

²⁹⁸ Issues relating to the LATAs are not a part of the plan of reorganization as such. However, the Court expects compliance with the decisions made with respect to such issues in the Opinion of April 20, 1983, and the present Opinion. It also expects the parties to comply with the other directions contained in these two documents.

²⁹⁹ All such modifications will supersede the existing provisions of the plan of reorganization to the extent of any inconsistency.

³⁰⁰ Section VIII(J) of the decree provides that the plan of reorganization "shall not be implemented until approved by the Court as being consistent with the provisions and principles of the decree." The Court considers that the plan will not be consistent with the decree until modified as required herein.

particular company, and provided further that on equipment sold any Bell trademark is accompanied by the corporate name of the respective Operating Company or Regional Company.

3. AT&T will grant to each Operating Company nonexclusive and personal royalty-free licenses to use telecommunications equipment and operational methods covered by all existing patents owned or controlled by AT&T and all other patents issued to AT&T on or before five years after the date of divestiture.

AT&T will grant to each Operating Company the right to sublicense all AT&T patents to manufacturers for use only in providing the Operating Companies with goods and services embodying the inventions of the patents.

[*1124] 4. In determining whether the use made by an Operating Company of facilities or other assets predominates over that made by AT&T within the meaning of section VIII(G) of the decree, the capacity of a facility or other asset devoted to Operating Company Official Service functions will be included as part of the Operating Company's use. Nothing in the decree precludes an Operating Company from constructing or maintaining facilities or other assets devoted [**216] to Operating Company Official Service functions.

5. The Operating Companies will not provide inter-LATA order writing, order typing, or other provisioning exclusively for AT&T.

6. The decree does not relieve AT&T and the Operating Companies from bargaining in good faith with any labor union, except with respect to the division of the Bell System Pension Plan into nine separate plans; the actuarial methodology specified in the plan of reorganization; and the elimination, one year following the date of divestiture, of unlimited portability of service credit.

MEMORANDUM

I

AT&T has asked for partial reconsideration of the Court's ruling of July 8, 1983, requesting that the Court delete Modification 1¹ [**217] which requires that AT&T guarantee the costs of providing equal access and of reconfiguring the network to conform to the LATAs (hereinafter generally referred to collectively as access costs or access expenses). The principal contention supporting the request for an outright elimination of the guarantee provision² is that this provision would improperly add to AT&T's obligations under the decree.³

As the Court previously pointed out (Opinion of July 8, 1983 slip op. at 14-19), there are two bases under the decree for requiring AT&T to bear at least part of the cost of access, whether in the form of a guarantee or otherwise. First, although section requires AT&T to transfer to the Operating Companies adequate facilities to enable the local companies to meet the equal access requirements, the transfers of equipment provided for under

¹ This Modification reads as follows:

If by January 1, 1994, the Operating Companies in the aggregate have not recovered the costs of providing equal access and network reconfiguration (as defined in AT&T's Consolidated Application filed with the Federal Communications Commission on March 1, 1983), plus financing expenses, through their collection of access charges from the interexchange carriers, AT&T will reimburse the Operating Companies in the amount of any remaining deficit. For purposes of this provision, 'costs' shall mean the actual costs incurred by the Operating Companies, as distinguished from the estimates in the Consolidated Application. A preliminary accounting will be provided to the Court at the close of the Operating Companies' equal access and network reconfiguration program or by January 1, 1989, whichever is earlier, and a final accounting not later than January 1, 1994.

² Other points made by AT&T essentially relate to the request for a proviso to the Modification and are considered under II *infra*.

³ AT&T also claims that the issue was not briefed or otherwise considered prior to the Court's decision on July 8, 1983, but this claim is difficult to understand. Dozens of memoranda with supporting materials were submitted to the Court on the question whether the access costs should more appropriately fall on AT&T or on the Operating Companies, and this was also one of the subjects on which argument and testimony were adduced at the June 2, 1983 hearing.

the plan of reorganization will clearly not be sufficient to [**218] achieve that purpose. Second, AT&T consistently represented to the Court that, even though the company would not pay the access expenses directly, it would do so indirectly through the carrier access charges.⁴ It now appears, however, that for several reasons discussed in the July 8, 1983 Opinion, the carrier access charges may not be adequate to reimburse [*1125] the Operating Companies for these costs. Hence the guarantee required as a prerequisite to the Court's approval of the plan of reorganization.

The argument made by AT&T, and supported by the Department of Justice, that the guarantee would impose an obligation on the company that would be inconsistent with what the parties call the decree's "basic premise" -- that the access costs be recovered through access charges paid by all interexchange carriers, not merely AT&T⁵ -- thus misses the point, for it fails to consider [**219] those features which embody a special AT&T obligation not shared by other carriers: the provisions of section I(A)(1) and the representations made to the Court by AT&T.⁶

All of these subjects [**220] were fully explored by the parties and considered by the Court prior to the issuance of the July 8, 1983 Opinion; AT&T's motion adds nothing new on any of the underlying issues; and the Court will therefore deny that motion to the extent that it requests the deletion of Modification 1.

II

The essence of AT&T's argument in support of the attachment of a proviso to the Modification lies in the claim that the Operating Companies and the local regulators would have and might exercise the opportunity to establish access charges that would be insufficient for full cost recovery. The result of such actions would be that the costs would ultimately be recovered from AT&T pursuant to the guarantee. This, according to AT&T, is not the purpose for which the Modification was designed. That understanding is correct.

The Operating Companies, assured under the guarantee provision of reimbursement from AT&T at the end of the ten-year period specified in the Modification, would have a significant incentive consistently to under-recover access costs prior to that time;⁷ the regulators would have a similar incentive to deny full recovery of such costs;⁸ and AT&T's competitors would have an incentive [**221] to encourage these trends.⁹ In the judgment of the Court it is quite likely that, absent some countervailing mechanism, these entities will act on these incentives.

The Court was not unmindful of this contingency when it issued the July 8, 1983 Opinion. Indeed, it was for that reason that it required AT&T and the Operating Companies to file prior to divestiture a description of the accounting methods which would be used for identifying the access costs and for determining whether and when they had been recovered. Opinion [**222] at slip op. 19 note 37. The Court had in mind that, if AT&T and the Operating Companies agreed on the procedure and substance with respect to such recovery, there would be no need for

⁴ While all interexchange carriers will pay such access charges, AT&T, as the largest carrier, will contribute the lion's share.

⁵ AT&T Memorandum at 3-4; Department of Justice Response at 2.

⁶ Moreover, as the National Association of Regulatory Utility Commissioners (NARUC) points out,

it would be fundamentally unfair if AT&T, whose interstate toll operations were sheltered by the refusal to provide equal access, should be allowed to unload the massive costs of complying with the decree upon the BOCs.

Response at 2. On this basis, the Court also rejects AT&T's demand that it strike the reference in the July 8, 1983, Opinion to AT&T's prior obligation to provide equal or substantially equal access. Motion at slip op. at p. 607 note *. If this issue should arise in other, private litigation, the tribunals having jurisdiction will, of course, draw their own conclusions based on their understanding of court and FCC precedents.

⁷ This would lower rates and thus stimulate usage, and it would also tend to divert the equal access obligation from the local companies to AT&T.

⁸ The resulting lower intra-LATA toll rates would obviously be popular with the public the regulators serve.

⁹ To the extent that AT&T, as a result of the guarantee, ultimately paid for the costs of providing equal access, its competitors would be relieved of the obligation of paying for that access through interexchange access charges.

further judicial intervention; if these parties did not agree (essentially because of a dispute similar to that generated [*1126] by AT&T's present motion) the Court could take steps before divestiture to guard against the contingencies feared by AT&T. By its motion AT&T has brought the issue to a head now, and there is no reason for delaying consideration of this subject.

The July 8, 1983 ruling represents the Court's determination that the somewhat conflicting requirements of the decree¹⁰ can best be harmonized by requiring the Operating Companies to incur the access expenses while requiring AT&T to provide the guarantee embodied in Modification 1. Implicit in that Modification is the principle that AT&T shall guarantee all access costs legitimately incurred and legitimately unrecovered. Equally implicit is the corollary: that AT&T need not provide a guarantee with respect to costs which remain unrecovered as a consequence of actions by Operating Companies or regulators designed improperly [*223] to divert such costs to AT&T. The proviso proposed by AT&T would make the latter objective explicit,¹¹ and it would do so -- as will not be seen -- without in any way weakening the guarantee itself.

Several of the intervenors¹² argue that the proviso would have the practical effect of nullifying the guarantee obligations. The theory underlying these arguments is that, if due to market forces or substantial bypass by AT&T, there is a shortfall in any one year in the recovery of carrier access charges to pay for the access costs, the Operating Companies will under the proviso be compelled to file, and the regulators will be compelled to approve, [*224] a higher tariff the following year, and so on every year until the end of the guarantee period. This process, it is said, would automatically and inevitably relieve AT&T of all obligations on the following basis. If the tariffs were designed so as to recover all necessary costs, there would never be a shortfall; on the other hand, if the tariffs were not designed to recover all necessary costs, they would violate the proviso and AT&T would be discharged of its obligation on that basis.

That analysis misconceives the breadth of the guarantee and the relatively narrow focus of the proviso. As AT&T has pointed out (Reply at 8-9):

The obligation would still require AT&T to stand as the ultimate guarantor of whatever equal access and network reconfiguration costs are allowed in the BOCs' tariffs in the ten years following divestiture. If market conditions ultimately prevent the BOCs from recovering those costs by January 1, 1994 -- despite [*225] their inclusion in tariffs intended to produce full recovery -- AT&T pays the balance, even as the guarantee would be conditioned by the proviso.

Properly construed, then, the effect of the Modification in combination with the proviso will be to protect AT&T from manipulation by the Operating Companies or the regulators; at the same time, these provisions will not excuse AT&T from the guarantee obligation in the event that there is a shortfall in the recovery of carrier access charges for access cost purposes as a result of market forces or bypass by AT&T.¹³ Under the decree and in equity, that is as it should be.¹⁴

¹⁰ Compare, e.g., section I(A)(1) with Appendix B.

¹¹ Essentially, the protection of AT&T is accomplished in the proviso by the clauses relieving AT&T of its obligation if the Operating Companies fail to file access charge tariffs designed to recover all costs included within the guarantee, or if the regulators refuse to allow such tariffs to take effect.

¹² E.g., Maine, p. 2; NARUC, pp. 4-7; GTE, p. 7; SBS, p. 2.

¹³ In the event that at the conclusion of the guarantee period, there is a dispute as to the cause of any shortfall, the Court will resolve that dispute as provided for on p. slip op. at 19 of the Opinion of July 8, 1983.

¹⁴ The proviso proposed by AT&T includes a footnote which reads as follows:

To the extent that network reconfiguration costs relate to the BOCs' provision of other services (such as intra-LATA toll), rather than to carrier access services, the BOCs will be required to include such costs in tariffs for those other services which are filed and allowed to become effective in accordance with this proviso, and any amounts thus recovered shall count toward reimbursement of the BOCs' costs of network reconfiguration.

[**226] [*1127] Questions have been raised by some (e.g., SBS Memorandum at 3) regarding the duration of the guarantee period. Modification 1 envisages the recovery by the Operating Companies of the costs of access within ten years. AT&T and others (e.g., the Department of Justice) have pointed out that under current regulatory directives, many major capital investments must be depreciated over extended periods of time, some in twenty-five years. The Court is thus presented with the choice of either substantially extending the guarantee period or retaining the ten-year period notwithstanding the various existing or proposed depreciation schedules.

After giving the subject careful consideration, the Court has decided to retain the ten-year deadline.¹⁵ Any change in that regard would create unnecessary and inappropriate entanglements between AT&T and the Operating Companies well into the next century.¹⁶ Moreover, depreciation schedules vary, depending not only upon the equipment involved but also upon the practices of the several state and federal regulators, and it would be difficult, if not impossible, to tailor the guarantee to meet all these contingencies. Finally, [**227] the various depreciation schedules are not immutably fixed in the law but are subject to change by the regulators.

[**228] The choice thus rests with the various regulatory bodies.¹⁷ They may either so adjust the depreciation schedules for equipment used to provide equal access or network reconfiguration as to accommodate the requirements of Modification 1, or they may decline to do so, recognizing that if they elect this course not all the costs may be recovered within a ten-year period and AT&T will be relieved of its obligation to that extent to make up the difference.

The Court denies AT&T's motion for partial reconsideration insofar as it requests that the Court strike Modification 1, but it grants that motion insofar as it requests the addition to the Modification of a proviso.¹⁸ [*1128] Accordingly, Modification 1 is hereby amended by the addition of the following language:

Network facilities to be constructed will, of course, be used in part for services other than interexchange access (e.g., for intra-LATA access or intra-LATA toll services), and accordingly a portion of the investment in these facilities will normally be recovered from services other than such access. On this basis, it is appropriate, therefore, that any funds received by the Operating Companies from these other sources be counted toward AT&T's reimbursement obligation. It was for this reason that the Court required in its July 8, 1983 Opinion that the Operating Companies keep records to isolate access expenses from expenses they would have incurred in any event (Opinion at slip op. at 19 note 37), and it is on the same basis that it approves the inclusion of this footnote.

It should be noted that this provision will not compel regulators to determine that any portion of network reconfiguration costs relates to services other than carrier access services; it simply provides that *if* the regulators make such determinations, AT&T will be protected from having to pay under the guarantee even though, in reality, there was no deficit.

¹⁵ The Court recognizes that one consideration cuts the other way: a ten-year schedule, as California points out (Opposition at 7), may inflate the Operating Companies' annual access costs in the near term. However, that increase in costs must be kept in perspective. Even if \$3 billion will have to be recovered in the ten-year period, the total amount would still only be two percent of the over \$150 billion that is estimated to be collected by the Operating Companies in access charges. See Department of Justice Response, Attachment B at 6. Thus, the effect on rates of a ten-year recovery period vs. some longer period would not be substantial, and even that effect could further be mitigated by the regulators.

¹⁶ For the same reason, the Court rejects the suggestion of the United Church of Christ (Opposition at 8) that AT&T be relieved of the guarantee only to the extent that the Operating Companies may be able to recover costs after 1994.

¹⁷ This solution also appropriately meets concerns expressed by the Federal Communications Commission (Comments at 2) and by NARUC (Response at 5) that the Court's decision might improperly interfere with the authority of the regulators.

¹⁸ Several of the intervenors propose various measures in other areas of the plan of reorganization in order to counterbalance what they regard as the effects of the proviso. Thus, California proposes (Opposition at 9-10) that the Court assign the so-called "Account 232" to AT&T, and MCI suggests (Opposition at 3) that the Court's modification with respect to patent licensing will have a beneficial impact on the recovery of the access costs. The plan of reorganization, as it was required to be modified in the July 8, 1983 Opinion, is carefully balanced to achieve the decree's purposes and objectives. The proviso is not sufficiently significant to call that balance into question and thus to provoke reconsideration of other aspects of the plan.

California also suggests (Opposition at 5-6) that

Provided, **[**229]** however, that with respect to any Operating Company, AT&T's obligation shall be discharged to the extent that: (a) the Operating Company fails annually to file carrier access tariffs designed to recoup any then-unrecovered equal access and network reconfiguration * costs by January 1, 1994; or (b) any regulatory commission refuses to permit such tariffs to take effect; or (c) regulatory requirements for the depreciation or amortization of equal access and network configuration investment cause any portion of the investment not to be recognized as a cost of ratemaking in periods prior to January 1, 1994.

[230]** It is the Modification as so amended which AT&T and the Department of Justice will be required to incorporate in the plan of reorganization as a prerequisite to the Court's final consideration and approval of that plan.

MEMORANDUM

Several motions for reconsideration or clarification of the Court's July 8, 1983, Opinion have been filed. This Memorandum disposes of all such motions.¹

1. MCI Communications Corporation has moved for clarification of Modification 3, which modifies the provisions of the plan of reorganization with respect to **[**231]** patents. MCI argues that computer software is subject to this modification, and that AT&T must grant to the Operating Companies royalty-free licenses thereto as well as the right to sublicense where the provision of goods and services to these companies is involved.

The Court stated in its July 8, 1983 Opinion that, for purposes of the plan of reorganization, "patents" includes non-patented technical information. Opinion at slip op. p. 53 note 100. However, as the Court indicated in the very next sentence of that footnote, it was referring in the technical information context to such information as was funded by the license contract between AT&T and the Operating Companies. Computer software has not been so funded.

More broadly, as the discussion in Part IV of the July 8, 1983 Opinion demonstrates, insofar as technical information (as distinguished from patents) is concerned, the Court was concerned in Modification 3 with the issues raised in the "Patents" section of the plan of reorganization, in particular note 399 at p. 411 of the plan. That footnote flatly states that "the BOCs will not be granted any licenses relating to patents **[*1129]** or any other technical information **[**232]** that relate solely to provision of CPE, inter-LATA service or any BOC services now prohibited by the Decree." The July 8 Opinion made it clear that this restriction was unacceptable under the purposes and principles of the decree and the representations that had been made to the Court. This, in turn, led to the requirement of Modification 3.

Other portions of the plan of reorganization deal with non-patented technical information in completely different contexts. For example, Part II(A)(1) (pp. 341-369 of the plan) discusses in considerable detail the assignment of various types of computer software. It was not the Court's intention to disapprove these portions of the plan *sub silentio*.² Indeed, the two reasons given in the July 8 Opinion for granting to the Operating Companies more extensive patent rights than originally provided for by the plan of reorganization -- (1) recognition of past contributions to research they had made through the licensing contracts, and (2) the reasonableness of the removal

[throughout] the nation, BOCs are presenting regulatory authorities with rate increase proposals requesting not only substantial increases in total revenue but also drastically restructured rate designs, featuring 100 to 300 percent increases in basic monthly rates . . . , occasional reductions in toll rates [and] substantial customer access line charges

To the extent that these requests are claimed to be based on the divestiture as presently structured, they have no justification.

¹ To the extent that motions or individual arguments made in motions are not addressed herein, they either raise issues which were previously fully considered or are deemed to lack merit for other reasons. However, the Operating Companies' proposed provision of cellular radio services across LATA boundaries, which is not part of the plan of reorganization but constitutes a request for an exception under Section VIII(C) of the decree, will be considered at a later time.

² The provisions in the plan regarding computer software represent complex arrangements some of which were substantially modified by AT&T following Department of Justice objections. See, e.g., Response of Department of Justice to Comments at 144-52.

of the mandatory patent licensing provisions of the 1956 decree³ -- are not applicable to the type of non-patented, computer software which is the subject of MCI's motion. [**233]⁴ These parts of the plan were not affected by Modification 3, and they remain in effect.

To the extent that clarification is required to resolve any seeming inconsistency between the Court's reference to technical information in note 100, on the one hand, and its implicit approval of the plan's treatment of non-patented technical information which AT&T did propose to share with the Operating Companies, on the other,⁵ it is hereby resolved as described above. MCI's motion will accordingly be denied.

[**234] 2. Several intervenors ask the Court to reconsider its approval of the assignment of the so-called Account 232 to the Operating Companies and to assign the Account instead to AT&T.⁶ That request will likewise be denied. In-place wiring, which is a principal item in Account 232, is as much a "bottleneck" as are the subscriber access lines.⁷ To assign such wiring to AT&T would be to insert AT&T-controlled facilities between the Operating Companies and the subscribers, and such an assignment would thus be entirely inconsistent with the basic purposes of the decree.⁸

Account 232 also includes the capitalized labor costs associated with the installation [**235] and testing of customer premises equipment, and a theoretical case could be made that, since under the plan embedded CPE is being assigned to AT&T, so should be this portion of Account 232. However, the Court was and is persuaded by AT&T's argument, for the reasons stated in AT&T's Response to Objections at 154-55, that there is no practical way to separate out the various handling costs.⁹ The provision made in the plan of reorganization regarding Account 232 is consistent with the decree and otherwise reasonable, and there is no basis for reconsidering the Court's approval of the plan in this regard.

3. GTE Corporation has petitioned the Court for limited reconsideration of that part of the Court's July 8, 1983 Opinion which approved the Operating Companies' classifications (as either intra-LATA or inter-LATA) [*1130] of traffic between their territories [**236] and Independent telephone company territories. Opinion of July 8, 1983 at slip op. p. 124-31. The basis for this request for the reconsideration of nineteen out of hundreds of such classifications is that new information regarding homing and network arrangements was revealed for the first time during the development of the exchange areas under the proposed consent decree in *United States v. GTE Corp.*, Civil Action No. 83-1298, (filed May 4, 1983), which is pending before this Court. See GTE Petition at 2.

Of the nineteen classifications at issue, in eleven instances the relevant Operating Company does not oppose GTE's reclassification proposal.¹⁰ These proposals are reasonable and consistent with the decree, and they will accordingly be deemed incorporated in the plan of reorganization.

³ Opinion of July 8, 1983 at slip op. p. 58-60.

⁴ See AT&T Response to Objections at 426-29.

⁵ I.e., technical information not related to CPE, inter-LATA service, or other Operating Company services prohibited by the decree.

⁶ The Court did not discuss this issue in the July 8, 1983, Opinion, but it was considered. Opinion at slip op. p. 2 note 2, and at 3.

⁷ Much inside wiring is wire that is embedded in conduits, and it is not replaceable by, nor often even accessible to, the customer.

⁸ See [*Litton Systems, Inc. v. Am. Tel. & Tel.*, 700 F.2d 785 \(2d Cir. 1983\)](#).

⁹ See also, the FCC's treatment of this issue, *Amendment of Part 31 (Uniform System of Accounts)*, CC Docket No. 79-105, [85 F.C.C.2d 818, 823-30 \(1981\)](#).

¹⁰ These proposals relate to the following areas: Indiana-Lafayette; Oklahoma-Guymon; South Carolina-Florence; Illinois-Olney; Illinois-Macomb; Pennsylvania-Erie; Texas-Texarkana; Kentucky-Winchester; Michigan; Oregon; and Washington. With respect

[**237] Of the remaining eight GTE proposals, in two instances the Operating Company does not oppose a temporary reclassification pending the completion of certain modernization programs (which was the basis for the Operating Company's original proposal). ¹¹ Such a temporary reclassification makes sense in view of current network arrangements, and the Court will approve it for these two areas on such a basis. In another case, permission is hereby granted for the reclassification which GTE proposes, upon completion of the rehoming project.¹²

In two instances, the Operating Company and GTE are in agreement, but the Department of Justice has correctly pointed out that the Operating Company should be permitted, but not required, [**238] to service the adjacent area.¹³ With respect to the three remaining proposals, the relevant Operating Company opposes the reclassification -- at least at this time -- and GTE has not demonstrated that the classification as originally proposed by that Operating Company, and approved by the Department of Justice and the Court, is unreasonable or inconsistent with the decree.¹⁴ Accordingly, that part of GTE's motion which relates to these five areas is denied.

[**239] 4. The Public Service Commission of Kentucky has moved for reconsideration of the Court's decision to deny consolidation of the Winchester and Louisville LATAs. The Commission argues that the incremental loss of intrastate toll revenue that will be occasioned by three LATAs rather than two will require increases in local rates. However, the Commission has failed to note that access charges to be collected from the interexchange carriers can, if set properly, make up for any loss of revenue to South Central Bell. In any event, significant competitive advantages would flow from three LATAs. The Department of Justice has previously argued in favor of three LATAs on this basis; and the Public Service Commission has not demonstrated that [*1131] the Court ought to disturb its prior decision that three LATAs are appropriate in Kentucky.¹⁵ The motion is denied.

5. New York Telephone Company has expressed concern that the July 8, 1983 Opinion may have placed [**240] territorial restrictions on the Operating Companies' provision of directory advertising services. That concern is unwarranted. As the company correctly surmised, when the Court made mention of activities outside an Operating Company's territory,¹⁶ it was referring to the Bell logo standing alone and the Bell name without a modifier. The decree and the plan do not limit the provision of directory advertising or of customer premises equipment to prescribed geographical territories.

6. The American Council of the Blind, the Paralyzed Veterans of America, and others are concerned about the transfer to AT&T of embedded specialized equipment for the disabled, such as teletypewriters and large button telephones, the price of which may conceivably no longer be subsidized after the transfer. The Court's approval of the decree's provisions regarding embedded CPE is, of course, without prejudice to whatever equitable arrangements may be made among AT&T, the Operating Companies, [**241] and the representatives of the

to the last three areas, the respective Operating Company has indicated that the classifications in these states are already being revised as required by the Court's July 8, 1983 Opinion, and that they will therefore be consistent with the GTE proposals. Response of the Operating Companies to GTE Petition at 6-7.

¹¹ The proposals in this category relate to the areas of Illinois-Bloomington and Illinois-Kewanee. Response of the Operating Companies to GTE Petition at 4, 7.

¹² This will enable the association of the Chesapeake exchange with the Columbus LATA when the exchange is rehomed in 1984.

¹³ These two proposals relate to Indiana-Terre-Haute and West Virginia-Bluefield.

¹⁴ These proposals relate to the following areas: Illinois-Chicago; Ohio-Medina; and California-Oxnard. With respect to the last of these areas, Pacific Telephone has indicated that it is presently discussing the resolution of this matter with the Department of Justice. Response of the Operating Companies to GTE Petition at 3. As the Court indicated in the Opinion of July 8, 1983, the Bell Operating Companies may, under the decree, subsequently petition the Court for reclassification or for exceptions in regard to service between their own areas and Independent territory. Opinion of July 8, 1983 at slip op. p. 129 n.238.

¹⁵ South Central Bell is neutral on this issue.

¹⁶ July 8, 1983 Opinion at slip. op. p. 51.

disabled regarding continued subsidization of such equipment. See also, The Telecommunications for the Disabled Act, P.L. 97-410 (1982).

7. The Communications Workers of America yesterday for the first time requested that the Court clarify or reconsider language in the July 8, 1983 Opinion which may prohibit portability of pension benefits not only between AT&T and the divested entities but also among the Regional Companies and between them and the Central Staff Organization. See Opinion at slip op. p. 83. In view of the fact that AT&T and the Union are apparently at the present time engaged in collective bargaining, the Court inquired of AT&T whether it was prepared, on an informal and expedited basis, to express its agreement with the Union's interpretation, but AT&T responded that it could not do so. Accordingly, the issue will be resolved on the basis of briefing in accordance with the usual procedure.

ORDER

Upon consideration of the motion filed by AT&T on April 7, 1983 to approve the Plan of Reorganization, the proposed plan of reorganization as amended, the testimony given, and the oppositions, affidavits, comments, responses, and briefs **[**242]** filed with respect thereto:

It appearing that AT&T on August 3, 1983, agreed to the modifications required by the Court on July 8, 1983, as qualified on July 28, 1983, and it appearing that the Department of Justice has likewise given its assent to such modifications, it is this 5th day of August, 1983,

ORDERED That the motion be and it is hereby granted, and it is further

ORDERED That AT&T's proposed plan of reorganization, dated December 16, 1982, as amended March 14, 1983, March 25, 1983, April 7, 1983, and August 3, 1983, be and it is hereby approved as consistent with the provisions and principles of the decree entered on August 24, 1982.

End of Document



Aydin Corp. v. Loral Corp.

United States Court of Appeals for the Ninth Circuit

September 16, 1982, Argued and Submitted ; July 12, 1983, Decided

No. 81-4592

Reporter

718 F.2d 897 *; 1983 U.S. App. LEXIS 25875 **; 1982-2 Trade Cas. (CCH) P65,492; 1983-2 Trade Cas. (CCH) P65,492

AYDIN CORPORATION, a Delaware corporation, Plaintiff-Appellant, v. LORAL CORPORATION, a New York corporation, and CONIC CORPORATION, a Delaware corporation, Defendants-Appellees

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Northern District of California.

Marilyn H. Patel, District Judge, Presiding

Disposition: AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Core Terms

antitrust, employees, district court, summary judgment, state court action, competitor, business relationship, horizontal, genuine, sham, unfair competition, anticompetitive, allegations, intentional interference, district judge, material fact, ancillary, rule of reason, covenants, microwave

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

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

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

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

[HN1](#) [💡] Standards of Review, De Novo Review

An appellate court reviews a district court's order of summary judgment de novo.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN2 [+] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Section 1 of the Sherman Act, [15 U.S.C.S. § 1](#), prohibits an unreasonable contract, combination or conspiracy in restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN3 [+] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

The hallmark of a horizontal market allocation is collusion among competitors to confer upon each a monopoly in a specific area. In order to establish a horizontal restraint, there must be collaboration among competitors.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

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

HN4 [+] Practices Governed by Per Se Rule, Boycotts

The courts are reluctant to extend the per se categories of antitrust violations beyond price-fixing, market division, group boycotts, and tying arrangements. The test for determining whether the rule of per se illegality should be extended to a business practice not heretofore afforded per se treatment and whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, instead of one designed to increase economic efficiency and render markets more, rather than less, competitive.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Trade Secrets Law > Federal Versus State Law > **Antitrust Law**

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

HN5 Types of Contracts, Covenants

Employee covenants not to compete or interfere with the employer's business after the end of the employment relationship should not be tested under the per se rule of antitrust illegality. Such covenants often serve legitimate business concerns such as preserving trade secrets and protecting investments in personnel. In addition, the courts have had inadequate experience with noncompetition and noninterference covenants to warrant a per se categorization.

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

HN6 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The proper function of ancillarity in antitrust analysis is to remove in some instances the per se label from restraints otherwise falling within the category. Whether a restraint that does not fall within a per se category is ancillary to a valid agreement is relevant only in the sense that ancillarity increases the probability that the restraint will be found reasonable.

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

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

HN7 Per Se Rule & Rule of Reason, Sherman Act

Whether an agreement had sufficient anticompetitive effect is an essential part of a claim pursuant to [Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), under the rule of reason.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

HN8 Regulated Practices, Private Actions

Although summary judgment is disfavored in antitrust cases in which motive and intent are important factors, its use is not prohibited and may save judicial resources.

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

HN9 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The plaintiff in an antitrust action judged under the rule of reason bears the burden of proving unreasonableness.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

718 F.2d 897, *897 (1983 U.S. App. LEXIS 25875, **1

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

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

HN10 [blue icon] Regulated Practices, Private Actions

When an antitrust defendant brings a summary judgment motion, he bears the burden of demonstrating the absence of a genuine issue of material fact and that he is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The moving party is subject to a particularly rigorous burden in antitrust cases. In addition, nonmoving plaintiff is entitled to have all reasonable inferences of fact drawn in his favor.

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

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

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

HN11 [blue icon] Summary Judgment, Burdens of Proof

The amount of evidence necessary to raise a genuine issue of material fact on a summary judgment motion is enough to require a jury or judge to resolve the parties' differing versions of the truth at trial. Substantial evidence to raise a triable issue is more than a mere scintilla, but the moving party has the burden of clearly demonstrating the absence of any genuine issue as to the existence of each material fact which under applicable principles of substantive law would be required to support a judgment in its favor.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN12 [blue icon] Regulated Practices, Market Definition

To establish anticompetitive market effect, antitrust plaintiff must prove that defendant's actions caused a decrease in competition in the relevant market. Whether a decrease in competition occurred and whether it was caused by defendant's conduct are factual matters which, if disputed, must be resolved by the trier of fact.

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

HN13 [blue icon] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

To amount to an unreasonable restraint of trade, defendant's anticompetitive conduct must have an effect greater than its effect upon plaintiff's business.

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

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

718 F.2d 897, *897 U.S. App. LEXIS 25875, **1

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

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

HN14 [blue icon] **Entitlement as Matter of Law, Genuine Disputes**

In response to a motion for summary judgment, a nonmoving plaintiff cannot rest on its pleadings but is required to respond with affidavits or other evidence. [Fed. R. Civ. P. 56\(e\)](#).

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Governments > State & Territorial Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > Judicial Immunity

HN15 [blue icon] **Transportation, Railroads**

Bona fide efforts to obtain or influence legislative, executive, judicial or administrative action are immune from antitrust liability under the Noerr-Pennington doctrine. The Noerr-Pennington doctrine protects the [First Amendment](#) right to petition the government. If, however, the effort to obtain or influence government action is a sham, and is actually an attempt to interfere improperly with the business relationships of a competitor, antitrust liability may be imposed.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN16 [blue icon] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Multiple lawsuits are not a condition precedent to showing sham. A single action is sufficient to invoke the sham exception to the Noerr-Pennington doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN17 [blue icon] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Whether an effort to invoke the judicial process is a genuine effort to obtain redress, or instead is a mere sham, is a question of fact.

718 F.2d 897, *897L^A 1983 U.S. App. LEXIS 25875, **1

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN18 [Defenses, Demurrsers & Objections, Motions to Dismiss]

A district court may in its discretion reach pendent state claims even when the federal claims are dismissed before trial.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Governments > Courts > Judicial Precedent

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN19 [Federal & State Interrelationships, Erie Doctrine]

A federal court is bound to follow an interpretation of state law by the highest state court.

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

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > Business Torts > Commercial Interference > Prospective Advantage

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN20 [Regulated Practices, Trade Practices & Unfair Competition]

The tort of interference with prospective business advantage encompasses intentional interference with business relations or advantages which are merely prospective and ordinarily not the subject of an existing contract. The protected area of activity is not a contractual relationship but an economic relationship with the potential to ripen into contract. The relations protected against intentional interference include interference with the prospect of obtaining employment or employees.

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN21[] Standards of Review, Clearly Erroneous Review

A federal court of appeals ordinarily accepts a district judge's analysis of the law of the state in which the judge sits, unless clearly wrong.

Counsel: Michael L. Harrison, Esq., Harrison, Hearn, (Illegible Word), San Jose, California, for Appellant/Petitioner.
Ernest Leff, Esq., Hahn, Cazier & Leff, Los Angeles, California, for Appellee/Respondent.

Judges: Wallace, Kennedy, and Nelson, Circuit Judges.

Opinion by: WALLACE

Opinion

[*899] WALLACE, Circuit Judge:

Aydin Corporation (Aydin) sued Loral Corporation (Loral) and Conic Corporation (Conic), a subsidiary of Loral, alleging violations of the federal antitrust laws. Aydin also alleges that they violated California statutory and common law. The district judge granted summary judgment for Loral and Conic on all counts. We affirm in part and reverse in part and remand.

I

Moyes served as head of the TerraCom Division of Conic (TerraCom) for several years prior to 1979. He also served as a director of Conic. On March 29, 1979, Moyes and directors of Loral and Conic signed a handwritten agreement terminating Moyes's employment. The agreement contained provisions resolving [*2] salary and stock obligations, as well as an agreement by Moyes not to "disrupt, damage, or impair" Conic's business.

On May 4, 1979, Moyes signed a more formal agreement with Loral and Conic which generally followed the provisions of the March 29th agreement. The May 4th agreement provided in part that Moyes would "preserve the confidentiality of all trade secrets and other confidential information" and that he would not:

now or in the future disrupt, damage, impair or interfere with the business of Conic Corporation, or its TerraCom Division whether by way of interfering with or raiding its employees, disrupting its relationships with customers, agents, representatives or vendors or otherwise[. Moyes is] not however, restricted from being employed by or engaged in a competing business.

After termination of his employment with Conic, Moyes became employed by Aydin as head of Aydin's newly formed Microwave Division. During the next several months, ten TerraCom employees left and went to work for Moyes at Microwave.

Loral and Conic filed suit in California state court in October 1979 against Moyes and two of the Aydin employees who had been employed by TerraCom, [*3] alleging breach of the May 4th agreement and unfair competition. Loral and Conic filed another state court action against Aydin in Pennsylvania. The Pennsylvania suit was dismissed after Loral and Conic joined Aydin as a defendant in the California action.

Aydin filed this suit in federal court in April 1980, alleging that the May 4th agreement is an unlawful restraint of trade, that Loral and Conic's state court actions violate the antitrust laws, and that Loral and Conic are liable under California law for tortious interference with prospective business relations, for injury to a servant, and for unfair competition. Loral and Conic moved for summary judgment which was granted on all counts. HN1[] We review the district court's order of summary judgment de novo. *State ex rel. Edwards v. Heimann*, 633 F.2d 886, 888 & n.1 (9th Cir. 1980).

II

We find no merit in Aydin's contention that the agreement prohibiting Moyes from disrupting, damaging, impairing or interfering with Conic's business is a per se violation of [section 1](#) of the Sherman Act. [15 U.S.C. § 1.](#) [**4] [Section 1 HN2](#) [↑] prohibits an unreasonable contract, combination or conspiracy in restraint of trade. See [Standard Oil Co. v. United States](#), 221 U.S. 1, 63-68, 55 L. Ed. 619, 31 S. Ct. 502 (1911).

Aydin first alleges that the May 4th agreement constitutes a per se violation of [section 1](#) because it results in a horizontal market division. To support this claim, Aydin [*900] must establish that Moyes competes at the same market level as Loral and Conic. [United States v. Topco Associates, Inc.](#), 405 U.S. 596, 608, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972); accord [Krehl v. Baskin-Robbins Ice Cream Co.](#), 664 F.2d 1348, 1354 (9th Cir. 1982) [HN3](#) [↑] ("The hallmark of a horizontal market allocation is collusion among competitors to confer upon each a monopoly in a specific area."); [National Tire Wholesale, Inc. v. Washington Post Co.](#), 441 F. Supp. 81, 87 (D.D.C. 1977) ("In order to establish a horizontal restraint, there must be a collaboration [**5] among competitors.") (emphasis in original), aff'd without opinion, [595 F.2d 888 \(D.C. Cir. 1979\)](#). Moyes is not a competitor of Loral and Conic in any significant measure and does not operate at the same level of the market structure. Further, the May 4th agreement expressly permits Moyes to be employed by or engage in a competing business. There is no evidence that Aydin or any other competitor of Loral and Conic participated in any way in the formation of the agreement. We express no opinion on whether, on another set of facts, a noninterference agreement between a company and a departing executive could ever amount to a horizontal market division.

Aydin next argues that even if the May 4th agreement does not result in a horizontal market division, the categories of per se antitrust violations should be expanded to include post-employment noninterference agreements. [HN4](#) [↑] We have been reluctant to extend the per se categories of antitrust violations beyond price-fixing, market division, group boycotts, and tying arrangements. See [Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.](#), 637 F.2d 1376, 1381-88 [**6] (9th Cir.), cert. denied, 454 U.S. 831, 70 L. Ed. 2d 109, 102 S. Ct. 128 (1981); [DeVoto v. Pacific Fidelity Life Insurance Co.](#), 618 F.2d 1340, 1344 (9th Cir.), cert. denied, 449 U.S. 869, 66 L. Ed. 2d 89, 101 S. Ct. 206 (1980); [Gough v. Rossmoor Corp.](#), 585 F.2d 381, 386-88 (9th Cir. 1978), cert. denied, 440 U.S. 936, 59 L. Ed. 2d 494, 99 S. Ct. 1280 (1979); accord [White Motor Co. v. United States](#), 372 U.S. 253, 263, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963). As we stated in [Krehl v. Baskin-Robbins Ice Cream Co.](#):

The test for determining whether the rule of *per se* illegality should be extended to a business practice not heretofore afforded *per se* treatment is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'"

[664 F.2d at 1356](#), quoting [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.](#), 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979); [**7] accord [Betaseed, Inc. v. U & I Inc.](#), 681 F.2d 1203, 1220 (9th Cir. 1982); see also [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.](#) 441 U.S. at 8-10 (per se classification appropriate when practice is plainly anticompetitive and courts have considerable experience with the challenged business relationship); [Continental T.V., Inc. v. GTE Sylvania Inc.](#), 433 U.S. 36, 49-50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977) ("Per *se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.").

[HN5](#) [↑] Employee covenants not to compete or interfere with the employer's business after the end of the employment relationship should not be tested under the *per se* rule. Such covenants often serve legitimate business concerns such as preserving trade secrets and protecting investments in personnel. [Newburger, Loeb & Co. v. Gross](#), 563 F.2d 1057, 1082 (2d Cir. 1977), cert. denied, 434 U.S. 1035, 54 L. Ed. 2d 782, 98 S. Ct. 769 (1978). In addition, the courts have had inadequate [**8] experience with noncompetition and noninterference covenants to warrant a *per se* categorization. See [Bradford v. New York Times Co.](#), 501 F.2d 51, 59-60 (2d Cir. 1974); [Business Foods Service, Inc. v. Food Concepts Corp.](#), 533 F. Supp. 992, 995 (E.D.N.Y. 1982).

Other circuits have likewise declined to apply a *per se* rule to noncompetition agreements. See, e.g., [Lektro-Vend Corp. v. Vendo Co.](#), 660 F.2d 255, 264-65 (7th Cir. [*901] 1981), cert. denied, 455 U.S. 921, 71 L. Ed. 2d 461, 102

S. Ct. 1277 (1982) (noncompetition covenants ancillary to sale of business); [Bradford v. New York Times Co., 501 F.2d at 59-60](#) (post-employment noncompetition agreement).

Without citing any authority, Aydin asserts that because most covenants ancillary to a valid agreement are tested by the rule of reason, all non-ancillary restraints must be tested under a per se standard. Even assuming that the restraints in this case may be deemed "non-ancillary," Aydin's analysis is confused. [HN6](#) [↑] The proper function of ancillarity [**9] in antitrust analysis "is to remove [in some instances] the *per se* label from restraints otherwise falling within the category." Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. Antitrust Section Proceedings 211, 212 (1959). Whether a restraint that does not fall within a *per se* category is ancillary to a valid agreement is relevant only in the sense that ancillarity increases the probability that the restraint will be found reasonable. See, e.g., [Lektro-Vend Corp. v. Vendo Co., 660 F.2d at 264-65](#); [Sound Ship Building Corp. v. Bethlehem Steel Corp., 387 F. Supp. 252, 255 \(D.N.J. 1975\), aff'd, 533 F.2d 96 \(3d Cir.\), cert. denied, 429 U.S. 860, 50 L. Ed. 2d 137, 97 S. Ct. 161 \(1976\)](#). See generally [Gough v. Rossmoor Corp., 585 F.2d at 388](#) (practices not conclusively presumed unreasonable must be proved unreasonable).

Aydin has not alleged conduct by Loral or Conic that fits within the market division category of *per se* restraints. We decline to expand the categories of *per se* violations and, therefore, affirm that part of the judgment of the district court rejecting the *per* [**10] *se* claim.

III

The district court's entry of summary judgment for Loral and Conic on Aydin's claim that the May 4th agreement is an unreasonable restraint of trade prohibited by [section 1](#) of the Sherman Act is more troublesome. At issue is [HN7](#) [↑] whether the agreement had sufficient anticompetitive effect, an essential part of a [section 1](#) claim under the rule of reason. [Kaplan v. Burroughs Corp., 611 F.2d 286, 290-91 \(9th Cir. 1979\), cert. denied, 447 U.S. 924, 65 L. Ed. 2d 1116, 100 S. Ct. 3016 \(1980\)](#). The district court summarized Aydin's allegations of anticompetitive effect as encompassing conduct by Loral and Conic interfering with the public's ability to obtain optimum service in the microwave telecommunications industry and affecting the employee labor market by preventing TerraCom employees from going to work for Moyes at Aydin. The district judge held that these allegations were insufficient to state a [section 1](#) claim and that Aydin's "allegations of far-reaching anticompetitive effects in the relevant industry are simply not supported by the uncontested [**11] facts of this case."¹

[HN8](#) [↑] Although summary judgment is disfavored in antitrust cases in which motive and intent are important factors, [Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 \(1962\)](#); [Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 683 \(9th Cir.\) \(per curiam\), cert. denied, 429 U.S. 940, 50 L. Ed. 2d 309, 97 S. Ct. 355 \(1976\)](#), its use is not prohibited and may save judicial resources. See [First National Bank v. Cities Service Co., 391 U.S. 253, 288-90, 20 L. Ed. 2d 569, 88 S. Ct. 1575 \(1968\)](#); [Hamro v. Shell Oil Co., 674 F.2d 784, 786 \(9th Cir. 1982\)](#) (California antitrust statutes); [Betaseed, \[**12\] Inc. v. U & I Inc., 681 F.2d at 1207; Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 622, 624 \(9th Cir. 1977\)](#).

[HN9](#) [↑] The plaintiff in an antitrust action judged under the rule of reason bears the burden of proving unreasonableness. [Betaseed, Inc. v. U & I Inc., 681 F.2d at 1228](#). Nevertheless, [HN10](#) [↑] when the defendant brings a summary judgment motion, he bears the burden of demonstrating the absence of a genuine issue of material fact and that he is [*902] entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#); accord [Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d at 624](#). The moving party is subject to a "particularly rigorous" burden in antitrust cases. *Id.*; [Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276, 280 \(9th Cir. 1976\), cert. denied, 431 U.S. 938, 53 L. Ed. 2d 256, 97 S. Ct. 2651 \(1977\)](#). In addition, a nonmoving plaintiff is entitled to have [**13] all reasonable inferences of fact drawn in his favor. See, e.g., [Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 438 \(9th Cir. 1979\)](#).

¹ Because matters outside the pleadings were presented to and not rejected by the district judge, we treat the ruling as one for summary judgment. [Fed. R. Civ. P. 12\(b\)](#).

HN11[] The amount of evidence necessary to raise a genuine issue of material fact is enough "to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank v. Cities Service Co.*, 391 U.S. at 288-89; *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d at 624. As we stated in *Sherman v. British Leyland Motors, Ltd.*:

Substantial evidence to raise a triable issue is more than a mere scintilla, but the moving party has the burden of clearly demonstrating the absence of any genuine issue as to the existence of each material fact which under applicable principles of substantive law would be required to support a judgment in its favor.

601 F.2d at 439 (citations omitted).

HN12[] To establish anticompetitive market effect, the plaintiff [**14] must prove that the defendant's actions caused a decrease in competition in the relevant market. Whether a decrease in competition occurred and whether it was caused by the defendant's conduct are factual matters which, if disputed, must be resolved by the trier of fact. See *First Beverages, Inc. v. Royal Crown Cola Co.*, 612 F.2d 1164, 1175-76 (9th Cir.), cert. denied, 447 U.S. 924, 65 L. Ed. 2d 1116, 100 S. Ct. 3016 (1980); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d at 451; *Kaplan v. Burroughs Corp.*, 611 F.2d at 295-96 (affirming judgment *non obstante veredicto*); *DeVoto v. Pacific Fidelity Life Insurance Co.*, 516 F.2d 1, 6-7 (9th Cir.) (reversing grant of summary judgment on section 1 claim), cert. denied, 423 U.S. 894, 96 S. Ct. 194, 46 L. Ed. 2d 126 (1975); see also *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. at 49 ("Under [the rule of reason], the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.").

Aydin [**15] did not allege in its complaint that the actions of Loral and Conic adversely affected competition in the microwave telecommunications industry. It alleged only that it was restrained from competing with Loral and Conic in a product market area alleged to extend to California, "other states and foreign countries." Regarding its employee labor market allegations, Aydin alleged only that it was "prevented . . . from seeking to employ skilled personnel who are desirable, logical candidates." We are at a loss to identify with any specificity the "fields of competition [with which] we are concerned and the dimensions of [those] field[s]." *Gough v. Rossmoor Corp.*, 585 F.2d at 389. Aydin has the burden to plead and prove that the actions of Loral and Conic harmed competition, not merely that the actions harmed Aydin in its capacity as a competitor. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) (antitrust laws exist to protect competition, not competitors); *Gough v. Rossmoor Corp.*, 585 F.2d at 386 **HN13**[] ("To [**16] amount to an unreasonable restraint of trade the anticompetitive conduct must have an effect greater than its effect upon the plaintiff's business."). Aydin must demonstrate "a reduction . . . in competition flowing from the defendant's acts . . ." *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 732 (9th Cir. 1979).

The issue of market effect was properly raised before the district judge, but Aydin failed to raise a genuine issue of material fact. **HN14**[] In response to the motion for judgment, Aydin could not rest on its pleadings but was required to respond with affidavits or other evidence. *Fed. R. Civ. P.* [¹*9031 56(e)]. The only qualified response we have found on this issue was a portion of a deposition attached to Aydin's Brief in Opposition to Motion for Summary Judgment to the effect that the Chairman of the Board of Loral expressed concern that Aydin would build competitive microwave radios. This alone is insufficient. No other evidence was pointed out to us by Aydin. Viewing the evidence in the light most favorable [**17] to Aydin, a rational trier of fact could not find that Loral and Conic have caused a decrease in competition in the relevant product or labor markets.

IV

The district court also rejected Aydin's Sherman section 1 theory that the state court actions against Aydin, Moyes, and other Aydin employees constituted an antitrust violation. The district court ruled for Loral and Conic on the basis that "plaintiff failed to provide convincing proof that defendants' state court action to enforce the May 4

agreement is anything less than a genuine attempt to prevent irreparable injury to TerraCom caused by Moyes' breach of the agreement."

HN15[] Bona fide efforts to obtain or influence legislative, executive, judicial or administrative action are immune from antitrust liability under the *Noerr-Pennington* doctrine. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961); [**18] accord *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1262 (9th Cir. 1982) (*Clipper Express*). The *Noerr-Pennington* doctrine protects the *first amendment* right to petition the government. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. at 510; *Clipper Express*, 674 F.2d at 1262-63. If, however, the effort to obtain or influence government action is a sham, and is actually an attempt to interfere improperly with the business relationships of a competitor, antitrust liability may be imposed. *California Motor Transport Co. v. Trucking Unlimited*; *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 144; *Clipper Express*, 674 F.2d at 1263.

HN16[] Multiple lawsuits are not a condition precedent to showing sham. Whether we consider the state court actions begun by Loral and Conic and subsequently combined as one or two actions is immaterial. We have held that a single action is sufficient to invoke the sham exception to the *Noerr-Pennington* [**19] doctrine. *Clipper Express*, 674 F.2d at 1265-67 & 1265 n.19.

HN17[] Whether an effort to invoke the judicial process is a genuine effort to obtain redress, or instead is a mere sham, is a question of fact. *Clipper Express*, 674 F.2d at 1264. Based on the record before us, we can draw no inference from the fact that the state court action was still pending when the district court entered judgment. Success or failure might be helpful as one indication of Loral and Conic's intent in bringing the action, *id.*; *Ernest W. Hahn, Inc. v. Coddington*, 615 F.2d 830, 841 n.13 (9th Cir. 1980), but such an indication is not available before the state action is terminated.

This leaves us once more to determine if there is a genuine issue of fact material to whether the filing of the state actions was a sham. No evidence of sham, aside from the filings of the actions, was pointed out to us by Aydin. A rational trier of fact could not conclude that the state court actions were a sham and therefore not immune from antitrust liability.

V

We next consider [**20] the district court's entry of summary judgment for Loral and Conic on the pendent claims.

HN18[] A district court may in its discretion reach pendent state claims even when the federal claims are dismissed before trial. See *Rosado v. Wyman*, 397 U.S. 397, 403-05, 25 L. Ed. 2d 442, 90 S. Ct. 1207 (1970); *Aitken [*904] v. IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1271 (9th Cir. 1979); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d at 454; cf. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). The district court did not abuse its discretion in retaining jurisdiction to decide the state claims, because the record shows that the court and the litigants had expended considerable time on the pendent claims before the antitrust claims were dismissed. *Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226, 227-28 (9th Cir. 1976) (per curiam), cert. denied, 430 U.S. 915, 51 L. Ed. 2d 593, 97 S. Ct. 1327 (1977). Aydin seeks relief on three California [**21] state-law theories: intentional interference with prospective business relations, injury to a servant affecting his ability to serve his master, and unfair competition.

The California Supreme Court set forth the standard for determining whether a plaintiff has stated a claim for intentional interference with prospective business relations in *Buckaloo v. Johnson*, 14 Cal. 3d 815, 537 P.2d 865, 122 Cal. Rptr. 745 (1975). **HN19**[] We are, of course, bound to follow an interpretation of state law by the highest state court. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236, 85 L. Ed. 139, 61 S. Ct. 179 (1940); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

In *Buckaloo v. Johnson*, the California Supreme Court held that a complaint alleging a "colorable economic relationship" between the plaintiff and a third party, with "the potential to develop into a full contractual relationship"

was sufficient to withstand a demurrer. *Buckaloo v. Johnson*, 14 Cal. 3d at 828-29, 537 P.2d at 873, 122 Cal. Rptr. at 753; [**22] see also 4 B. Witkin, *Summary of California Law*, Torts § 392 (8th ed. 1974) [HN20](#)↑ (tort of interference with prospective business advantage encompasses "intentional interference with business relations or advantages which are merely prospective and ordinarily not the subject of an existing contract"); *Restatement (Second) of Torts* § 766B comment c (1979) (the relations protected against intentional interference include interferences with the prospect of obtaining employment or employees). The California Supreme Court also stated that "the protected area of activity is not a contractual relationship but an economic relationship with the potential to ripen into contract." *Buckaloo v. Johnson*, 14 Cal. 3d at 830 n.7, 537 P.2d at 873 n.7, 122 Cal. Rptr. at 753 n.7.

We conclude that Aydin has made a sufficient showing to overcome a summary judgment motion of a colorable economic relationship with the potential to ripen into a full contractual relationship with TerraCom personnel that it desires to hire. Although this count refers to prospective employees, the economic [**23] relation is sufficiently demonstrated by the existing employment agreements between Aydin and the ten ex-TerraCom employees, Moyes's previous relationship with the prospective employees, and his desire to hire as many TerraCom employees as possible. [HN21](#)↑ We ordinarily accept the district judge's analysis of the law of the state in which the judge sits unless clearly wrong. E.g., *Camacho v. Civil Service Commission*, 666 F.2d 1257, 1262 (9th Cir. 1982); *S.A. Empresa De Viacao Aerea Rio Grandense v. Boeing Co.*, 641 F.2d 746, 752 (9th Cir. 1981); *C.R. Fedrick, Inc. v. Borg-Warner Corp.*, 552 F.2d 852, 856 (9th Cir. 1977). Here, the district judge was clearly wrong when she concluded that under California law Aydin must allege that it offered employment to TerraCom employees other than those actually hired, see *Olivet v. Frischling*, 104 Cal. App. 3d 831, 839-40, 164 Cal. Rptr. 87, 91 (1980) (allegation that defendants' conduct resulted in refusal to renegotiate leases upheld against demurrer), and as a result improperly [**24] granted summary judgment on the intentional interference with prospective business relations claim. The district court did not reach the issue of the defense of justification and neither do we. We only hold that on the ground relied upon by the district court, summary judgment could not be granted on this count.

[*905] Aydin's counts for relief for injury to servants affecting ability to serve under *California Civil Code section 49(c)* ([section 49\(c\)](#)) and on a common law unfair competition theory present more difficult issues concerning the proper interpretation of California law. Both claims are based upon the actions taken by Loral and Conic in filing the state court actions. We have found no California precedents that resolve the legal issues which confront us. Therefore, we are unable to assume, from a review of available California law, the result the California Supreme Court would reach. *Scandinavian Airline System v. United Aircraft Corp.*, 601 F.2d 425, 427 (9th Cir. 1979) (affirming partial summary judgment).

Aydin asserts that it has a claim under [section 49\(c\)](#) due to the harm caused to some of its employees as a result of Loral and Conic's [**25] state court actions. The district judge assumed without deciding that a claim could arise under [section 49\(c\)](#) for harm to an employer caused by a suit against an employee. The court ruled, however, that no claim was stated "absent some substantiation for [Aydin's] claim that the [state] suit is groundless and in bad faith." Whether a state court action is groundless and in bad faith is a factual issue.

The district court decided against Aydin on its common law unfair competition claim because it found that Aydin failed to demonstrate that Loral and Conic's state court actions were brought in bad faith.² As with the [section 49\(c\)](#) claim, the district court declined to determine whether a cause of action can be stated under California law for injury resulting from the filing of a lawsuit. We know of no authoritative California precedent resolving the issue.

[**26] Thus, both the [section 49\(c\)](#) and the unfair competition claims were resolved on the same issue. As we concluded in connection with Aydin's *Noerr-Pennington* claim, see part [IV, supra](#), whether the state actions were a sham or a genuine effort by Loral and Conic to obtain redress is a factual issue and, based upon the record before us, Aydin failed to raise an issue of material fact. The district judge was not clearly wrong in concluding that no

² The district court also rested its summary judgment ruling for Loral and Conic on the unfair competition claim on the basis that Aydin failed to demonstrate that the agreement with Moyes was unlawful. We do not address this aspect of the district court's ruling because we affirm the summary judgment on the unfair competition claim on another basis.

cause of action under either section 49(c) or a common law unfair competition theory could be stated based upon litigation instituted in good faith. Thus, summary judgment was properly granted.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Concur by: KENNEDY (In Part)

Dissent by: KENNEDY (In Part)

Dissent

KENNEDY, Circuit Judge, concurring in part and dissenting in part:

Although I agree that the plaintiff's antitrust claim must be dismissed, in my view the case presents an issue different from the one discussed by the majority. I respectfully submit a separate concurrence on this aspect of the appeal. I also dissent from the remand of one of the plaintiff's state claims, for I would dismiss that part of the action as well.

[**27] The majority states: "Aydin must establish that Moyes competes at the same market level as Loral and Conic." It further states: "Moyes is not a competitor of Loral and Conic in any significant measure and does not operate at the same level of the market structure." The problem with these statements is that Aydin is the plaintiff, and Aydin does compete at the same market level as Conic. Moyes's agreement with Conic in fact serves to restrain Aydin as though Aydin itself were bound not to hire Conic employees. For analytic purposes, at least, the agreement thus operates as a horizontal division of the market among competitors.

The majority in effect holds that a chief executive officer and his company cannot agree to lessen competition, even when they contract to do so explicitly and in anticipation of the executive's leaving the company's [*906] employment. I know of no principle that immunizes such agreements from standard antitrust analysis.

This said, I would nevertheless grant summary judgment against Aydin. Even if we assume the complaint alleges a horizontal market division, it does not mean we must find it a per se Sherman Act violation, or we must find it unreasonable. [**28] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979), dealt with an arrangement bearing all the earmarks of a horizontal restraint through price-fixing, yet the Court failed to condemn it as illegal. See also United States v. Sealy, Inc., 388 U.S. 350, 357, 18 L. Ed. 2d 1238, 87 S. Ct. 1847 (1967) (dictum). Finally, of course, United States v. Addyston Pipe & Steel Co., 85 F. 271 (7th Cir. 1898), points away from per se treatment, when an agreement is ancillary to the achievement of legitimate business concerns.

Although the purpose of the agreement in question was to diminish competition of Loral's employees, doing so was ancillary to the protection of Loral-Conic's trade secrets, namely its information as to the talent and potential of its most valuable technical employees. It furthers rather than stifles competition when an employer is enabled to keep such information confidential. The economic rationale for protecting such trade secrets is the same as that for protecting patents: only by creating property rights with respect to knowledge can we insure the efficient [**29] production of such knowledge. See, e.g., F. Scherer, Industrial Market Structure and Economic Performance, ch. 16; R. Posner & F. Easterbrook, Cases and Materials on Antitrust Law, ch. 2, c.3. In my view, the agreement is pro-competitive; it is not governed by per se tests, and it satisfies the rule of reason.

I dissent from remand of the pendent state claim on intentional interference with prospective business relations. The majority is correct in ruling that there is an insufficient showing of bad faith prosecution on the other state counts. In my view, this premise should lead us to affirm the dismissal of the interference count as well, rather than to remand to the district court, which will be required to dismiss it in any event.

Section 773 of the Restatement (Second) of Torts provides:

One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another *does not interfere* improperly with the other's relation if the actor believes that his interest [**30] may otherwise be impaired or destroyed by the performance of the contract or transaction. (Emphasis added.)

This proposition has been endorsed by California courts. See, e.g., *Imperial Ice Co. v. Rosier*, 18 Cal. 2d 33, 36, 112 P.2d 631, 633 (1941); *Fletcher v. Western National Life Ins. Co.*, 10 Cal. App. 3d 376, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78, 89 (1970); *United Professional Plan v. Superior Court*, 9 Cal. App. 3d 377, 88 Cal. Rptr. 551, 562 (1970). Even if we view justification as an affirmative defense, our finding of good faith completely disposes of the issue.

I would affirm the district court in all respects.

End of Document



Deauville Corp. v. Federated Dep't Stores, Inc.

United States District Court for the Southern District of Texas Houston Division

July 12, 1983

CIVIL ACTION NO. 76-H-974

Reporter

1983 U.S. Dist. LEXIS 15534 *; 1983-2 Trade Cas. (CCH) P65,599; Fed. Sec. L. Rep. (CCH) P65,599

THE DEAUVILLE CORPORATION, ET AL v. FEDERATED DEPARTMENT STORES, INC., ET AL

Core Terms

mall, space, parties, retail, partnership, withdrawal, competitor, shopping center, site, geographic, monopoly, fiduciary duty, venture, joint venture, compete, department store, matter of law, monopolization, locate, regional center, retail space, tenants, cases, customers, Optionee, directed verdict, anti trust law, contractual, terminable, non-mall

Counsel: [*1] Andrews, Kurth, Campbell & Jones, (Paul E. Harris), Houston, Texas, and Fisher, Roch & Gallagher, (Michael Perrin), Houston, Texas, for Plaintiffs.

Baker & Botts, (David P. Cotellesse), Houston, Texas, and Vinson & Elkins, (Travis C. Broesche), Houston, Texas, for Defendants.

Opinion by: STERLING

Opinion

MEMORANDUM AND ORDER:

This is a suit for damages brought after Plaintiffs' planned shopping center development failed to materialize. Due to the disposition of the case, the facts will be summarized with all reasonable factual inferences drawn in favor of Plaintiffs who are three parent and subsidiary corporations and two individuals (Messrs. Gordon and Jones), who owned the corporations.

For a number of years Plaintiffs had unsuccessfully attempted commercially to develop a tract of approximately 177 acres located at the intersection of highways IH 45 and FM 1960 in Harris County, Texas, in the northern part of the greater Houston metropolitan area. Early attempts to develop a regional shopping center at the site failed principally because a major department store could not be persuaded to locate there. In the spring of 1975, Plaintiffs' outlook improved somewhat, and on May 5 [*2] they were able to sign Montgomery Ward Properties Corporation (Properties) to a letter partnership or joint venture agreement to develop "an enclosed, air conditioned shopping center" (Dx. W 74). The letter agreement by its terms was to be followed at an indefinite date by a "partnership agreement containing comprehensive provisions regulating the acquisition and development of the . . . site."

After May 5, development planning proceeded apace and in June the joint endeavor secured a new option to buy the land at the proposed site from its owners who are not parties of this suit (Dx. W 80). In the fall of 1975 the parties determined that it would be advisable to enlist the services of a more experienced mall developer. They

invited Melvin Simon, a nationally recognized developer, to join the venture. Later all partners in the project entered into a second letter agreement (Dx. W 92). This agreement, dated November 26, 1975, significantly modified the earlier agreement, changed the ownership rights and contribution obligations of the three partnership entities, placed valuations on various subsections of the optioned land, and explicitly recognized the right of each partnership [*3] entity to withdraw.

During this same period Properties renewed discussions it had held for several years with Federated Stores Realty (Realty) concerning the possibility of locating a Ward's store in Greenspoint Mall which was a shopping center being developed by Realty on IH 45 approximately six miles south of the FM 1960 site. Simon, who is not a party of this lawsuit, and Plaintiffs did not learn of these discussions until February, 1976. During that month Properties refused to extend a commitment to build a Ward's store to the owners of the optioned land at FM 1960. Since the option contract required such a commitment and payment of a fee on or about March 1st to extend the option to purchase the land through June 4, 1976, Plaintiffs, specifically Jones, attempted and successfully achieved renegotiation of the option contract so that the commitment requirement was deleted (Dx. W 116). Properties agreed to pay the full amount of the final, March 1 option payment which, under the November 26, 1975, letter agreement, normally would have been divided according to the ownership interest of the three partner entities, i.e., Plaintiffs, Simon, and Properties.

In May, 1976, Properties [*4] and its parent reached agreement with Realty that Ward would purchase land at Greenspoint Mall and locate a store there (Dx. F 68). Several days later Properties advised Simon and Plaintiffs that it did not intend to participate in the purchase of the partnership optioned land at IH 45 and FM 1960 (Dx. W 134). Plaintiffs filed this suit within one month.

The case was tried before a jury on a second amended complaint which alleged violation by all Defendants of the Sherman Antitrust Act, interference with contractual and prospective business relations by all Defendants except Properties, and breach of contract and fiduciary duty by Properties. Plaintiffs claimed actual, untrebled damages in the approximate amount of \$30 million. At the close of the presentation of all evidence at trial, the Court concluded that the critical issues in the case were either legal issues or questions governed by "facts and inferences [which] point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men [and women] could not arrive at a contrary verdict." [Boeing Co. v. Shipman, 411 F.2d 365, 374 \(5th Cir. 1969\)](#) (en banc). Accordingly, the motions by Defendants [*5] for directed verdicts were granted.

Contract Claim

Plaintiffs claimed that Properties breached the May 5, 1975, partnership or joint venture agreement by refusing after May, 1976, to participate in the development of the shopping center. They argue that the November 26, 1975, agreement is totally inapplicable to this case or at least that paragraph 7 of the agreement is inapplicable since Properties did not comply with its terms, but in fact made all payments under the option agreement (Dx. W 80). The subject paragraph reads:

7. Any of the parties may cease option payment beginning with the subsequent payments due as of the end of January and continuing through June if they do desire, and the other parties shall have the opportunity to purchase the withdrawing partners interest. If both parties desire to purchase this interest, it would be on a proportionate basis as it now stands.

The question of whether a contract is ambiguous is one of law for the Court. [R & P Enterprises v. La Guarda, Gavel & Kirk, Inc., 596 S.W.2d 517, 518 \(Tex. 1980\)](#). The primary object of courts in construing written contracts is to arrive at the intention of the parties. [Harris v. Row, 593 S.W.2d 1*61, 303, 306 \(Tex. 1979\)](#) (affirming the trial court's instructed verdict against a plaintiff's contract claim). Intent is to be determined from the words of the contract "consider[ed] . . . in the light of the surrounding circumstances." [City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515, 519 \(Tex. 1968\)](#) (interpreting another contract in a jury case). See [Watkins v. Petro Search, Inc., 689 F.2d 537 \(5th Cir. 1982\)](#).

In this case it is clear that both the May 5 and November 26, 1975, agreements are binding on the Plaintiffs. They unquestionably agreed to the latter agreement which controls the former. See *A.A.A. Realty Co. v. Neece*, 292 S.W.2d 811 (Tex.Civ.App. - Fort Worth 1956), aff'd 156 Tex. 614, 299 S.W.2d 270 (1957), aff'd on rehearing, [159 Tex. 403, 322 S.W.2d 597 \(1959\)](#). "Be a contract ever so binding, it is but a meeting of the minds, and those who enter into a contract may by mutual agreement rescind or alter it." *West India Industries, Inc. v. Tradex*, 664 F.2d 946, 949 (5th Cir. 1981). Paragraph 7 is unambiguous, and clearly granted each party the right to withdraw from the joint venture or partnership during the period January through June, 1976.

The critical [*7] issue is whether the paragraph 7 term, "option payment," includes only the payments due on or before March 1, 1976, under the option agreement (Dx. W 80) as contended by Plaintiffs, or whether the term includes, in addition to those payments, the initial payment due on the date of closing pursuant to paragraph 3(a) of the option agreement. The Court concludes that the term "option payment" includes the initial purchase price payment required by paragraph 3(a) of the option agreement.

At least partly decisive of this question is the fact that the withdrawal paragraph grants the parties the right to "cease option payment . . . due as of . . . June if they so desire." None of the payment advocated by Plaintiffs as being the "option payments" referred to in paragraph 7 could have come due in June. See Dx. W 80, paragraphs 2, 3, 10.

The initial purchase price payment was a true option under the agreement. If the option was "exercised" by paying the amount specified in paragraph 3 of the agreement, the optionee could buy the land. If the payment was not made, then all rights under the agreement terminated just as in the case of a failure to make the payments required by paragraph [*8] 2 to extend the term of the agreement.

Whether the initial purchase price payment due in June was in fact an "option" payment is a question clearly answered by examination of a document appropriately entitled for purposes of this inquiry, "Option Agreement." Dx. W 80. The first sentence of Paragraph 1 of that document defines what the option is, and what the optionee has in fact purchased. It reads in relevant part, "Optionor hereby grants, bargains, sells and conveys to Optionee the exclusive option . . . to purchase those certain tracts of land . . ." [emphasis added]. In other words, the option which existed was only an exclusive option to purchase certain land. Simply because the requisite payments were made to extend the discretionary period of one year to its fullest did not mean that no additional "option" existed. On the contrary, the most important option which would still be available to the optionee was the "option . . . to purchase" "prior to the expiration of the option term or any extension period." See Dx. W 80 at 3. Truly this was an "option payment . . . due . . . through June."

Paragraph 2 of the Option Agreement prefacing a part of the agreement with [*9] the condition, "If this option is exercised . . ." This conditional phrase, of course, was mandated by the fact that the most important option envisioned by the parties was the ultimate unpredictable "option . . . to purchase," which continued to be available to the optionee through June. At the risk of overemphasis, it should be noted that another phrase in the same paragraph of the agreement restates this idea. It reads, "Should Optionee elect to exercise the option herein granted Optionee shall have the right to do so. . ." (emphasis added). Clearly, these are words of option, choice, and discretionary right. The Optionee (and his assigns) were not committed to final purchase simply by extending the one-year term to its maximum, but held a further option to make a choice, or in the words of their November, 1975, agreement to make an "option payment". Only "[u]pon receipt of notice of Optionee's election to exercise the Option, [shall] this agreement . . . be and become a contract of sale . . ." Dx. W 80 at 3. The Court concludes from considering the words of the agreements and the surrounding circumstances that the logical and unambiguous intent of the parties was to [*10] allow withdrawal from the joint venture or partnership at any time until such time as the option became a contract of sale and a multi-million dollar purchase was irreversible.

At the approximate time Properties withdrew from the joint endeavor, its Executive Vice President, Mr. Burgess, indicated that he understood and relied upon the fact that the initial purchase price constituted and "option payment" as that term was used in the partnership agreement. See Dx. W 132 (referring to "the right under Section 7 to cease payments due under the options in June 1976"). Properties' interpretation of the agreement remained unchanged at trial and was supported by the testimony of Mr. Harbeck. R. 1321-22. Plaintiffs failed to produce any

specific evidence, either contemporaneously with the transaction or at the time of trial, which showed the existence of a contrary interpretation. "No principal of interpretation of contracts is more firmly established than that great, if not controlling, weight should be given by the court to the interpretation placed upon a contract of uncertain meaning by the parties themselves." *Harris v. Rowe, supra*. The Court concludes that the meaning of the [*11] instant contract is certain, but if any doubt existed it was removed by the contemporaneous interpretation of the parties.

Since all partners including Defendant Properties possessed the right to withdraw by ceasing option payments up to and including the one due as of June, exercise of that right by Properties was not a breach of the partnership contract. Plaintiffs' first claim fails as a matter of law. Alternatively, even if Plaintiffs' interpretation of the term "option payment" is correct, a proposition with which the Court disagrees, Properties still did not materially breach the partnership contract. At oral argument of the motions for directed verdicts the Plaintiffs, apparently for the first time, argued that cessation of option payments was a condition which if not satisfied required forfeiture of the right of termination. They argued that "option payment[s]" were those due on or before March 1, 1976, pursuant to the option agreement. Under Texas law, however, conditions which lead to forfeitures are not favored and are avoided if that is possible as a matter of interpretation. *Home Savings Assoc. v. Tappan Co., 403 F.2d 201 (5th Cir. 1968)*.

The Court concludes [*12] that if the initial purchase price payment was not an "option payment" that cessation of option payment was not a condition precedent to the right of withdrawal. Paragraph 7 is not written in language of condition, and does not specify that withdrawal in any manner other than cessation of payment is void or a waiver of the power of withdrawal. Cf. *Southern Surety Co. v. Macmillian Co., 58 F.2d 541, 546 (10th Cir. 1932)*. Additionally, as a matter of interpretation it is appropriate to look at the likely intent of the parties as reflected by the language of the contract and the surrounding circumstances. *Id. at 547*. One of the most important, ultimate goals of both 1975 agreements was to establish the obligations of the partners to contribute to the common enterprise. To infer that the parties' intent was to encourage early cessation of such joint contribution by prohibiting withdrawal subsequent to payment of the March option payment would contravene the overwhelming bulk of the evidence heard at trial. Certainly, Plaintiffs possessed no interest in terminating Properties financial contribution to the development at an early date. Simon and Properties wanted more time to attract [*13] additional anchor tenants. The evidence at trial overwhelmingly indicated that Plaintiffs desired and attempted to keep the development alive for as long a period as was possible even after Properties announced its withdrawal. Payment of the option costs, even by a withdrawing partner, would have furthered the express intent of the parties to purchase and develop the land at FM 1960.

In short, as a matter of contract interpretation, a legal question for the Court, it is clear that the intent of the parties in subscribing to Paragraph 7 of the November, 1975, agreement was not to encourage early rather than late withdrawal. The evident intent was to establish a right of succession to partnership interests along with a broad right of withdrawal at any time before "the Option, [shall] . . . be and become a contract of sale." See Dx. W 80 at 3. The intent of the parties as expressed by their language was to provide a right of withdrawal "through June if they so desire."

Plaintiffs have failed wholly to allege or show the existence of any damages suffered by them as a result of Properties' withdrawal in May rather than, for instance, in March, 1976. Cf. *Southern Surety Co. v. Macmillian Co., supra at 549*. This failure to claim or prove prejudice is a third independent, alternative ground upon which to deny Plaintiffs' contract claim.

Fiduciary Duty

Plaintiffs claim that Properties breached the fiduciary duty it owed as a partner or joint venturer by negotiating with Realty concerning Greenspoint Mall during the term of the FM 1069 venture, and by failing to reveal the occurrence of those secret negotiations. Plaintiffs argued additionally that even if a contractual right of withdrawal existed Properties could not have exercised that right without breaching an inherent duty to its partners.

The latter contention clearly is not the law in Texas. A partnership or joint venture is subject to dissolution and termination at any time at the express will of its principals. *Booth v. Wilson, 339 S.W.2d 388* (Tex.Civ.App. - Texarkana 1960, writ ref'd n.r.e.). See *TEX.REV.CIVSTAT.ANN. art. 6132b, § 31(a)* (Vernon 1970). Litigants are

not permitted to change the clear meaning of their joint venture contract by "use of the equitable rule [of fiduciary duty]." [Warner v. Winn, 145 Tex. 302, 309-310, 197 S.W.2d 338, 343 \(1946\)](#). The joint venture agreement determines [*15] the scope of the mutual, fiduciary duty owed to each participant. [Smith v. Bolin, 271 S.W.2d 90 \(1954\)](#) (affirming the trial court's grant of summary judgment on the issue of the extent of a venturer's fiduciary duty).

In this case the parties agreed on November 26, 1975, that Properties possessed the absolute, unrestrained right to withdraw from the endeavor without penalty during the period January to June, 1976. Under the authorities cited above, the doctrine of fiduciary duty did not change that contractual right. Since Properties did not breach the subject agreements, it was entitled as a matter of law to dissolve its association with the joint venture or partnership without suffering liability. [Collins v. Lewis, 283 S.W.2d 258](#) (Tex.Civ.App. - Galveston 1955, 2485 ref'd n.r.e.). Plaintiffs have identified no injury to their interests, with respect to the fiduciary duty claim (including the failure to reveal negotiations with Realty),¹ which did not result solely from Properties' decision to withdraw from the venture.² Liability cannot be imposed upon Properties simply because it did that which Plaintiffs expressly agreed it could do.

[*16] Plaintiffs cite [Johnson v. Peckham, 132 Tex. 148, 120 S.W.2d 786 \(1938\)](#) and quote [Maykus v. First City Realty and Financial Corp., 518 S.W.2d 887, 893](#) (Tex.Civ.App. - Dallas 1974, no writ) to support their contention that Properties could not withdraw without breaching a fiduciary duty. However, the first case holds only that one may not knowingly purchase his co-partner's interest in the property of the partnership for approximately one-seventh its market value without first informing the co-partner of the price disparity. The second case holds that one may not, in breach of the joint venture contract, purchase for one's personal profit with joint funds land which was intended by agreement to be joint property. Without doubt, neither case controls under the instant facts nor inapugns the contractual right of withdrawal held by Properties.

Similarly, Plaintiffs' fiduciary duty claim fails on other independent, but entirely sufficient grounds. Plaintiffs have misconstrued the reach of the fiduciary doctrine in this state as it is applied to joint venturers. That doctrine limits a venturer's business conduct only with respect to property which by contract or agreement is included [*17] within the venture. [Rankin v. Naftalis, 557 S.W.2d 940 \(Tex. 1977\)](#); and [Huffington v. Upchurch, 532 S.W.2d 576 \(Tex. 1976\)](#). Accord: [Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 \(1928\)](#). In [Warner v. Winn, supra, 145 Tex. at 308, 197 S.W.2d at 342](#), the Supreme Court of Texas stated the relevant law in the following language:

[W]hen a joint adventure or partnership has been formed for the acquisition, ownership or development of certain defined property, the equitable rule [of fiduciary duty] will not be extended so as to forbid the acquisition, ownership or development by one of the parties for his own benefit of property not embraced in the enterprise and outside of its scope.

In Warner the Supreme Court found it insufficient that development of the outside site by a co-venturer "would be in competition with and antagonistic to the success of the common enterprise." [Id. 145 Tex. at 309, 197 S.W.2d at](#)

¹ Plaintiffs did not allege that they would have dissolved the partnership if they had been aware earlier of Properties' negotiations with Realty. Apparently, in light of the total absence of such evidence in this case they did not even request a jury instruction or interrogatory on this issue. Properties' failure to notify Plaintiffs on the subject negotiations caused no damage to any complaining party. Plaintiffs' financial disappointments are exclusively attributable to the exercise by Properties of its legitimate power of termination.

² Overwhelming evidence adduced at trial indicated that before dissolution in June, 1976, the partners or joint venturers shared expenses according to their respective ownership interests in the venture except that Properties paid much more than its share of the March 1, 1976, option payment made by the venture. See Dx. W 116, W 114, W 80. Further, under [TEX.REV.CIVSTAT.ANN. art. 6132b](#), § 18(1)(f), no partner is entitled to remuneration for acting in the partnership business unless the partners specifically agree to the contrary. No such agreement was made. Defendants retained no partnership property. Accordingly, Plaintiffs have not shown that they are entitled to an accounting, see section 22, and, in fact, have not requested one.

343. See also *Rankin v. Naftalis, supra at 946*. In the Warner case the outside enterprise which was developed by a member of the joint venture drained the jointly operated land of its gas and absolutely reduced the share of the local gas field market available to the joint venture.

[*18] The present case is controlled by the cited precedents. Under the unambiguous agreements of the parties only the land at the intersection of FM 1960 and IH 45 was included within the scope of the venture. The parties did not consider or agree to a general partnership or joint development of any other parcels at any other location. There was no contractual limitation on outside development by venture members and such an agreement would have been absurd in light of the national activities of Simon and Properties. The acquisition of the site at Greenspoint was strictly analogous to the fact situations described in Warner v. Winn, Rankin v. *Naftalis and Smith v. Bolin, supra*. The existence of the joint venture agreement did not as a matter of law "forbid the acquisition [or] ownership . . . of [other] property [by Defendant Properties]." *Warner v. Winn, supra*.

Plaintiffs cited *Reynolds-Southwestern Corp. v. Dresser Industries, Inc.*, 438 S.W.2d 135 Tex.Civ.App. Houston [14th Dist.] 1969, writ ref'd n.r.e.), for the proposition that the failure of a partner to inform his co-partner of the former's development of a machine to "compete" with the partnership's machine constituted [*19] a breach of fiduciary duty. The language of *Woodruff v. Bryant*, 558 S.W.2d 535, 544 (Tex.Civ.App. - Corpus Christi 1977, writ ref'd n.r.e.) can be read similarly. But these two lower court cases are distinguishable. They are partnership cases. As the Supreme Court noted,

"[t]he scope of a prior confidential relationship is broader [than that owed by a joint venturer] when the defendant is a fiduciary such as a . . . partner. While . . . the [joint venture] relationship between the parties . . . was fiduciary in character, the fiduciary duties extended only to dealings within the scope of the underlying relationship of the parties: joint venturers for the development of a particular [property]." [citations omitted]. *Rankin v. Naftalis, supra*.

Further, in light of the several decisions by the highest court of the State of Texas, it is clear that Reynolds-Southwestern Corp. and Woodruff should not be read so broadly as to encompass the context of a joint venture for the development of designated property which is the situation before the Court. Examined in this light the first case held simply that a failure to reveal a competing operation is actionable only when [*20] the partnership assets are being wound up and the ignorant partner pays too much for the partnership property because his partner failed to inform him of the latter's unknown competition which significantly devalued the same property. Thus, the first case is similar to *Johnson v. Peckham, supra*, and is equally inapplicable to the present fact situation. The Woodruff case is more easily distinguished. That decision involved the breach by the defendant of a covenant not to compete which was contained in the partnership agreement. The first duty of partner-fiduciaries is to comply with their contractual obligations to their co-partners. The defendant in Woodruff did not do that. As discussed, supra, these Defendants did.

For purposes of this case it is not necessary to define precisely the prohibition against "antagonistic competition" by a co-venturer inherent in the concept of "fiduciary duty." ³ It is enough to say that a co-venturer may acquire and own neighboring property for his own benefit and devote it to a similar use if the land involved is not within the scope of the joint venture contract, with scope defined narrowly. *Rankin v. Naftalis, supra*; *Smith v. Bolin, supra*; [*21] and *Warner v. Winn, supra*. Defendant Properties did not misrepresent or obscure the value of venture property, and did not act improperly with respect to the scope or terms of the venture contract. It is therefore, not liable for breach of an alleged "fiduciary duty."

The third and also fatal flaw evident in Plaintiffs' fiduciary duty theory concerns the measure of damages. Plaintiffs have cited no cases and the Court believes no Texas cases exist wherein the complaining party recovered the expected profits of a partnership or joint venture from a departing member unless such departure constituted a breach of contract. Accordingly, this "fiduciary duty" claim is an action on contract which is rejected because Properties did not breach its contract by withdrawing in 1976. The cases cited by Plaintiffs all involved the

³ In point of fact Properties' purchase of a parcel of land at Greenspoint was not in competition with the development goals of the FM 1960 venture. Properties has not acted as a mall developer or shared in such profits at Greenspoint. See note 4, infra.

imposition of constructive trusts. In the present case, Plaintiffs have requested no such relief in [*22] either their complaint or charge to the jury, i.e., they have not requested that a constructive trust be imposed upon the Ward store at Greenspoint Mall.⁴ The Court concludes that Plaintiffs' second claim is deficient as a matter of law.

Interference Claims

In Counts II and III of their second amended complaint Plaintiffs maintain that the Ward and Federated Defendants unlawfully interfered with the joint venture agreement between Simon, Properties and themselves and also interfered with their future business relations and prospective [*23] advantage. However, as a matter of Texas law, these claims are without support in the record.

In the first part of this opinion the Court concluded, pursuant to the May and November, 1975, agreements, that the joint venture was terminable at the will of any of its members during the period January to June, 1976. Inducement of a third person to exercise his "at will" right to terminate a contract with a plaintiff does not constitute actionable interference of any nature if the defendant has acted to further his business competition with the plaintiff or otherwise to protect his economic interests. *Claus v. Gyorkey*, 674 F.2d 427, 435 (5th Cir. 1982) ("matter of law"); *Davis v. Alwac International, Inc.*, 369 S.W.2d 797, 802 (Tex.Civ.App. - Beaumont 1963, writ ref'd n.r.e.); *Kingsberry v. Phillips Petroleum Co.*, 315 S.W.2d 561, 576 (Tex.Civ.App. - Austin 1958, writ ref'd n.r.e.) (directed verdict); *RESTATEMENT (SECOND) OF TORTS §§ 766 Comment g* (second paragraph), 766B Comment a, 768 Comment i (1977). See *Martin v. Phillips Petroleum Co.*, 455 S.W.2d 429 (Tex.Civ.App. - Houston [14th Dist.] 1970, no writ) (directed verdict).

After reviewing the cases cited by the parties, the [*24] Court is convinced that the RESTATEMENT (SECOND) OF TORTS in general, and particularly section 768 thereof accurately reflects the law of this State.⁵ That section notes in general that competition within defined limits completely justifies the actions of "[o]ne who intentionally causes a third person not to enter into a prospective contractual relation with another who is a competitor or not to continue an existing contract terminable at will."⁶ "The courts take the position that if means of competition are fair, advantage should remain where success has put it. . . ." *Leonard Duckworth, Inc. v. Michael L. Field and Company*, 516 F.2d 952, 958 (5th Cir. 1975).

[*25] The Rule . . . rests on the belief that competition is a necessary or desirable incident of free enterprise. Superiority of power in the matters relating to competition is believed to flow from superiority in efficiency and service. If the actor succeeds in diverting business from his competitor by virtue of superiority in matters relating to their competition, he serves the purposes for which competition is encouraged.

⁴The constructive trust remedy is unavailable whether requested by Plaintiffs or not. The goal of the FM 1960 venture was to develop the land at that location so that mall space could be rented and improved land surrounding the proposed mall could be sold. Properties, however, has never had an interest in the mall or surrounding land at Greenspoint which could be shared with Plaintiffs. Just as it was envisioned that Plaintiffs would have no interest in the land upon which the planned Montgomery Ward Store at FM 1960 was to have been built, they have no present claim to the land upon which the Ward store is now located at Greenspoint Mall.

⁵This conclusion is sound even though "[t]here are frequent expressions in [Texas] judicial opinions that "malice" is requisite [and substantially sufficient] for liability." *RESTATEMENT § 766 Comments*. Review of the Texas cases, however, confirms the conclusion that generally "what is meant is not malice in the sense of ill will but merely "intentional interference without justification," Id., or the use of "wrongful means" of competition by the defendant. See RESTATEMENT § 768(1)(a). The determination whether interference was achieved without justification or by use of wrongful means is one for the Court at least in such a case as this which involves no dispute concerning the means employed to effect the alleged, competitive interference.

⁶Plaintiffs have failed to allege or show that they suffered any damages as a result of any alleged interference which occurred before Properties withdrew from the joint venture. All the claimed damages are attributable solely to Properties' entirely proper withdrawal from the venture which subsequently caused the failure of the development with consequential loss of envisioned profits. In this case, because the alleged interference resulted from proper competitive efforts by the Federated Defendants, Plaintiffs were not wronged and are not entitled to damages. RESTATEMENT § 768(1) Comment i.

RESTATEMENT § 768 Comment e.

In this case it is uncontested that the Federated Defendants were in direct mall competition with the FM 1960 development and that the acquisition of the Montgomery Ward store for Greenspoint benefited the Federated Defendants' mall. Plaintiffs wholly failed to claim or prove that any wrongful means whatsoever were employed.⁷ Their complaint is limited to notation of the conclusion of the competition - they lost.

Considering the decisions in *Claus v. Gyorkey, supra*, *Kingsbery v. Phillips Petroleum Co., supra*, and *Martin v. Phillips Petroleum Co., supra*, it appears as a matter of law that the Federated Defendants acted without "malice" in this business competition, i.e., they did not act wrongfully and were justified in attempting to persuade Ward to locate at Greenspoint rather than at FM 1960. Alternatively, "reasonable men [and women] could not arrive at a contrary verdict." *Boeing Co. v. Shipman, supra*.

Similarly, Ward, which held Properties as a wholly owned subsidiary, did not improperly interfere in the latter's venture agreement with Plaintiffs. "Interference with contractual [and, a fortiori, prospective business] relations is privileged where it results from the exercise of a party's own rights or where the party possesses an equal or superior interest to that of the plaintiff in the subject matter." *Black Lake Pipe Line Co. v. Union Construction Co., 538 S.W.2d 80, 91 (Tex. 1976)*. See *RESTATEMENT (SECOND) OF TORTS § 769 illustration 2*. Without doubt Ward has a right to place its own stores where it desires so as to maximize sales.

Plaintiffs cited a number of decisions which upon examination are entirely consistent with the foregoing analysis. In *Leonard Duckworth, Inc. v. Michael L. Field and Company, [*271 supra*, real estate agents were permitted to recover their anticipated brokerage fee on the tort ground of interference with prospective business advantage. They had brought the buyer and seller of certain real estate together, obtained relevant sales information, and participated in general, preliminary negotiations. Later without notifying the plaintiffs, the buyer and seller consummated their transaction without paying a fee. The Court noted at 956 that "at all times plaintiffs were recognized as the brokers to whom a commission would be due should the parties enter into a contract." Acceptance of all the advantages and services of a real estate broker coupled with later refusal to pay for the same in the recognized, customary manner can be easily viewed as a "wrongful means" of competition under section 768(1)(b). This conduct could even be classified as theft of services. This Court does not consider the reference at 958 to "surreptitious negotiations" to indicate that such negotiations are wrongful per se but to the contrary the reference simply identifies a fact indicating consciousness or wrongdoing given accepted real estate brokerage practices, i.e., the reference illustrates [*28] "other conduct below the behavior of fair men similarly situated." [emphasis modified].

Leonard Duckworth relies heavily upon *Light v. Transport Insurance Co., 469 S.W.2d 433* (Tex.Civ.App. - Tyler 1971, writ ref'd n.r.e.). In that case the offer by defendant of a contract of insurance which was known to be illegal under the insurance laws of Texas unquestionably constituted a "wrongful means" of competition. Clearly, the present case and the two cited cases are entirely distinguishable. Federated's offer and Ward's acceptance were absolutely lawful. The Plaintiffs played no part in bringing the Defendants together, and they do not claim to have provided brokerage or comparable services for which they reasonably expected compensation. On the contrary, they claim to have been joint venturers and, accordingly, their expectations were defined by their agreement. Defendants' means of competition were proper.

Along similar lines of analysis *Clements v. Withers, 437 S.W.2d 818 (Tex. 1969)*, another case cited by Plaintiffs, is equally inapposite. There the defendants were liable because they induced and obtained the breach of an acknowledged, non-executory contract. The Texas Supreme [*29] Court simply determined that the Statute of Frauds "does not give third parties the right to interfere with the performance of oral contracts." In the instant case there was no breach of the at will contract, but only a justified competitive offer from Defendants made without use of wrongful means. The interference claims must be dismissed.

⁷ Plaintiffs' claim that Defendants created or continued an unlawful restraint of trade is discussed and rejected in the final part of this opinion. See RESTATEMENT § 768(1)(c).

Antitrust Allegations

Plaintiffs claim that Defendants monopolized or attempted to monopolize the "supply of regional center space in the North Harris County Market" in violation of section 2 of the Sherman Act. The second amended complaint also alleges that section 1 of the Act was violated when "the Federated Defendants and the Ward Defendants combined and conspired together in unlawful unreasonable restraint of trade . . . by means of a course of conduct the purpose or effect of which was to exclude Plaintiffs' proposed center as a competitor" or potential competitor in the claimed market.

The Section 2 Claim

The Court of Appeals of this Circuit has stated:

In our court a section 2 plaintiff attempting to prove either completed monopolization or attempt must provide the jury with sufficient evidence to permit it to define the relevant [*30] geographic and product market [and to find sufficient market power therein].

[Dimmitt Agri Industries, Inc. v. CPC International, Inc.](#), 679 F.2d 516, 525 (5th Cir. 1982). See [Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.](#), 382 U.S. 172, 177-78 (1965). The burden is squarely on the shoulders of the plaintiff to make such a showing. See [United States v. United Shoe Machinery Corp.](#), 110 F.Supp. 295, 307 (D. Mass. 1953) aff'd per curiam [347 U.S. 521 \(1954\)](#).

If a plaintiff fails to present sufficient evidence from which a jury could determine the market power of the defendant in a relevant market, then "the District Court should [grant a] . . . motion for a directed verdict . . . with respect to the § 2 claim." [Spectrofuge Corp. v. Beckman Instruments, Inc.](#), 575 F.2d 256, 286 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1970). A failure to prove market power mandates granting a directed verdict on the attempt claim as well as the monopoly allegation because a requisite of the former is a showing of a "dangerous probability" of monopolization. [American Tobacco Co. v. United States](#), 328 U.S. 781, 785 (1946). Even a showing of monopolization of twenty percent [*31] of the relevant market may be insufficient to establish a dangerous probability of monopoly such that a section 2 attempt claim may be maintained. [Yoder Brothers, Inc. v. California-Florida Plant Corp.](#), 537 F.2d 1347, 1369 (5th Cir. 1976), cert. denied, 429 U.S. 1094 (). After hearing all the Plaintiffs' evidence the Court granted a directed verdict with respect to the section 2 allegations because the jury was not provided sufficient evidence from which to conclude that Defendants had the requisite power in a relevant market to be guilty of attempted or completed monopoly.

A relevant market has two dimensions. One is the product involved and the other is the geographical area in which effective competition exists between suppliers of the product. Plaintiffs assert that the "supply of regional center space" is the product in this case. To this Court such a definition of the product is fanciful at best.

Relevant Product Market

"Monopoly power is the power to control prices or exclude competition" in a given product and geographic market. [United States v. E.I. duPont de Nemours & Co.](#), 351 U.S. 377, 391 (1956). But an alleged monopolist cannot control price or exclude competition [*32] with his "monopolized" product if there is a competing, substitute product available in the market. Generally one product is a substitute for another if more than "a limited number of buyers will turn" to it given only "reasonable variations in price", i.e., the products have significant "cross-elasticities of demand." [Times-Picayune Publishing Co. v. United States](#), 345 U.S. 594, 612 n. 31 (1953). Thus, in reversing the fact finder, the Supreme Court found that morning and evening newspaper advertisements were not separate products in the industry but that the two types of advertisements were substitutes for the purposes of advertisers and consumers. The offer of one type effectively competed in price and presence against an offer of the other. [Id. at 613.](#)

In [United States v. Continental Can Co.](#), 378 U.S. 441, 453, 456-57 (1964), the court recognized that although there was not complete "[i]nterchangeability of use and cross-elasticity of demand" between glass containers and metal

cans, "the existence of a large area of effective competition between the makers "of the two items' is sufficient to warrant treating as a relevant product market the combined glass and metal container [*33] industries." ⁸ In reversing the trial court the Supreme Court found as a matter of law that cans and glass containers were part of the same product market stating simply, "[w]e cannot accept . . . [the fact finder's contrary] conclusion." *Id. at 449*. See also *Spectrofuge Corp. v. Beckman Instruments, Inc., supra*. This Court must similarly reject Plaintiffs' definition of the relevant product market. Plaintiffs contend that the "supply of regional center space" and only such space is relevant. This claim is clearly insupportable.

Initially it must be noted that the Federated Defendants, the only parties charged in Plaintiffs' second amended complaint with monopolization, do not possess a monopoly of the supply of regional center space even at Greenspoint. All the major tenants at the center, including Sears, Penneys, Ward, Lord & Taylor, and Joskes, own the land (pads) upon which [*34] their stores are constructed and consequently, they control a larger supply of regional center space than does Federated. See Dx. F 127. Also, the sale of land to Ward at Greenspoint did not further an attempt of monopolization of space, but actually decreased Federated's share of the supply of regional center space at the mall.

But apparently, Plaintiffs argue for an even narrower product market. They maintain that the relevant product market is confined solely to the shops ["space"] that can be rented to smaller business tenants who locate in malls between major tenants, i.e., the general lease area (GLA) space. The issue then is whether under the Times-Picayune, and Continental Can standard the claimed product space faces "effective competition" from other space and whether with only "reasonable variations in price" of the claimed space significant numbers of buyers and retailers "will turn" to the use of other space. The Court is convinced that the claimed space faces competition from department store space in the mall and from numerous buildings located outside the mall which contain retail space. Both of these categories of "space" are "substitutes" for the article of [*35] commerce or trade which Plaintiffs claim has been monopolized.

The alleged monopoly at issue in this case questions the opportunity of the buying public to purchase retail goods and services and the opportunity of the suppliers of the same to obtain outlets for their enterprises. The list of goods and services sold by small mall retailers is, to say the least, extensive. The following list of stores is only partially representative but may be used for purposes of illustration: clothes, shoes, restaurants, movie theaters, hair cutting and styling, sports equipment, records, electronics, jewelry, greeting cards, books, artwork, photography, etc. Of course, these goods and services are sold in huge retail dollar amounts and market shares both inside and outside Greenspoint center.

It is beyond belief and entirely unreasonable to say that a mall retailer selling these items and services does not face intense price and other competition from department stores in the mall and many other stores outside the mall selling the same goods or services across the aisle, street, or several blocks and even miles away. Similarly, a retailer who feels rent inside the mall is too high can look [*36] for substitute shop space outside the mall and can turn to the major mall tenants for the purchase or lease of space within the major stores or for arrangement of other joint merchandising relationships.

While it is clear that department stores are part of the market for consumer sales from a consumer's viewpoint, it is also clear that department stores are not without market relevance from the viewpoint of retailers desiring to secure space for their establishments. The presence of department stores selling competing goods and services limits an alleged monopolist's "power to control prices or exclude competition" in the supply of space. If GLA rental is raised too high then small retailers will become substantially less competitive against all stores including department stores in the same mall. Accordingly, their sales will drop. The prospect of low sales for a retailer will assuredly limit a mall owner's power in the market for the rental of retail space.

⁸ *United States v. Continental Can Co., supra*, dealt with section 7, Clayton Act, but for purposes of product market definition there is little or no reason to distinguish cases applying that section and section 2, Sherman Act. See *United States v. Grinnell Corp.*, 384 U.S. 563, 572-73 (1966).

Plaintiffs contend that space for a store inside a mall possesses a unique product status. The Court rejects this contention. It is true that a mall store may be thought to have several important advantages over an [*37] outside store. Chiefly, these are: a large volume of foot traffic past a retail establishment, the chance that large numbers of prospective buyers will indulge in coincidental or impulse buying, a generally pleasant setting and the convenience of concentrated location for the customer.

An outside store also has many advantages which makes it competitive with a mall store both as a place to locate for a retailer and a place to buy for a consumer. An outside store can obtain a closer, more convenient location to a partially desirable submarket of the larger geographic market area of the mall, i.e., closer location to the homes or workplaces of prospective customers including those with or without cars. Outside stores can locate closer to parking lots, thus increasing convenience and minimizing long walks for customers. Free-standing stores or those located in smaller shopping centers generally have less automobile congestion and parking problems which in Houston are not insignificant disadvantages at mall sites. Another important advantage is lower building and overhead costs. Evidence adduced at trial showed that small retailers in malls actually subsidize the cost of the land [*38] upon which the large stores are built, and they pay costs associated with building huge roofed structures and pedestrian walk areas with corresponding heating and air conditioning costs. Further, a non-mall retailer may have more flexibility and control over his store's building since his relative bargaining power is much stronger than that of his counterpart located in a large mall. Finally, a retailer located in a mall faces not only higher fixed costs but more intense competition which serves to limit his profit. In a mall there are many competitors (including large stores which may have lower variable costs because of bulk purchases) present in the immediate market and there are fewer barriers to competition, i.e., a competitor can likely offer a buyer the same article or service at a place only a short walk away.

It is clear that non-mall space is competitive with mall space. "Certainly, that the competition here involved . . . is between products with distinctive characteristics does not automatically remove it from [classification within the same product market]." ⁹ In Times-Picayune, the Court concluded that it was irrelevant to advertisers whether they delivered their [*39] messages to consumers in the morning or evening newspaper. *Id. at 613*. This Court concludes similarly that it is irrelevant to consumers and retailers where they respectively buy and sell their products if the location is economically favorable to them. These various locations comprise a "large area of effective competition" between the renters and users of mall and non-mall space. See *United States v. E.I. duPont de Nemours & Co., supra*, (a section 2 case holding that cellophane shared the relevant product market with various other types of wrapping materials even though there were some differences in product characteristics).

Plaintiffs' argument reduced to its essentials is that non-mall retail space is practically obsolete in a given geographic market when compared to the much more advantageous retail mall space. The huge retail sales share of the market captured by non-mall stores selling the same goods and services as mall stores in the same geographic area clearly refutes this claim. The expert's study commissioned by Plaintiffs similarly contradicts this claim. See Px. 5, Vol. VI at 14-15 (listing non-mall [*40] stores as "major retail competition"). Reasonable minds could not differ that the space occupied by those listed stores plus smaller stores are within the relevant product market. See also, *Id.* at 12, noting, "[t]he total sales potential made available by residents of the trade area is subject to attraction from retail stores within the trade area. . . ." [emphasis added]. The 1974 Larry Smith Analysis discusses as competitors "retail facilities" and "major retail centers" which includes more space than just that provided by malls. "A new shopping center will not, of course, attract all the business in its trade area." Px. 22 at 29 [Urban Land Institute Shopping Center Development Handbook].

Even though "the record [does not] furnish the exact quantitative share of the relevant market . . . [t]he claimed deficiencies in the record cannot sweep aside the existence of a large area of effective competition." In this case the Court does not conclude necessarily that the relevant product market includes all non-mall retail space, but only that on this record Plaintiffs failed to "provide the jury with sufficient evidence to permit it to define the relevant . . .

⁹ *United States v. Continental Can Co., supra, at 452-53.*

product market." [*41] *Dimmitt Agri Industries, Inc. v. CPC International, Inc., supra; Spectrofuge Corp. v. Beckman Industries, Inc., supra.*

Geographic Market

In 1976, Plaintiffs were developers or entrepreneurs producing or promoting buildings and shopping centers of various sizes. That was their business or the area of commerce in which they competed. They attempted at least by 1975 to produce a type of center which can be characterized as the largest shopping center known in the industry - the so-called "regional shopping center mall."

The producers of that type product, if it be a product, compete throughout the nation to forge the necessary agreements and take the necessary steps to build such centers. Both of Plaintiffs' joint venture partners participate in one manner or another in the development of regional malls throughout the United States. The same may be said of Plaintiffs' competitors in this case - the Federated Defendants. The many major stores Plaintiffs solicited for location commitments also participate in mall developments throughout the nation or at least this state. That area is the relevant geographic market recognized by the industry. Cf. *United States v. Grinnell Corp., *421 384 U.S. 563, 570-76 (1966)*.

The record discloses no barriers to Plaintiffs' competing for other mall sites in a wider area than North Houston except their unwillingness to compete. Plaintiffs admitted development of other projects throughout the greater Houston area and claimed that this experience qualified them to develop a regional center. Logically this same experience would have qualified them to compete in a much wider area than simply "North Harris County."

Plaintiffs could have constructed malls at any desirable site which held the potential to attract major stores as "anchor tenants." Both sites and tenants were realistically available to Plaintiffs in a much wider area than that identified by them as the relevant geographic area. *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)*, established that for purposes of defining the relevant geographic market, "the area of effective competition . . . must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practically turn for supplies." It is clear that Plaintiffs could turn to potential mall sites throughout a large area and that area is the appropriate [*43] one in which to measure alleged monopoly power in the supply of regional center space. See *American Football League v. National Football League, 323 F.2d 124, 130 (4th Cir. 1963)*. It is equally clear that, measured against the mall development done by Plaintiffs' state and nationwide competitors, only an insignificant amount of trade or commerce was secured by Defendants at Greenspoint. This did not amount to monopolization or the attempt thereof. Id.

This case was prosecuted under the theory that the cryptic term, "North Harris County," described the relevant geographic market. That term was defined by Mr. Harper, Plaintiffs' expert, as being the expected "trade area [to be] served by the proposed mall at I-45 and 1960." R. 648; see R. 642-50. But, as discussed earlier the proper inquiry in a section 2 case is the share held by the alleged monopolist in the relevant market. See *United States v. Grinnell Corp., supra, at 571*.

The testimony and work product of Plaintiffs' experts attempt to define generally the geographic market for retail space by reference to the area from which retail customers may be attracted to such space. Messrs. Harper, Huff and Smith all determined [*44] that it was reasonable to assume that shoppers would be willing to drive twenty-five to thirty-five minutes to be able to shop at a mall in the vicinity of Greenspoint Mall. R. 642. This fact is critical because as a matter of competition if customers are willing to drive approximately thirty minutes to visit one shopping center, then they are almost certainly willing and must be presumed to be willing to drive thirty minutes to visit another center in the same general area. The fact that some potential shoppers within thirty minutes of a given mall might choose to travel to a closer or more desirable store of any given size does not present an exception to this premise but only illustrates that the mall is in competition with other neighboring stores to attract buyers. This circumstance is graphically admitted by Larry Smith Analysis, Px. 5, Vol. VI, at 12-15.

In that Analysis stores twenty-five miles from the subject site were listed as "competition." See also the first sentence of page twelve of the Analysis describing the location of the competition. This admission is particularly

damaging to Plaintiffs' case because the testimony of their only expert witness concerning market [*45] area was principally based on this Analysis. R. 692-93.

The Court concludes that even if the geographic limits of the market for space is relevantly connected to the area from which such space will draw sales, the geographic area most favorable to Plaintiffs upon which reasonable minds could agree on this record would be the area within thirty minutes driving time of Greenspoint Mall. In reaching this conclusion the Court is aware that "the relevant competitive market is not ordinarily susceptible to a 'metes and bounds' definition. *Tampa Electric Co. v. Nashville Coal Co., supra, at 331*. But this approximate definition fits well with the conclusions reached by other courts and the particular facts of this case.¹⁰ In *Brown Shoe Co. v. United States, 370 U.S. 294, 339 (1962)*, the Court stated,

. . . the District Court properly defined the relevant geographic markets in which to analyze . . . [the competitive effect] as those cities with a population exceeding 10,000 and their environs in which both Brown and Kinnin retailled shoes through their own outlets. Such markets are large enough to include the downtown shops and suburban shopping centers in areas contiguous to the [*46] city, which are the important competitive factors, and yet are small enough to exclude stores beyond the immediate environs of the city, which are of little competitive significance.¹¹

See *Lehrman v. Gulf Oil Corp., 464 F.2d 26, 30 (5th Cir. 1972)*, cert. denied, 409 U.S. 1077 (1972) (price competition exists between retail gasoline stations located twenty miles apart). This market definition also adequately addresses the significant effect that even fringe competitors can have on a given firm's "power to control prices or exclude competition." See, e.g., AREEDA, ANTITRUST ANALYSIS 202 (2d ed. 1974) (explaining that competition for the marginal customer frequently controls a firm's pricing decisions).

Competitors of Defendants which are included within the geographic market include Gulfgate, Meyerland, Sharpstown, Northline, [*47] Memorial City, Town & Country, Northwest and the Galleria malls,¹² see Dx. F 126 at 1, plus the many smaller centers and stores within thirty minutes travel of Greenspoint. Considering only retail space in malls located within the approximate, relevant geographic market and setting aside for the moment consideration of retail space in free-standing stores and lesser shopping centers it is clear as a matter of law that Defendants lacked monopoly power in the supply of regional center space since they held only about ten percent of the market. Dx. F 126 at 1; see, e.g., *United States v. United Shoe Machinery Corp., supra, 110 F.Supp. at 346*.

Unless there are high barriers to entry in the business of supplying such space, it is also true as a matter of law that given this share of the market there is not a dangerous probability of monopoly so as to permit presentation of the attempt claim to the jury. See *Dimmitt Agri Industries, Inc. v. CPC International, Inc., supra at 533*. Barriers [*48] to entry were not high. It is undisputed that the area north of Greenspoint Mall experienced extensive and rapid growth throughout the last decade. The new construction included homes, free-standing retail outlets, shopping centers, and the completion in 1981 of Willowbrook Mall which is within nine miles of Defendants' Mall. Judged by the results of actual efforts to enter the market, the most accurate gauge, it is clear that entrance barriers were low. The constant shift of population to the north also made monopolization by a stationary store unlikely. The offer of a store site to Ward did not raise a dangerous probability of monopoly. *Yoder Brothers, Inc. v. California-Florida Plant Corp., supra, at 1369*.

¹⁰ *Id. at 456*. It was uncontested that the average (not maximum) driving time of the patrons who shopped at Greenspoint was twenty-two minutes. See R. 618.

¹¹ The entire greater urban and suburban areas of Minneapolis, Fort Worth, San Antonio and Detroit were considered as individual geographic markets in the cited, merger case. *Id. at 349-51*.

¹² All the listed malls are located on interstate highway systems and are well within 30 minutes driving time of Greenspoint given the non-stop nature of automobile travel on such highways.

The foregoing conclusion was reached without considering the market share of retail space held by department stores, shopping centers and free-standing stores located in the relevant area. When one considers those factors, which Plaintiffs largely failed to identify or quantify, there can be no question that they failed to prove their case with respect to both their section 2 claims. Submission of these claims to the jury would have required that body to speculate concerning [*49] critical facts which were not present in the record. [Spectrofuge Corp. v. Beckman Instruments, Inc., supra.](#) As a matter of law Plaintiffs cannot recover on their monopoly or attempted monopoly claims.

The Section 1 Claims

Plaintiffs appeal to have formulated several theses to support their restraint of trade allegation. They claim that Defendants have acted intentionally to further or extend a monopoly, acted in a wrongful or anti-competitive manner, and have conspired and combined to stifle competition.

The first argument falls because of the failure to prove either the attempted or completed offense of monopoly. The cases, [United States v. Griffith, 334 U.S. 100 \(1948\)](#), and [Lorain Journal Co. v. United States, 342 U.S. 143 \(1951\)](#), are radically different from this one, and are not controlling. Both Supreme Court decisions involved situations in which monopolies were found to exist, and the defendants therein secured agreements with their suppliers or customers that imposed on-going restrictions upon the efforts of their competitors to compete against the monopolies. Neither factor is present here.

At oral argument of the motions for directed verdict, Plaintiffs contended [*50] that Defendants competed unfairly in bringing "to an end a business relationship such as this joint venture," rather than competing in a "hard and fair" manner. Record of Proceedings at 19 (Sept. 29, 1982). But this argument suffers from at least two deficiencies. First, as discussed previously, Federated and Plaintiffs were competing mall developers and Federated's offer to Ward did not improperly or illegally interfere with Plaintiffs' business relations, nor did it violate a protected privilege. Second, allegations of unfair competition without more do not state a cause of action under the [Sherman Act](#). [Northwest Power Products, Inc. v. Omard Industries, Inc., 576 F.2d 83 \(5th Cir. 1978\)](#), cert. denied, 439 U.S. 1116 (1979). This thesis must also be rejected. The decision, [Landmarks Holding Corp. v. Bermant, 664 F.2d 891, 896-97 \(2d Cir. 1981\)](#), cited by Plaintiffs, is easily distinguishable from this case. There the defendants, with the purpose of delaying construction of plaintiff's mall, improperly solicited and subsidized numerous baseless suits, appealed from each "knowing that they lacked standing to do so," misrepresented facts to the Chief Justice of the Connecticut Supreme [*51] Court, and failed to communicate settlement offers to third parties who they sponsored as surrogates in their sham litigation. There are no comparable allegations in this suit.

Before specifically considering Plaintiffs' conspiracy contention, it will be worthwhile to put the section 1 claims as a whole in context. There are no allegations of per se violations of the Sherman Act, e.g., there are no claims of price fixing, Cf. [United States v. Sealy, Inc., 388 U.S. 350 \(1967\)](#), horizontal division of market areas, Cf. [United States v. Topco Associates, Inc., 405 U.S. 596 \(1972\)](#), boycott or concerted refusal to deal,¹³ Cf. [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 \(1959\)](#), or product tying, Cf. [International Salt Co. v. United States, 332 U.S. 392 \(1947\)](#).

[*52] None of the business transactions assailed here involve exclusive or requirements contracts, Cf. [Tampa Electric Co. v. Nashville Coal Co., supra](#), merger, Cf. [United States v. Columbia Steel Co., 334 U.S. 495 \(1948\)](#) (a

¹³ On the contrary, Plaintiffs' complaint claimed that a major mall developer (Simon) and two major department stores (Sakowitz and Joskes) were quite willing to deal with Plaintiffs. Evidence adduced at trial showed that it was possible to develop a large shopping center without the presence of Sears, J.C. Penney or Wards. See Dx. F 126 at 4-5. The evidence failed to show any agreement to limit any store's option to deal with Plaintiffs in any location at any time including the future. The evidence also showed that Plaintiffs failed to contact stores which are now located in Houston and which might have located with them. Finally, if the interest to be considered is the freedom to participate in the business of regional center development, Plaintiffs are not unreasonably restrained since as discussed, *supra*, the Court found that development business to be one conducted in a state or nationwide area in which other opportunities were available.

section 1 case) or market division of any type, Cf. [White Motor Co. v. United States, 372 U.S. 253 \(1963\)](#).¹⁴ Any of the department stores located at Greenspoint, including Ward, was free at any time to contract with Plaintiffs for construction of a store at any place. If Plaintiffs had retained their interest in the FM 1960 site they might now be able to take advantage of the extensive growth in northern Houston and develop a mall at that site. That is what occurred at Willowbrook Mall which opened in September, 1981, at the intersection of FM 1960 and West Montgomery Road. In sum, there is a substantial question whether the actions of Defendants in this matter constitute a legally cognizable restraint. Upon reviewing prior cases, one becomes convinced that a finding of section 1 liability under these circumstances would be clearly unprecedented as well as unsupported by the evidence.

[*53] Moreover, to condemn the actions of Defendants here would disserve what was described in [Sulmeyer v. Coca Cola Co., supra, at 851](#), as the summum bonum of the Sherman Act. The Federated Defendants and Plaintiffs were competitors in every sense of the word. The two groups were located only about six miles apart, were known to one another and were in the same business - the construction of regional shopping centers. Both were attempting to build the biggest mall possible with the most desirable department store tenants as quickly as possible. The competition was fierce. Plaintiffs' group has one very strong Houston area merchandiser (Sakowitz) practically committed, and claimed to have probably a stronger if not the strongest Houston area merchandiser preparing to commit (Joske's). Ward, which could have served as an anchor tenant for the center, was committed also except that it held the right to terminate its commitment through the early part of June, 1976.

Throughout the 1970's both sets of developers competed for favorable major store commitments. Federated talked to Sakowitz, Joske's and Ward, and Plaintiffs attempted to interest several stores that eventually built at [*54] Greenspoint. Ward, just as were the other major stores, was an object of competition between the two development groups. In the end Federated won. They offered a superior product.

In the spring of 1976, the initial construction at Greenspoint was nearly complete and opening was imminent. Plaintiffs' proposed mall on the other hand was still in the planning stage with no construction whatsoever underway. Ward was anxious to enter the northern Harris County market quickly at any reasonable location. Greenspoint offered an earlier opening with less risk since the development work had already been completed there and the mall was essentially operational. Because Joske's had not committed to the 1960 site, Ward was faced with the real possibility of having a rather inefficient two-store mall at 1960 if it chose to locate there. This potential problem was not fanciful but was a problem which Ward had encountered earlier with unfavorable financial results at the Memorial City Shopping Center. Locating at Greenspoint additionally involved less risk because the population to support that mall was more nearly already present while that to support the more outlying 1960 location was [*55] not present but was hoped to be gained in the future. This consideration apparently affected the location analysis of Sears also. Although that company owned a mall site at Willowbrook (FM 1960 and West Montgomery Road) it chose to build first at Greenspoint and wait until 1981 to open its store on FM 1960.

In short, Federated competed fairly with Plaintiffs and won. The issue now is whether that business competition should be overturned in a court of law. "The antitrust laws . . . were enacted for the "protection of competition, not competitors.'" [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 \(1977\)](#). The Sherman Act, which has been called an economic "charter of freedom," relies upon competition and "the free play of market forces" to regulate the national economy in part to obviate the need for "continuous administrative supervision." [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 \(1940\)](#). The "underpinning for antitrust has been a belief that competition makes a substantial contribution to economic performance in two important respects: (1) efficiency in the use and allocation of economic resources, and (2) progressiveness in the development of more [*56] efficient . . . services." 2 P. Areeda & D. Turner, [Antitrust Law](#) P401, 267-68 (1978).

¹⁴ Antitrust claims or theories not specifically alleged are deemed waived after the conclusion of trial. See [Sulmeyer v. Coca Cola Co., 515 F.2d 835, 846 \(5th Cir. 1975\)](#), cert. denied, [424 U.S. 934 \(1976\)](#). See also [Associated Carpenters, U.S.A., 103 S.Ct. 897 \(1983\), 51 U.S.L.W. 4139, 4141 \(1983\)](#).

It is highly impractical and inefficient to encourage competition generally as a desired end but then draw a line near the point of ultimate success and penalize the successful competitor for further competing. In a perfectly competitive situation an inefficient competitor will capture no share of the market. Because efficiency through competition is the public policy of this nation and continuous government regulation of competition has been rejected, it is not feasible or desirable to prohibit by law competition by any entity other than that of a monopolist. In the instant case there is no monopoly. Unacceptable economic concentration can be controlled through the concept of economy of scale. If a large mall fairly attracts the many customers necessary to make it economically successful, it must be presumed as an economic and legal fact that the mall is efficiently satisfying the needs of the community. On the other hand, a mall which is economically too large will inevitably be unable to attract sufficient customers to buy the huge quantity of goods and services required for its survival.

[*57] At no point in the course of this litigation have Plaintiffs proved or even claimed that the competition by Federated against them was other than that based on the merits of Greenspoint versus their site and proposed mall at 1960. All parties agree that Ward's move to Greenspoint has been successful. There has been no claim or showing that the opportunity of free-standing store owners or other mall developers to locate in the northern part of the county has been limited by any factor other than their ability to compete on the merits with Greenspoint. It is uncontested that there has been extensive construction of competing retail outlets in the immediate area.

It is clear that where there has been no showing of a use of anti-competitive means the courts should not interfere with the outcome of business competition. In this case Federated's entire Mall has been successful. It has satisfied the public demand and interest in an exceptional manner. The stores located there are in direct competition with one another at close proximity. They present to consumers few barriers to meaningful product choice. The Mall's location and timing appear to indicate an efficient and [*58] progressive entry in the marketplace which furthered the public interest expressed in the Sherman Act.¹⁵ It is inappropriate to force a business entity such as Ward to make an inefficient business decision so that it might avoid potential treble damage liability. The antitrust laws do not mandate foolish economic decisions. In this sense misapplication of the Sherman Act can itself be a serious restraint of trade. In short, if the antitrust laws prohibit a decision such as was made by Ward in this case, then the freedom of merchants to allocate resources efficiently will be severely restricted simply because at an earlier date the merchant tentatively considered locating with a competitor of his ultimate business associate.

[*59] When Ward declined to build at FM 1960, Plaintiffs reverted to a position which was no worse and was generally better than the one which they occupied before they initiated negotiations with the Ward Defendants in 1975. The Court concludes that an entity which considers, even seriously, becoming a competitor and then elects not to do so does not violate the antitrust laws simply by exploring its opportunities. The amount of regional center space competing with Greenspoint after Ward reached its decision in May, 1976, was no less than the amount competing before Ward considered becoming a supplier of the same. There was no decrease in competition in the alleged line of trade or commerce which resulted from Ward's decision to build at Greenspoint. Ward has continually been present in the relevant market, thus supporting regional mall competition from its location at Northline and at other centers. Its choice of Greenspoint over 1960 for location of another store should not without more make it liable under the antitrust laws. The opening of the Ward store at Greenspoint has increased competition in the mall between merchants there and has permitted Ward to participate in unrestrained [*60] development competition between Plaintiffs and Federated. In the long run if Ward is not permitted to make decisions maximizing its efficiency, its ability to compete as a merchandiser and as a supporter of regional mall space will be decreased to the injury of competition in general. The Court is convinced the section 1 claim must be dismissed.

¹⁵ Even if Ward's decision to move to Greenspoint had resulted in overconcentration of sellers vis a vis available buyers (shoppers), or had been inefficient in some other way, that agreement still would not present an anti-competitive threat to the market. Such an inefficient decision would increase the competitive opportunities of others in the area to construct decentralized retail establishments. Also, those entities responsible for the inefficient decision would not be shielded from the adverse economic consequences of their choice.

Alternatively, if further analysis is necessary, The instant situation is closely analogous to the several decided cases which have considered business relationships between manufacturers and their distributors. Both situations involve an association between parties in vertical relationships with one another and replacement of one member of the association with his horizontal competitor. Just as some manufacturers may offer financing to their distributors, or participate in competing distribution themselves, see [H & B Equipment Co. v. International Harvester Co., 577 F.2d 239 \(5th Cir. 1978\)](#), Ward tentatively agreed in return for a percentage interest to assist in development of Plaintiffs' mall. The rule of reason is applicable. Continental T.V., Inc. v. GTE Sylvania, Inc., 4333 U.S. 36 (1977).

The issue is whether the restraint in [*61] question is reasonable, specifically whether on balance it furthers or lessens competition. [Chicago Board of Trade v. United States, 246 U.S. 231 \(1918\)](#). As discussed previously, Wards' move to Greenspoint furthered competition in two important ways: it increased merchant competition within the mall and increased competition for the most efficient location of anchor tenants between Plaintiffs and Federated. "To prove an antitrust violation under the rule of reason, [Plaintiffs] . . . must show the defendants' conduct adversely affected competition. That showing is essential, because "an antitrust policy divorced from market considerations would lack any objective benchmarks."" [Northwest Power Products, Inc. v. Omak Industries, Inc., 576 F.2d 83, 90 \(5th Cir. 1978\)](#).

Plaintiffs failed to make the necessary showing. Even if it is assumed that the proposed mall would have developed as prophesied, its demise does not show, ipso facto, that competition was adversely affected. The Court earlier found the evidence would support only a finding that the relevant product market consisted of free standing retail stores, non-mall shopping center space and regional mall space. Because [*62] Plaintiffs' mall could not have been completed until many months after June, 1976, even if all necessary agreements had been reached with the major stores, it is proper to consider construction which has occurred subsequent to that date. The construction in northern Houston has been phenomenal. To the extent that this construction includes retail space, "interbrand" competition in the supply of the relevant product has increased dramatically. Further, because of the law of supply and demand, the Court must conclude that much of this space would not have been constructed but for the demise of the anticipated mall and retail space at IH 45 and FM 1960. Thus, its demise has increased competition from other sources. This is just another way of saying barriers to entry in the market were low.

Plaintiffs have failed to show that overall, interbrand competition has been adversely affected by the actions of Defendants. Specifically, they failed to furnish "any objective benchmarks" of the same. This failure is fatal. Continental T.V., Inc. v. GTE Sylvania, Inc., *supra*. See also, [Spectrofuge Corp. v. Beckman Instruments, Inc., supra](#); [E.A. McQuade Tours, Inc. v. Consolidated Air Tour \[*63\] Manual Committee, 467 F.2d 178 \(5th Cir. 1972\)](#), cert. denied, 409 U.S. 1109, (1973) (reversing damage award of jury with instructions to dismiss because as a matter of law no unreasonable restraint of trade had occurred).

"A supplier may switch dealers and conspire with a new dealer to take the place of an established one. Without more, the antitrust laws do not stand in their way." [Northwest Power Products, Inc. v. Omak Industries, Inc., supra at 86](#). In this case Ward had a supply, a department store, which was critical to the business of Plaintiffs and Federated. Those businesses principally entailed renting or selling (distributing) space which was located in close proximity to a concentration of department stores. Without this supply, albeit a one-time, semi-permanently issued supply, a mall developer could not distribute the surrounding land or the interior general lease area which comprises his business and furnishes his profit. "Even if [the supplier and new dealer] . . . did admit that they thought that [the old dealer] . . . would find it difficult to re-enter the market, we fail to see how this belief, without more, could give rise to the existence of a boycott [*64] . . ." [Carlson Machine Tools, Inc. v. American Tool, Inc., 678 F.2d 1253 \(5th Cir. 1982\)](#).

The preceding statements of **antitrust law** reflect the belief that if competitive conditions are unaffected, the potentially harsh consequences of competition upon inefficient or non-innovative or late arriving competitors must be accepted in furtherance of the public interest in free competition. In this case, however, Plaintiffs' business was not destroyed anymore than a salesman who loses one sale is destroyed in his business. Plaintiffs could have competed at other locations to develop other centers just as Simon has in fact done. Rather than striving in the marketplace Plaintiffs have elected to abandon their business in an attempt to achieve in the courts what they were

unable to gain within the economy. This approach should not be encouraged. This suit is dismissed in its entirety.
¹⁶

[*65]

End of Document

¹⁶ The fact that Ward may have had some horizontal association in mall development does not preclude application of the rule of reason. If Ward and Federated had gone so far as to merge, a circumstance involving much more extensive horizontal agreement and cooperation than was present here, their actions still would be judged by the rule. See *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) (section 7 Clayton Act); *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) (section 1 Sherman Act). Ward, of course, had important economic considerations relating to its competitiveness as a merchandiser to consider in choosing between Plaintiffs' and Federated's site. In moving to Greenspoint, Ward did not gain a share of the development project, but simply purchased a pad upon which to build its store. Just as importantly, Ward continued to maintain operation of its store at the Northline Shopping Center which was located only about ten minutes driving time away from Greenspoint. Northline and other centers in the relevant market which contain Ward stores are important competitors of Greenspoint.

Texas v. Scott & Fetzer Co.

United States Court of Appeals for the Fifth Circuit

July 22, 1983

No. 82-1404

Reporter

709 F.2d 1024 *; 1983 U.S. App. LEXIS 25593 **; 1983-2 Trade Cas. (CCH) P65,503

The STATE OF TEXAS, as parens patriae on behalf of natural persons residing in Texas, Plaintiff-Appellee, v. The SCOTT & FETZER COMPANY and the Kirby Sales Company, Inc., Defendants-Appellants

Prior History: [**1] Appeal from the United States District Court from the Western District of Texas.

Disposition: REMANDED.

Core Terms

parens patriae, attorney general, antitrust, suits, behalf of the state, anti trust law, cause of action, institutions, authorizes, violations, political subdivision, damages, powers

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1 [] Antitrust & Trade Law, Clayton Act

See [15 U.S.C.S. § 15c \(1976\)](#).

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2 [] Antitrust & Trade Law, Clayton Act

See [15 U.S.C.S. § 15h \(1976\)](#).

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3 Antitrust & Trade Law, Clayton Act

An anti-trust suit, brought by the Texas Attorney General on behalf of the State, falls squarely and unambiguously within the grant of authority in [Tex. Bus. & Com. Code § 15.40](#) (Vernon Supp. 1981).

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4 Antitrust & Trade Law, Clayton Act

See [Tex. Bus. & Com. Code § 15.40\(a\)](#) (Vernon Supp. 1981).

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5 Antitrust & Trade Law, Clayton Act

A *parens patriae* action is not merely a suit on behalf of individual citizens; it is an action on behalf of the state in which the attorney general seeks to vindicate the rights of the state's citizens injured by alleged actions in restraint of trade.

Counsel: Jack D. Maroney, Austin, Texas, Thomas Black, Austin, Texas, William T. Plesec, Washington District of Columbia, Barry L. Springel, Cleveland, Ohio, for Appellant.

Mark White, Atty. Gen., Austin, Texas, Katherine C. Bond, AAG, Austin, Texas, Steven Baron, AAG, Austin, Texas, for Appellee.

Judges: Politz and Jolly, Circuit Judges, and Hunter, * District Judge. E. Grady Jolly, Circuit Judge, dissenting.

Opinion by: HUNTER

Opinion

[*1024] EDWIN F. HUNTER, Jr., District Judge:

In this case, the State of Texas (acting through its Attorney General) seeks to bring suit in its capacity as *parens patriae* against defendants for their alleged violations of federal antitrust laws. Defendants moved to dismiss the complaint, insisting **[*1025]** that the Attorney General had no State authority to maintain the action. The district court denied the motion, but certified the issue for appeal. The question presented is whether the Attorney General of Texas has authority to maintain this suit.

[2]** The action was instituted in October of 1980 against Scott & Fetzer Company and its wholly owned subsidiary, Kirby Sales Company, Inc. It is brought pursuant to Section 4C of the Clayton Act, which is often referred to as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, 15 U.S.C. [[15 U.S.C. §§](#)

* District Judge of the Western District of Louisiana, sitting by designation.

15c-15h. As is true in every case involving the construction of a statute, our starting point must be the language utilized by Congress. HN1[] Section 4C provides:

Any Attorney General of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such state in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title . . .

15 U.S.C. § 15c (1976). HN2[] Section 15h provides [**3] that the Act "shall apply in any state, unless such state provides for its non-applicability in such state."

15 U.S.C. § 15h.

As the legislative history makes apparent, the Act was aimed primarily at enlarging the potential for consumer recovery for antitrust violations by effectively bypassing the burdensome requirements of Rule 23, Fed.R.Civ.P., that might tend to dissuade private litigants from pursuing consumer class actions for antitrust injury.¹ It involved no change in the substantive basis for antitrust liability. It simply created a new procedural device -- *parens patriae* actions by States on behalf of their citizens -- to enforce existing rights of recovery. See H.R. Rep. No. 499, 94th Congress, 2nd Sess. 6-8, reprinted in 1976 U.S. Cong. and Adm.News 2572, 2575-78. Columbia ex rel. Rogers v. Mid-Atlantic Toyota Distributors, et al., 704 F.2d 125 (4th Cir.1983).

[**4] Defendants argue that the clear import of the Act is that Congress opened the doors of the federal district courts only to state attorneys general who independently possess state law authorization to institute *parens patriae* actions, and then insists that Texas has never authorized its Attorney General to institute such a lawsuit. Texas suggests that there are at least four different sources of authority which permit its Attorney General to institute a *parens patriae* action under federal antitrust laws. Alternatively, Texas insists that its authority to sue became effective upon Section 4C's enactment and continued in each state unless the state revoked it under Section 4H.² [**5] Accepting arguendo defendants' assertion that Congress could not expand the state-defined power of its Attorney General,³ *1026 we hold that HN3[] a suit such as the instant one, brought by the Texas Attorney General on behalf of the State, falls squarely and unambiguously within the grant of authority in Section 15.40 of the Texas Business and Commerce Code.

The Texas statute which authorizes antitrust actions to be brought by the attorney general antedates the federal legislation.

¹ The House Report on the Bill ultimately enacted into law states that the thrust of the legislation is to overturn the decision in California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908, 93 S. Ct. 2291, 36 L. Ed. 2d 974 (1973). The Court in *Frito-Lay* had held that the State of California lacked standing to sue to recover treble damages as *parens patriae* on behalf of its citizens for antitrust injuries. The House Report, after quoting from *Frito-Lay*, went on to say:

H.R. 8532 is a response to the judicial invitation extended in *Frito-Lay*. The thrust of the bill is to overturn *Frito-Lay* by allowing State attorneys general to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability which some courts have found under Rule 23 [of the Federal Rules of Civil Procedure].

² Id. at 8, U.S.Code Cong. & Admin.News 1976, p. 2578.

³ Senate debate confirms that Section 4C was intended to affirmatively authorize state attorneys general to bring *parens patriae* damage actions. It reveals that this authority was to become effective upon Section 4C's enactment and to remain so in each state until that state decided to revoke it under Section 4H. 22 Cong.Rec. 15853 (1976). During the 1977 session of the Texas Legislature, H.B. 592 was introduced for this purpose but was not enacted into law. See H.B. 592 65th Leg. (Texas 1977).

³ The nature of defendants' Tenth Amendment argument is of the type that courts have avoided until another day. So we have done today, but it must be noted that Section 4C does not impose any duties on the Attorney General. It merely provides that he *may* bring *parens patriae* actions. Congress has revealed its respect for state sovereignty by giving the state the option to withdraw the attorney general's permissive authority.

It reads in pertinent part:

HN4[] The attorney general may bring an action on behalf of the state or of any of its political subdivisions or tax supported institutions to recover the damages provided for by the federal antitrust laws, Title 15, United States Code . . .

[Tex. Bus. & Com. Code § 15.40\(a\)](#) (Vernon Supp.1981).

Defendants argue that 15.40(a) does not authorize a statutory *parens patriae* damage action under the Hart-Scott-Rodino **[**6]** Antitrust Improvements Act; they insist that it authorizes only an action to recover damages for injury to the state in its proprietary capacity. We disagree. There is simply nothing to justify the judicial engrafting of such a limitation. The statute clearly does not confine the authority of the Attorney General to the prosecutions of common law *parens patriae* actions or actions to vindicate quasi-sovereign and proprietary state interests. Contrariwise, it fully authorizes the maintenance of the statutory right of action here in issue, which concededly is of neither type.

The United States Court of Appeals for the Fourth Circuit issued its decision in the *Mid-Atlantic Toyota Distributors, Inc.* cases on the very day that the instant case was argued ([704 F.2d 125, 1983](#)). The question there was whether the state attorneys general of Maryland, Delaware and Pennsylvania, and the Corporation Counsel of the District of Columbia, were authorized to maintain statutory *parens patriae* damage actions under Hart-Scott-Rodino (the Act), in the names of their respective jurisdictions on behalf of their natural-person residents injured by an alleged price-fixing conspiracy **[**7]** in violation of the Sherman Act. The language and reasoning of the Fourth Circuit is incisive and pertinent:

"While the statutory and constitutional definitions of the powers of the several plaintiff-attorneys general differ significantly, a common thread runs throughout. The Maryland Constitution provides that the Attorney General shall 'commence, and prosecute . . . any civil . . . action . . . on the part of the State or in which the State may be interested,' [Md. Const. art. V, § 3\(a\)\(2\)](#); the Delaware Antitrust Act empowers the Attorney General to institute proceedings 'on behalf of the State and its public bodies' for suspected antitrust violations, [Del. Code Ann. Tit. 6, § 2105](#) (Supp.1980); District of Columbia law provides that the Corporation Counsel shall 'have charge and conduct of all law business' of the District, D.C.Code Ann. § 1-361 (1981); and Pennsylvania's Commonwealth and its citizens in any action brought for violation of the antitrust laws, . . . '

"While the language differs, each provision allocates to the attorney general power and authority to represent the jurisdiction and its interests in litigation. In at least two ways, we find the present actions **[**8]** to fall clearly within the ambit of each of the attorneys general's state-derived authority.

"First, these attorneys general have brought suits in the names of their respective states to enforce causes of action created by federal law. Whether the state is a real party in interest or merely a representative party, this cause of action exists in favor of the state. See [New Mexico v. Scott & Fetzer Co., 1981-2 Trade Cas. \(CCH\) P64,439, at 75,149](#) **[*1027]** (D.N.M. Dec. 22, 1981). Because the attorneys general are suing to enforce their jurisdictions' causes of action, these lawsuits indeed are 'on the part of' Maryland, on 'on behalf of Delaware, and representative of the Commonwealth of Pennsylvania and the 'law business' of the District of Columbia . . .

"In addition to their authority to sue to enforce their jurisdictions' statutory causes of action, these attorneys general have undoubtedly authority to pursue litigation that advances or vindicates public interests. See [Brown v. Stanton, 617 F.2d 1224, 1232 n. 14 \(7th Cir.1980\)](#) ('In general, a state Attorney General may institute such suits as he deems necessary for . . . the protection **[**9]** of public rights. '), vacated and remanded on other grounds, 453 U.S. 917 [101 S. Ct. 3151, 69 L. Ed. 2d 999] (1981) . . . Indeed, the notion that these attorneys general may institute actions to remedy invasion of the public interest appears implicit in the statutory and constitutional schemes defining their powers.

"As Congress fully recognized in enacting the Antitrust Improvements Act, see H.R.Rep. No. 499, 94th Cong., 2d Sess. 6-8, reprinted in 1976 U.S. Code Cong. & Ad.News 2572, 2575-78; S.Rep. No. 803, 94th Cong., 2d

Sess. 39-40 (1976), this statutory cause of action promotes enforcement of the federal antitrust laws, which promotes at the same time a state's public interest in protecting its citizens from violations of these laws, see *New Mexico v. Scott & Fetzer Co.*, 1981-2 Trade Cas. (CCH) P69,439, at 75,149 (D.N.M. Dec. 22, 1981); *Clark Oil & Refining Corp. v. Ashcroft*, 639 S.W.2d 594, 596-97 (Mo. 1982); see also *Iowa v. Scott & Fetzer Co.*, 1982-2 Trade Cas. (CCH) P64,873, at 72,359 (S.D. Iowa July 8, 1982). We reject the defendants' contention that a state has an 'interest,' under the [**10] various provisions involved here, only in those suits which vindicate quasi-sovereign or proprietary interests. Undoubtedly, a state can have a legitimate public interest in ensuring the economic well-being of its citizens -- and in indirectly promoting a smoothly functioning economy freed of antitrust violations -- even though the most obvious beneficiaries may be individual consumers who ultimately recoup money damages."

We are in perfect accord with the conclusions reached by the Fourth Circuit and the rationale utilized in reaching those conclusions. The opinion is particularly cogent because of the remarkable similarity between the statutes there under scrutiny⁴ and the Texas statute.

Defendants' attack upon the authority of the Attorney General to institute this suit follows naturally from their premise that the phrase "on behalf of the state" does not include *parens patriae* [**11] actions. The argument like the premise is incorrect and has been decisively rejected by the Fourth Circuit in *Mid-Atlantic Toyota Distributors, Inc.*, and the Missouri Supreme Court in *Clark Oil and Refining Corporation v. Ashcroft*, 639 S.W.2d 594 (Mo. 1982). This premise runs directly contrary to the central thesis of the Fourth Circuit and the Supreme Court of Missouri, which is that HN5⁵ a *parens patriae* action is not merely a suit on behalf of individual citizens; it is an action on behalf of the state in which the attorney general seeks to vindicate the rights of Texas citizens injured by alleged actions in restraint of trade.

By instituting a suit of this nature the attorney general exercises his statutory authority to protect citizen consumers against antitrust violations. *Clark Oil and Refining Corporation v. Ashcroft*, 639 S.W.2d 594 (Mo. 1982). We reach the inescapable conclusion that the instant suit, as filed, falls squarely and unambiguously within the grant of authority contained in Section 15.40.⁵

[**12] [*1028] We, of course, do not pass on the merits of the complaint. There is nothing in the record to indicate the truth or falsity of the allegations. We only hold that the Attorney General of Texas has standing and authority to maintain this action in a *parens patriae* capacity.

The District Court properly denied defendants' motion to dismiss the complaint. We affirm his decision and remand for further proceedings that may be appropriate.

REMANDED.

Dissent by: JOLLY

Dissent

E. GRADY JOLLY, Circuit Judge, dissenting:

⁴ The wording of the statutes of Maryland, Delaware, District of Columbia and Pennsylvania appears in the opinion.

⁵ Texas cites Section 22 of Article IV of its Constitution and Article 4409 of its Civil Statutes as additional sources of authority. The Interpretive Commentary to Section 22 and cases construing the section establish that these two provisions confer broad responsibility to oversee private corporations to safeguard the public interest. The Attorney General argues that by bringing this action to prevent and deter alleged violations of the antitrust laws, he is acting precisely in conformity with Section 22 and Article 4409. We need not address this contention because of our holding that the instant action falls precisely within the grant of authority of Section 15.40.

I am unable to conjure the conclusion reached by my two brethren that, although Texas does not expressly provide either by statute or in its Constitution for *parens patriae* actions by its attorney general, such actions are impliedly authorized under the broad language of [*Tex. Bus. & Com. Code Ann. § 15.40\(a\)*](#) (Vernon 1981).¹

[**13] I begin with the proposition, which can hardly be gainsaid, that the powers of the attorney general derive either from common law or from Texas's statutes and Constitution.

The common law authority vis-a-vis *parens patriae* has, commonly, been limited to actions involving infants and those having mental or other incompetencies and to actions involving the quasi-sovereign interests of the state. See Malina and Blechman, *Parens Patriae Suits for Treble Damages under the Antitrust Laws*, 65 Nw.U.L.Rev. 193, 198-203 (1970). As stated by the majority here, the instant case involves neither of these common law actions.

We are left, therefore, with Texas's statutes and Constitution.² In my view, it cannot be reasonably said that the Texas Legislature intended that [*section 15.40*](#) provide the attorney general authority to bring the *parens patriae* action involved here.

[**14] First, I look to the statute itself. No mention is made of *parens patriae* suits. Despite the efforts by the majority to read such authority into [*section 15.40*](#), this statutory provision is, on its face and by the clear import of its language, *limited* to suits "on behalf of the state or of any of its political subdivisions or tax-supported institutions. . ." (Emphasis added.) This suit has *not* been brought "on behalf of the State" or on behalf of its subdivisions; [*1029] rather, as stated in the caption of the case, it has been brought "as *parens patriae* on behalf of natural persons residing in Texas."

The majority reads the provision in [*section 15.40*](#) for suits "on behalf of the state" as including authority to bring *parens patriae* actions. The *state* as a political entity is not the intended beneficiary of this suit; if any recovery is had, it will be by a few citizens who will have a few pennies and quarters put in their pockets with attendant publicity of the great victory against door-to-door vacuum cleaner salesmen³ achieved by an ever-vigilant attorney general's

¹ Because the majority opinion turns solely upon the issue of the attorney general's *parens patriae* authority under Texas law, this dissent is directed solely to that issue. As noted in note 3 of the opinion, however, several residual issues exist, the most important being that the Antitrust Improvements Act of 1976 grants authority to a state attorney general to bring a *parens patriae* antitrust action "unless the State provides by law for its nonapplicability in such state." I have very serious doubts about Congress's constitutional authority to grant to a state's attorney general authority which the state has not seen to confer. Nor is this [*tenth amendment*](#) violation cured by the simple expedient of an "opt-out" clause. At the very least, a state attorney general will have been granted powers by Congress beyond those granted by the state until the state has an opportunity to exercise its option. The putative evanescence of an unconstitutional grant of power does not render it constitutional.

² In addition to section discussed in the majority opinion, the attorney general has relied upon [*Tex. Rev. Civ. Stat. Ann. Art. 4409*](#) (Vernon 1976), which provides that the attorney general

shall . . . inquire into charter rights of all private corporations and, in the name of the State take such legal action as may be proper and necessary to prevent any private corporation from exercising any power or collecting any species of taxes, tolls, freight or wharfage not authorized by law.

Also, the attorney general refers us to [*Tex. Const. Art. IV § 22*](#), which states that the attorney general "shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party . . . and perform such other duties as may be required by law."

My reasons for concluding that [*section 15.40*](#) does not contain *parens patriae* authority are equally applicable to these two provisions.

³ This suit involves an allegation that the defendants, through the mechanism of selling vacuum cleaners door-to-door, violate [*antitrust law*](#) by "imposing a system of resale price maintenance and unreasonable customer restrictions on their distributors and participating in group boycotts of retail vacuum cleaner stores." Brief for Appellee at 1.

office. The majority thus confounds the clear intent of the statute, which, **[**15]** in addition to section (a) discussed by the majority opinion, provides for notification of intent to bring suits by the attorney general *only* to political subdivisions and to tax-supported institutions. No mention is made in [§ 15.40\(a\)](#) of notification to the public at large of any *parens patriae* suits. Had the legislature been thinking of *parens patriae* suits, it presumably would have provided for such notification so that individuals who desired to "opt-out" and bring their own cause of action could do so. Further, the statute provides specifically that when an action has been brought on behalf of a political subdivision or on behalf of a tax-supported institution the state shall retain such sums out of damages recovered as are necessary to reimburse the state for expenses incurred by it in the prosecution of the action. No mention is made of retention of funds out of damages recovered for individuals as might be recovered in a *parens patriae* suit. There is a good reason for this: the legislature never gave any thought that some federal court would later read such suits and such authority of the Texas attorney general into the statute.

[16]** Moreover, in [section 15.40\(b\)](#) the statute provides that "in any action brought by the Attorney General pursuant to the federal antitrust laws for the recovery of damages by the State or any of its political subdivisions or tax-supported institutions" the attorney general may take such actions in the prosecution of the suit as are appropriate and necessary. Glaringly absent from this statutory sub-section is any discussion of actions by the attorney general in connection with a suit brought to recover damages suffered by individuals. "The State" by any rational interpretation cannot be said to be synonymous with *parens patriae* representation.

Despite the absence of any provisions for *parens patriae* actions in [section 15.40](#), the majority essentially holds that the broad language contained in this statutory section includes within its broad reach *parens patriae* authority and that even if the state legislature did not specifically confer this authority, *parens patriae* authority is consistent with the authority which was specifically granted.⁴ So the majority, beneficently, magically, confers this authority by its own act; so much for preachments against judicial **[**17]** legislation.

Needless for me to say, this, in my opinion, exceeds the authority of this court. As stated in [State v. Harney, 164 S.W.2d 55, 56 \(Tex.Civ.App.1942\)](#), "the powers and duties **[*1030]** of the Attorney General are prescribed by the Constitution and Statutes, [and] those powers **[**18]** must be limited to those so prescribed, and may not be enlarged by the courts." Also [Hill v. Lower Colorado River Auth., 568 S.W.2d 473, 480 \(Tex.Civ.App.1978\)](#) (stating that there has been "consistent adherence" to this principle). So, where the majority states that there is "nothing to justify the judicial engraving of such a limitation" on the attorney general's power to bring a *parens patriae* action, I say, to the contrary, there is every reason why this court cannot engrave the extra-statutory *expansion* of authority granted by the majority opinion. Under *Harney* and *Hill*, it is not enough that *parens patriae* authority is "consistent with" the statutory authority provided by the legislature. The authority exercised by the attorney general must be real and actual and conferred by the legislature -- not by Congress or by the Fifth Circuit Court of Appeals.

In its assumption that [section 15.40](#) does subsume *parens patriae* actions, the majority, relying on *Mid-Atlantic Toyota*, makes much of the argument that *parens patriae* authority is contained in the broad grant of authority under [section 15.40](#) because the economic well-being of **[**19]** the state is implicated and therefore the state has a legitimate interest in pursuing the antitrust remedy sought.

Of course a state has a legitimate interest in its economy. But that obvious interest does not translate, absent the philosopher's stone, into general authorization for the state's attorney general to pursue a *parens patriae* action absent authority of state legislation. In fact, as the Antitrust Improvements Act was originally introduced, a state

The essential allegation in this case appears to be that, selling door-to-door, the defendants were able to avoid head-to-head competition with other vacuum cleaner retailers, avoid price advertising and maintain artificially high prices for their products.

⁴Indeed, in the State's brief, the attorney general takes the ingenuous position that, whether or not the Texas legislature contemplated *parens patriae* suits in enacting [section 15.40](#), he possesses that authority because the statute confers authority to recover all damages recoverable under the federal antitrust laws, such as damages suffered by natural persons. Brief for Appellee at 12-13. This implicates the [tenth amendment](#), of course, and as discussed *supra* note 1, neither the majority nor this dissent deals with that issue. The significance of the rather glib concession by the appellee is that, as in the majority opinion, the desires of the Texas state legislature are deemed irrelevant.

would have been expressly authorized to bring actions for harm to its general economy as well as to its citizens.
⁵ **[**20]** This "general economy" provision was omitted from the Act's final version which, as enacted, provided only for *parens patriae* actions to recover damages "for injuries sustained by such natural persons to their property. . . ."
⁶

I see no reason why, if a state may not sue in its own name for general economic harm, it may be allowed under some "natural law" concept to come in and sue in the name of its citizens for redress of that harm. Nor, given section 4C's clear provision only for recovery of damages for injuries sustained by individuals, does this back-door approach provide support for suit by the attorney general. The majority and *Mid-Atlantic Toyota* attempt to equate "action on behalf of the State" with "economic well-being" with "*parens patriae*." The logic does not survive the leap, however. The "general economy" argument strikes me as irrelevant.

In sum, the majority *ignores* the substantive distinction between suits on behalf of the state, which are provided for in [section 15.40](#), and *parens patriae* actions, which are not provided for, explicitly or implicitly, in [section 15.40](#). The majority opinion holds essentially that "actions on behalf of the state" **[**21]** include *parens patriae* suits. The majority by its writing erases the traditional, historical basis for *parens patriae* actions. Twelve states and the District of Columbia have provided express authority to their attorneys general to bring antitrust *parens patriae* actions.⁷ According to the **[*1031]** majority, they could have saved themselves the trouble.

The doctrine of *parens patriae* evolved in a specific way with specific applicability. It is a distinct, discrete jurisdictional device. The Texas State Legislature, had it seen fit, could have conferred upon its attorney general authority to bring *parens patriae* suits. The **[**22]** legislature clearly has not done so. The majority, despite the absence of authority, not only reads between the lines of the statute, but veritably gazes into the Utopian skies of "ought-to-be" and glimpses that authority. I am not gifted with such visionary powers. I see no authority. I dissent.

End of Document

⁵ In [Hawaii v. Standard Oil Co., 405 U.S. 251, 264, 92 S. Ct. 885, 892, 31 L. Ed. 2d 184 \(1972\)](#), the Court held that, inasmuch as section 4 of the Clayton Act allowed recovery only for injury to "business or property," suits for general economic harm had not been provided for by Congress. Further, the Court held that to permit recovery for such harm would duplicate individually recoverable damages.

⁶ See Scher *Emerging Issues under the Antitrust Improvements Act of 1976*, 77 Colum.L.Rev. 679, 713 n. 195 (1977).

⁷ See [Cal.Bus. & Prof.Code § 16760](#); [Conn.Gen.Stat.Ann. § 35-32](#); [Del.Code, tit. 6, § 2108](#); [D.C. Code Ann. § 28-4507](#); [Fla.Stat.Ann. § 542.22](#); [Haw.Rev.Stat. § 480-14](#); Mass. Ann. Laws 93, § 9; [Nev.Rev.Stat. § 598A.160](#); [Or.Rev.Stat. § 646.775](#); [R.I.Gen.Laws § 6-36-12](#); S.D. Comp. Laws Ann. §§ 37-1-23 to -32; [Va.Code § 59.1-9.15](#); [W.Va. Code § 47-18-17](#).

Slattery v. Costello

United States District Court for the District of Columbia

July 28, 1983

Civ. A. No. 83-0982

Reporter

586 F. Supp. 162 *; 1983 U.S. Dist. LEXIS 15077 **

James E. SLATTERY, et al., Plaintiffs, v. John COSTELLO, et al., Defendants

Core Terms

racketeering, enterprise, defendants', courts, terms, standing requirement, competitive injury, motion to dismiss, organized crime, plaintiffs', provisions, antitrust, alleges

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN1[] Racketeer Influenced & Corrupt Organizations, Claims

Permission to bring a civil action for a Racketeer Influenced and Corrupt Organizations Act (RICO) violation under [18 U.S.C.S. § 1964\(c\)](#), extends to those injured by a violation of the criminal RICO prohibitions, [18 U.S.C.S. § 1962](#). Had the Congress not intended civil RICO plaintiffs to prove the same elements which the government must prove in a criminal case, it undoubtedly would not define a civil violation with specific reference to a criminal one. Therefore, in deciding whether plaintiffs have properly alleged a civil RICO claim, the courts may properly draw upon those criminal RICO cases which have described the essential elements of such a claim.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Governments > Legislation > Interpretation > Rule of Lenity

HN2[] Private Actions, Racketeer Influenced & Corrupt Organizations

Given the inapplicability of the rule of lenity, to civil proceedings and the Racketeer Influenced and Corrupt Organizations Act's (RICO) statutory mandate for a liberal construction, [18 U.S.C.S. § 1961](#), the court would be hard pressed to justify a narrower construction of RICO's civil cause of action than that afforded RICO's criminal provisions.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

[**HN3**](#) **Private Actions, Racketeer Influenced & Corrupt Organizations**

[18 U.S.C.S. § 1964\(c\)](#) does not require the showing of a "racketeering enterprise injury."

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[**HN4**](#) **Private Actions, Racketeer Influenced & Corrupt Organizations**

The term "racketeering enterprise injury" may imply that the plaintiff must somehow link his injuries to the operations of a criminal "enterprise" within the meaning of [18 U.S.C.S. § 1961\(4\)](#). This definition of "racketeering enterprise injury," however, cannot be reconciled with prevailing judicial constructions of [§ 1962](#). The Racketeer Influenced and Corrupt Organizations Act applies to situations where the enterprise is, in effect, no more than the sum of the predicate racketeering acts. Accordingly, it would be inconsistent to force a plaintiff to connect his injuries strictly to the offending "enterprise" as opposed to the underlying criminal racketeering acts.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

[**HN5**](#) **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeering Influenced and Corrupt Organizations Act itself declares that Congress intended to supplement other available remedies. [18 U.S.C.S. § 1961](#).

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Criminal Law & Procedure > Trials > Judicial Discretion

[**HN6**](#) **Motions to Dismiss, Failure to State Claim**

A court's discretion in passing on a [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss is limited. The court's authority does not include the discretion to dismiss a complaint because a plaintiff might have brought suit under a different law in another forum which may result in some form of relief.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN7 Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) requires that all fraud allegations shall be stated with particularity. This rule applies with particular force to a civil complaint which alleges fraudulent conduct involving violations of the criminal code.

Counsel: [**1] William Dobrovir, Dobrovir & Gebhardt, Washington, District of Columbia, Allan Kanner, Philadelphia, Pennsylvania, for Plaintiffs.

Douglas Lashley, Beckett, Cromwell & Myers, Bethesda, Maryland, Thomas Dyson, Washington, District of Columbia, for Defendants.

Judges: Sirica, District Judge.

Opinion by: SIRICA

Opinion

[*163] MEMORANDUM AND ORDER

SIRICA, District Judge.

This matter is before the Court on the defendants' motion to dismiss the complaint pursuant to "Rules 12(b)(6), 21 and 23 of the Federal Rules of [Civil] Procedure." According to the complaint, the plaintiffs are two former clients of an executive employment service who allegedly represent a class of over 2,000 similarly situated clients. The defendants are five individuals and two District of Columbia corporations involved in a furnishing executive placement services to the public. The gravamen of plaintiffs' complaint is that each member of the alleged class paid sums of money to the defendants in order to obtain executive placement services based on the defendants' allegedly fraudulent representations about the defendants' resources and capabilities. In short, the complaint alleges that the defendants induced the plaintiffs [**2] to pay for job search services which the defendants never actually had the intention or ability to perform. The plaintiffs have alleged four separate claims in their alleged class action: a claim for treble damages under the federal civil racketeering statute (18 U.S.C. § 1964(c) (1976)); a claim for treble damages under the District of Columbia's Consumer Protection Act (D.C. Code § 28-3904); and two claims for misrepresentation and fraud.

In their motion to dismiss the defendants raise three separate grounds for dismissing the complaint. The initial reason set forth in their motion is that this Court lacks subject matter jurisdiction because of an allegedly pending case in the [*164] District Court for the Eastern District of Pennsylvania docketed as *Eisen v. National Executive Search, Inc.*, No. 82-4657. The *Eisen* case, however, was denied class certification and, in fact, a default judgment was entered in that case. While this Court has little difficulty in deferring to matters more properly before a court of equal competence, cf. Brinco Mining v. Federal Ins. Co., 552 F. Supp. 1233 (D.D.C. 1982), defendants' contention that this Court lacks subject matter jurisdiction [**3] due to an allegedly contested default judgment in another federal forum is completely without merit.

Defendants' second ground for dismissing the complaint is a general argument about misjoinder (Rule 21) and whether this case is appropriately maintained as a class action (Rule 23). In response to defendants' arguments regarding dismissal for misjoinder the Court refers the defendants to the first sentence of Rule 21. Defendants' Rule 23 arguments are not yet ripe because the class certification issue is not presently before the Court.

Defendants' third contention in support of dismissal relates only to the plaintiffs' civil racketeering allegations. Basically, the defendants present two separate reasons for dismissing the cause of action brought under [18 U.S.C. § 1964\(c\)](#) (Civil RICO). Initially the defendants suggest that the federal civil racketeering statute can only be used against civil defendants with some demonstrated connection to "organized crime." Alternatively, the defendants argue that the civil RICO count should be dismissed because the plaintiffs lack standing to sue under the terms of [18 U.S.C. § 1964\(c\) \(1976\)](#). Although the Court will address both of defendants' [**4] arguments, the Court would like to clarify its position on a preliminary matter raised by the defendants.

In their latest pleading the defendants have attempted to distinguish the plaintiffs' citations by claiming that the case law generated through judicial construction of the criminal racketeering statutes ([18 U.S.C. §§ 1962\(a\)-\(d\)](#)) (RICO) is inapplicable to the civil racketeering provisions in [18 U.S.C. § 1964\(c\)](#). This Court must disagree with the defendants' views on the applicability of criminal precedent to RICO's civil provisions. As one court recently stated:

[HN1](#)[⁵] Permission to bring a civil action for a RICO violation, [18 U.S.C. § 1964\(c\)](#), extends to those injured by a violation of the criminal RICO prohibitions, [18 U.S.C. § 1962](#). Had the Congress not intended civil RICO plaintiffs to prove the same elements which the Government must prove in a criminal case, it undoubtedly would not have defined a civil violation with specific reference to a criminal one. Therefore, in deciding whether plaintiffs have properly alleged a civil RICO claim, we may properly draw upon those criminal RICO cases which have described the essential elements of such a claim.

[Eaby](#) [**5] *v. Richmond*, 561 F. Supp. 131, 134 (E.D.Pa. 1983). In any event, [HN2](#)[⁶] given the inapplicability of the rule of lenity, see [Rewis v. U.S.](#), 401 U.S. 808, 812, 91 S. Ct. 1056, 1059, 28 L. Ed. 2d 493 (1971), to civil proceedings and RICO's statutory mandate for a liberal construction, [18 U.S.C. § 1961](#), note, this Court would be hard pressed to justify a narrower construction of RICO's civil cause of action than that afforded RICO's criminal provisions.

The defendants have asked the Court to follow a few-reported cases which have implied an "organized crime connection" before recognizing a valid complaint under civil RICO. See, e.g., [Adair v. Hunt Int'l Resources Corp.](#), 526 F. Supp. 736-48 (N.D.Ill. 1981); [Moss v. Morgan Stanley, Inc.](#), 553 F. Supp. 1347, 1361 (S.D.N.Y. 1983). The clear and overwhelming majority of courts which have addressed this question, however, have rejected any attempt to add an "organized crime" requirement onto the statutory terms of [18 U.S.C. § 1964\(c\)](#). [Schact v. Brown](#), 711 F.2d 1343 (7th Cir. 1983); [Bennett v. Berg](#), 685 F.2d 1053, 1063 (8th Cir. 1982), aff'd, en banc, 710 F.2d 1361 (8th Cir. 1983); [Hunt Int'l Resources Corp. v. Binstein](#), [**6] 559 F. Supp. 601 (N.D.Tex. 1982); [Crocker Nat'l Bank v. Rockwell Int'l Corp.](#), 555 F. Supp. 47 (N.D.Calif. 1982); [Meineke Discount Muffler Shops, Inc. v. Noto](#), 548 F. Supp. 352 (S.D.N.Y. 1982); [Mauriber v. Shearson/Amer. Express](#), 546 F. Supp. 391 (S.D.N.Y. 1982); cf. [United States v. Cauble](#), 706 F.2d 1322, 1330 (5th Cir. 1983) ("judicial consensus that [RICO] may be used even though no organized crime activity is charged"). Reference to the legislative history of RICO's provisions reveals that Congress drafted RICO in broad terms to avoid creating a criminal offense whose definition depended on a term as vague as "organized crime." See 116 Cong.Rec. 35, 204 (1970); 116 Cong.Rec. 35,343-46 (1970). In light of Congress's understandable reluctance to draft a criminal offense in terms of a relation to some ill-defined notion of organized crime this Court has no difficulty following the majority of courts by refusing to add such a requirement to RICO's civil provisions.

The defendants' alternative argument for dismissal of the Civil RICO count focuses on the status of the plaintiffs rather than that of the defendants. Defendants argue that the plaintiffs lack [**7] standing to sue under Civil RICO. The plain terms of the statute confer standing to "any person injured in his business or property." [18 U.S.C. § 1964\(c\) \(1976\)](#). The defendants, relying on a few reported district court opinions, ask this Court to look beyond the plain terms of the statute to determine whether the plaintiffs belong to that group of litigants for whom the statute was enacted. The defendants contend that plaintiffs lack standing because they have not alleged either "competitive injury" or what has been termed "racketeering enterprise injury." The Court will address these two standing arguments raised by the defendants as though they are distinct although the distinction between the two standing tests is less than clear.

Briefly stated, the "competitive injury" standing requirement which the defendants ask this Court to place upon [18 U.S.C. § 1964\(c\)](#) would require that the plaintiffs allege some type of commercial, business-related injury before they could invoke the statute. In other words, the defendants assert that the plaintiff must allege that they were placed at a competitive disadvantage due to the defendants' conduct. The few courts that have endorsed the "competitive" test have done so in the belief that because [18 U.S.C. § 1964\(c\)](#) was modeled after traditional antitrust remedies the standing requirements of the antitrust field should be brought into play in actions under [18 U.S.C. § 1964\(c\)](#). Upon analysis, however, there are few, if any, satisfactory grounds for requiring a showing of "competitive injury" from plaintiffs under civil RICO. To begin with, there is legislative history to suggest that Congress intended to thwart the imposition of restrictive antitrust standing tests by placing civil RICO within title 18. See 115 Cong.Rec. 9567 (1969) (remarks of Sen. McClellan). Even assuming that the antitrust laws are an appropriate guide to construing [18 U.S.C. § 1964\(c\)](#), an assumption which ignores the markedly different purposes behind these two legislative schemes, judicial construction of the antitrust parallel to civil RICO, section four of the Clayton Act, argues *against* the imposition of a "competitive injury" requirement on civil RICO. See [Reiter v. Sonotone Corp.](#), [442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 \(1979\)](#) (injury to "business or property" under Clayton Act includes non-competitive, "consumer" injury). [\[**9\]](#) Finally, it would take a very narrow view of civil RICO's legislative history to contend that Congress, in enacting [18 U.S.C. § 1964\(c\)](#), was only concerned with the plight of those racketeering victims who were engaged in open business competition with racketeers. Accordingly, this Court joins an increasing number of other courts in holding that there is no "competitive" injury standing requirement applicable to [18 U.S.C. § 1964\(c\)](#). Accord, [Schact v. Brown](#), [711 F.2d 1343 \(7th Cir. 1983\)](#); [Bennett v. Berg](#), [685 F.2d 1053, 1059 \(8th Cir. 1982\)](#), aff'd, en banc, [710 F.2d 1361 \(8th Cir. 1983\)](#); [Crocker Nat'l Bank v. Rockwell Int'l Corp.](#), [555 F. Supp. 47, 49 \(N.D. Cal. 1982\)](#).

[\[*166\]](#) The defendants have also offered an alternate standing test in furtherance of their motion to dismiss. The defendants assert that plaintiffs must aver a "racketeering enterprise injury" to have standing under [18 U.S.C. § 1964\(c\)](#). The few courts that have referred to the "racketeering enterprise injury" standing requirement have not presented a clear definition of what exactly is a "racketeering enterprise injury." To the extent that the term includes the type of injury which has also gone under [\[**10\]](#) the name of "competitive injury" this court has already determined that [HN3](#) [18 U.S.C. § 1964\(c\)](#) does not require such a showing. Similarly, if the term refers to the status of the defendants as being considered members of "organized crime" then this Court has previously found that argument to be without merit. About the only feature of a "racketeering enterprise injury" that courts have been able to articulate is that a "racketeering enterprise injury" does *not* include the injury due solely to the commission of predicate criminal racketeering acts found in [18 U.S.C. § 1961\(1\) \(1976\)](#). Obviously, it is difficult to describe, much less apply, such a standing requirement when all that can be said about it is that there is general agreement on what does not constitute "racketeering enterprise injury." Nevertheless, the Court will attempt to describe what may be meant by the term "racketeering enterprise injury."

Those few courts which have used the term "racketeering enterprise injury" have reached the conclusion that [18 U.S.C. § 1964\(c\)](#) requires an allegation of this type of injury for two primary reasons. First, some courts have based their conclusions on a general analogy to [antitrust](#) [\[**11\]](#) [law](#) and reason that the general purpose of RICO is served when standing is limited to those injured by conduct Congress intended to proscribe. See [Landmark Savings & Loan v. Rhoades](#), [527 F. Supp. 206, 208 \(E.D. Mich. 1981\)](#). A second reason for imposing a "racketeering enterprise injury" standing requirement has been found in the "by reason of a violation of [section 1962](#)" language contained in [18 U.S.C. § 1964\(c\)](#). See [Harper v. New Japan Securities Int'l](#), [545 F. Supp. 1002 \(C.D. Cal. 1982\)](#). Despite these two different approaches to standing under [18 U.S.C. § 1964\(c\)](#), one based on a general reading of RICO and the other on the terms of civil RICO, this Court still has difficulty in articulating what type of injury satisfies either approach.

If "racketeering enterprise injury" merely means that a party has standing only if he has suffered injury from a violation of [18 U.S.C. § 1962](#), then it adds little or nothing to the terms of the statute itself. References to the general purpose of the RICO statute to support a narrow construction have been explicitly rejected by both the Supreme Court, [United States v. Turkette](#), [452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 \(1981\)](#), [\[**12\]](#) and Congress, see [18 U.S.C. § 1961](#), note (1976). One plausible explanation for the creation of the term "racketeering enterprise injury" might be that the statute should be available only to those victims whose injury can be connected

with a confluence of the statutory terms contained in RICO. Perhaps to show a "racketeering enterprise injury" a plaintiff must demonstrate that his business or property injury stemmed from the defendant's racketeering conduct in an enterprise which is specifically prohibited under the terms of [18 U.S.C. § 1962\(a\), \(b\), \(c\)](#), or [\(d\)](#). Again, however, this appears to mean little more than that the plaintiff must allege an injury attributable to a violation of RICO's criminal provisions.

On the other hand [HN4](#)[↑] the term "racketeering enterprise injury" may imply that the plaintiff must somehow link his injuries to the operations of a criminal "enterprise" within the meaning of [18 U.S.C. § 1961\(4\) \(1976\)](#). See [Van Schaick v. Church of Scientology](#), 535 F. Supp. 1125 (D.Mass. 1982). This definition of "racketeering enterprise injury", however, cannot be reconciled with prevailing judicial constructions of [18 U.S.C. § 1962](#). The majority of circuits have [\[**13\]](#) interpreted the Supreme Court's decision in [United States v. Turkette](#), 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) as affirming the "application of [\[*167\]](#) RICO to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering acts." [United States v. Bagaric](#), 706 F.2d 42, 55 (2d Cir. 1983); see also [United States v. Cagnina](#), 697 F.2d 915, 921 (11th Cir. 1983); [United States v. Bagnariol](#), 665 F.2d 877, 890-91 (9th Cir. 1981). Accordingly, it would be inconsistent to force a plaintiff to connect his injuries strictly to the offending "enterprise" as opposed to the underlying criminal racketeering acts. Of course, if "racketeering enterprise injury" means business or property injury to *plaintiffs* "enterprise" then it is nothing more than a different name for "competitive injury" which this Court has already rejected.

Having failed to define what the term "racketeering enterprise injury" is supposed to mean, all that remains is the often repeated statement that "racketeering enterprise injury" does *not* include injury attributable only to the underlying criminal predicate acts. This statement is itself somewhat hard [\[**14\]](#) to understand. Presumably, any person injured by the activities of racketeers as this group is defined by RICO will suffer direct injury from the actual criminal acts of the racketeers. In fact, Congress intentionally selected a group of criminal offenses as definitive of the type of conduct engaged in by organized criminals. The Eighth Circuit, for example, has singled out the elimination of the underlying pattern of criminal conduct as Congress's primary goal when RICO was enacted. [United States v. Dean](#), 647 F.2d 779, 787 (8th Cir.), on rehearing, 667 F.2d 729 (8th Cir. 1981), cert. denied, 456 U.S. 1006, 102 S. Ct. 2296, 73 L. Ed. 2d 1300 (1982). As that Circuit stated: "Supporters of RICO legislation, explaining its operation during the Congressional debate, shared the view that the evil to be punished was the pattern of racketeering activities and its injection into legitimate businesses, not the conversion of legitimate enterprises, into corrupt ones." [Id. at 787](#). By statutory design the victim's compensable injuries from the underlying criminal conduct will frequently be identical to those caused by the racketeering violation. Finally, the compensatory and deterrent [\[**15\]](#) purposes of RICO would be frustrated if a racketeering victim were prohibited from bringing suit on the basis of injuries directly attributable to predicate criminal acts. See [Cenco Inc. v. Seidman & Seidman](#), 686 F.2d 449, 457 (7th Cir. 1982) (Civil RICO to be construed in light of its "compensatory and deterrent objectives").

In conclusion, the Court is unable to provide a satisfactory definition for the term "racketeering enterprise injury." More importantly, the various reasons that have been proffered for the imposition of this type of a standing requirement are inconsistent with the objectives of the racketeering statute as well as the statutory scheme set forth in [18 U.S.C. § 1962](#). Hence, the Court will deny the defendants' request to impose a "racketeering enterprise injury" standing requirement on the plaintiffs in this case. This Court is satisfied that plaintiffs, having alleged a compensable injury to their "business or property" by reason of defendants' alleged violation of [18 U.S.C. § 1962](#), fall within that category of racketeering victims afforded a cause of action under [18 U.S.C. § 1964\(c\)](#). Of course, the Court does not wish to imply any view on the merits of [\[**16\]](#) plaintiffs' case. Rather, this Court merely holds that plaintiffs have alleged sufficient facts in their complaint to prevail over defendants' motion to dismiss for lack of standing.

The defendants raise one final argument in favor of dismissal at this early stage. During oral argument defense counsel voiced a general policy argument in favor of dismissing the plaintiffs' [section 1964\(c\)](#) claims even though they may be well-pleaded. Defendants contend that because the plaintiffs have other, more traditional and more specific claims available under District of Columbia law this Court should dismiss the plaintiffs' federal cause of action. The defendants are correct in their assertion that the broad terms of [18 U.S.C. § 1962](#) & [1964\(c\)](#) pose a risk

of turning traditional state claims into federal cases. The 91st Congress, however, enacted [*168] RICO despite persuasive similar arguments by several Congressmen. See 116 Cong.Rec. 35,205 (remarks of Rep. Mikva); see also *United States v. Turkette*, 452 U.S. 576, 586-87, 101 S. Ct. 2524, 2530-31, 69 L. Ed. 2d 246 (1981) (Congress intended to enter domains traditionally left to the states in enacting RICO). Moreover, [HN5](#) [↑] the statute [**17] itself declares that Congress intended to supplement other available remedies. See [18 U.S.C. § 1961](#), note. Accordingly, this Court will not entertain the defendants' federalism policy argument when it is clear that Congress has already made that judgment. Defendants have also asked this Court to dismiss the complaint because other, more specific causes of action are available to plaintiffs. It is beyond dispute, however, that the plaintiff "is master to decide what law he will rely on. . . ." *Bell v. Hood*, 327 U.S. 678, 681, 66 S. Ct. 773, 775, 90 L. Ed. 939 (1946). [HN6](#) [↑] A court's discretion in passing on a [Rule 12\(b\)\(6\)](#) motion to dismiss is limited. See *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1848, 23 L. Ed. 2d 404 (1969). This Court's authority does not include the discretion to dismiss a complaint because a plaintiff might have brought suit under a different law in another forum which may result in some form of relief. In addition, the Court notes that defendants' argument concerning the availability of more specific causes of action has uniformly been rejected when raised by criminal defendants in RICO proceedings. Courts have denied defendants' argument [**18] when viewed as a dual sovereignty challenge, *United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), or as a challenge to the government's charging decision under two overlapping federal criminal statutes; see *United States v. Computer Sciences*, 689 F.2d 1181, 1187 (4th Cir. 1982); cf. *United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979). Although the considerations relevant to judicial review of the government's charging decisions are not equally applicable between private litigants, this Court's review under a [Rule 12\(b\)\(6\)](#) motion is limited to whether the complaint states a valid cause of action.

Although the Court cannot grant the defendants' motion to dismiss based on the reasons offered by the defendants, the Court is genuinely concerned about the plaintiffs' compliance with [Rule 9\(b\) of the Federal Rules of Civil Procedure](#). [HN7](#) [↑] [Rule 9\(b\)](#) requires that all fraud allegations "shall be stated with particularity." *Id.* This rule applies with particular force to a civil complaint which alleges fraudulent conduct involving violations of the criminal code. The complaint in this case alleges that the defendants conducted a pattern of racketeering [**19] activity, to wit, an alleged scheme to defraud under [18 U.S.C. § 1341](#) & [1343](#), "in violation of [§ 1962](#)." Complaint, para. 10. While U.S.C. [§ 1964\(c\)](#) literally speaks only to violations of "[section 1962](#)," that does not remove the burden placed on plaintiffs to state a specific type of [section 1962](#) violation. For example, paragraph ten of the complaint refers to a conspiracy but the complaint fails to indicate whether a violation of RICO's conspiracy section, [18 U.S.C. § 1962\(d\)](#) is being alleged. Within the context of [Rule 9\(b\)](#)'s mandate for specificity, it is essential that plaintiffs identify what particular violation of [section 1962](#) is being alleged. [Rule 9\(b\)](#) also extends to the essential elements of the particular type of racketeering violation that is being alleged. Consequently, the plaintiffs must state with particularity the nature of the "enterprise" alleged as well as the acts constituting the basis for the underlying claims of mail and wire fraud. The Court will dismiss the complaint without prejudice to plaintiffs filing an amended complaint in conformity with [Rule 9\(b\) of the Federal Rules of Civil Procedure](#). Wherefore, it is this 28th day of July, 1983.

ORDERED that [**20] the defendants' motion to dismiss is denied in all respects, and it is

FURTHER ORDERED that the complaint is dismissed without prejudice to the refiling of an amended complaint in conformity with [Rule 9\(b\) of the Federal Rules of Civil Procedure](#) within thirty (30) days from the date of this Order.



Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.

United States Court of Appeals for the Eleventh Circuit

July 29, 1983

No. 81-5693

Reporter

710 F.2d 752 *; 1983 U.S. App. LEXIS 25371 **; 1983-2 Trade Cas. (CCH) P65,521

CONSTRUCTION AGGREGATE TRANSPORT, INC., a Florida corporation, Plaintiff-Appellee, v. FLORIDA ROCK INDUSTRIES, INC., a Florida corporation, Defendant-Appellant, Florida Crushed Stone, a Florida corporation, Defendant

Prior History: [**1] Appeal from the United States District Court for the Middle District of Florida.

Core Terms

aggregate, hauling, trailers, rock, manufacturer, customer, horizontal, commerce, sand, termination, Sherman Act, illegality, stone, interstate commerce, pro forma, damages, conspiracy, distributor, anticompetitive, competitor, vertical, Asphalt, estimates, Turnpike, delivery, target, transportation, markets, instrumentalities, merchant

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

HN1 [blue download icon] **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 15\(a\)](#).

Antitrust & Trade Law > Sherman Act > General Overview

HN2 [blue download icon] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Clayton Act > General Overview

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

HN3 [blue download icon] **Antitrust & Trade Law, Clayton Act**

710 F.2d 752, *752L^A 1983 U.S. App. LEXIS 25371, **1

The test for standing adopted by the Eleventh Circuit is the "target area" test: The plaintiff must show that he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry.

Antitrust & Trade Law > Clayton Act > General Overview

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

HN4 [down] **Antitrust & Trade Law, Clayton Act**

The court must identify the area or areas of the economy adversely affected by the alleged anticompetitive act and then determine whether the claimed injury occurred within those areas.

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

HN5 [down] **Justiciability, Standing**

Standing to sue is a preliminary matter to be evaluated upon the allegations of the complaint.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

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

HN6 [down] **Standing, Injury in Fact**

Ultimate proof of injury in fact is not required in order for a plaintiff to have standing to sue.

Antitrust & Trade Law > Clayton Act > General Overview

HN7 [down] **Antitrust & Trade Law, Clayton Act**

The "target area" test does not require a conspiratorial purpose to injure the particular individual bringing suit.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN8 [down] **Antitrust & Trade Law, Sherman Act**

Absent an adequate showing by the plaintiff that the defendants' conspiracy will result in restraint of trade or commerce among the several states, the plaintiff's claim must be dismissed.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Transportation Law > Interstate Commerce > Federal Powers

710 F.2d 752, *752L983 U.S. App. LEXIS 25371, **1

Antitrust & Trade Law > Sherman Act > General Overview

[**HN9**](#) [down] **Sherman Act, Jurisdiction**

Jurisdiction under the Sherman Act, [15 U.S.C.S. § 1](#), does not require that the activities in question actually occur in interstate commerce. Rather, the reach of the Sherman Act is coextensive with Congress' power under the [Commerce Clause](#).

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

[**HN10**](#) [down] **Sherman Act, Jurisdiction**

The jurisdictional requirement of the Sherman Act, [15 U.S.C.S. § 1](#), may be satisfied by proving either that the business activities occurred in commerce or that those activities had an effect on commerce.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

[**HN11**](#) [down] **Sherman Act, Jurisdiction**

Any challenge to subject matter jurisdiction in a Sherman Act, [15 U.S.C.S. § 1](#), case is resolved by answering the following question: Can Congress prohibit the challenged conduct under the [Commerce Clause](#)? If so, then the conduct is within the jurisdictional reach of the Sherman Act.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

[**HN12**](#) [down] **Sherman Act, Jurisdiction**

The existence or absence of an intent to affect interstate commerce is not dispositive when determining subject matter jurisdiction under the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

[**HN13**](#) [down] **Antitrust & Trade Law, Sherman Act**

Under the "affecting commerce" test, it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. Rather, the plaintiff must

710 F.2d 752, *752L^A 1983 U.S. App. LEXIS 25371, **1

allege and prove that the relevant local activity has an effect on some other appreciable activity demonstrably in interstate commerce. Further, the plaintiff must demonstrate that the local activities as a matter of practical economics have a not insubstantial effect on the interstate commerce involved.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

Under the rule of reason, a plaintiff must demonstrate anticompetitive effect in the relevant market.

Antitrust & Trade Law > Sherman Act > General Overview

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

The Sherman Act, [15 U.S.C.S. § 1](#), prohibition against "every" agreement in restraint of trade has been interpreted by the federal courts to forbid only "unreasonable restraints."

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

A merchant may choose with whom he will do business and with whom he will not do business; such action generally does not violate the antitrust laws. Thus, the manufacturer can deal or not deal with customers for reasons sufficient to itself. This sort of arrangement, referred to as "exclusive dealing," does not give rise to antitrust liability without proof of actual competitive injury. Implicit in the freedom to deal exclusively with one merchant, of course, is the freedom to refuse to deal with a competitor of that merchant. Again, such a unilateral exercise of business judgment is free from scrutiny in the absence of proof of competitive harm, or other underlying illegal behavior.

Antitrust & Trade Law > Sherman Act > General Overview

710 F.2d 752, *752 (1983 U.S. App. LEXIS 25371, **1

[**HN18**](#) [blue document icon] Antitrust & Trade Law, Sherman Act

When a merchant goes beyond unilateral choice and combines with other merchants to deal or not to deal only with a specific customer, the legal consequences are vastly different. Such an agreement between independent merchants is known as a "concerted refusal to deal" and is generally subject to the per se rule of illegality.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN19**](#) [blue document icon] Antitrust & Trade Law, Sherman Act

A concerted refusal to deal essentially is an agreement among two or more parties that each will engage in an individual refusal to deal with a particular customer or customers.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Covenants not to Compete

[**HN20**](#) [blue document icon] Antitrust & Trade Law, Sherman Act

The touchstone of an illegal group boycott or concerted refusal to deal is the agreement between two or more merchants not to deal with another merchant when, in the absence of such an agreement, the conspiring merchants would normally have been free to deal with that merchant.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN21**](#) [blue document icon] Antitrust & Trade Law, Sherman Act

The "touchstone" of per se illegality is not the presence of exclusionary conduct in the particular case but rather is the market impact of the kind of restrictions in question. Departure from the rule of reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

[**HN22**](#) [blue document icon] Antitrust & Trade Law, Sherman Act

The key inquiry when determining whether a particular arrangement is horizontal or vertical is not the presence of a conspirator on the plaintiff's market level ("horizontal" to the plaintiff) but whether the conspiratorial agreement is between entities which are horizontally arranged at some level in the market.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN23**](#) [blue document icon] Antitrust & Trade Law, Sherman Act

710 F.2d 752, *752L^A 1983 U.S. App. LEXIS 25371, **1

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 product, or at least agrees that he will not purchase that product from any other supplier.

Antitrust & Trade Law > Sherman Act > General Overview

HN24 [] **Antitrust & Trade Law, Sherman Act**

When the victim of an alleged tie-in is not required to buy a single unit of the tied product from the tying party or from any source in which the tying party has an interest or on whose sales the tying party earns a commission, the arrangement simply does not constitute a tie.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN25 [] **Antitrust & Trade Law, Sherman Act**

Tying arrangements are subject to a special qualification that the party enforcing the tying agreement must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product.

Antitrust & Trade Law > Sherman Act > General Overview

HN26 [] **Antitrust & Trade Law, Sherman Act**

The economic power which must be demonstrated need not rise to the level of monopoly power or even dominant power in the market.

Antitrust & Trade Law > Sherman Act > General Overview

HN27 [] **Antitrust & Trade Law, Sherman Act**

Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from its uniqueness in its attributes. Thus, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > Damages

[**HN28**](#) [blue icon] Clayton Act, Claims

Under the Clayton Act, [15 U.S.C.S. § 15](#), a private plaintiff who has demonstrated a violation of the Sherman Act, [15 U.S.C.S. § 1](#), also must prove an injury to his business resulting from the defendant's wrongful actions, and some indication of the amount of the damage done.

Antitrust & Trade Law > Clayton Act > General Overview

[**HN29**](#) [blue icon] Antitrust & Trade Law, Clayton Act

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 the Clayton Act, [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Clayton Act > General Overview

[**HN30**](#) [blue icon] Antitrust & Trade Law, Clayton Act

Once the fact of causation is established, the burden of proving damages is much less severe.

Civil Procedure > Appeals > Standards of Review

[**HN31**](#) [blue icon] Appeals, Standards of Review

Although the question of damages requires that the court enter into the realm of the imprecise and the uncertain, the appellate court must reverse the jury's verdict if it becomes apparent that its judgment was based on speculation and guesswork. Its task is to ensure that the jury rendered a just and reasonable estimate based on relevant data.

Antitrust & Trade Law > Clayton Act > General Overview

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

[**HN32**](#) [blue icon] Antitrust & Trade Law, Clayton Act

Loss of future profits is a well-established basis for determining the measure of economic injury resulting from an anticompetitive act which forces the victim out of business.

Antitrust & Trade Law > Clayton Act > General Overview

[**HN33**](#) [blue icon] Antitrust & Trade Law, Clayton Act

Although the lesser standard of sufficiency controls once the fact of causation has been established, an expert's projection of future profits must be supported by proven facts.

Counsel: Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Tampa, Florida, C. Timothy Corcoran, III, Tampa, Florida, Arent, Fox, Kintner, Plotkin & Kahn, Washington, District of Columbia, William B. Sullivan, Washington, District of Columbia, Charles R. Claxton, Washington, District of Columbia, (For Florida Crushed Stone:), Holland & Knight, Tampa, Florida, Preston Moore, Tampa, Florida, for Appellant.

Schwartz & Wilson, Gainesville, Florida, Herbert T. Schwartz, Gainesville, Florida, for Appellee

Judges: Vance and Anderson, Circuit Judges, and Scott, * District Judge.

Opinion by: ANDERSON, III

Opinion

[*756] R. LANIER ANDERSON, III, Circuit Judge:

Florida Rock Industries ("FRI") appeals from an adverse judgment entered against it in a treble damages action under § 4 of the Clayton Act, [15 U.S.C.A. § 15](#) [**2] (*West Supp. 1983*),¹ and § 1 of the Sherman Act, [15 U.S.C.A. § 1](#) (*West Supp. 1983*).² [**3] A jury found for the plaintiff, Construction Aggregate Transport, Inc. ("CAT"), and awarded damages of \$300,000, which the trial court [*757] trebled. We reverse and remand for a new trial because the trial court erred in instructing the jury on a theory of per se illegality.³

I. FACTS

Construction Aggregate Transport, Inc., a Florida corporation engaged in the hauling of sand, gravel, and other rock material ("aggregate") in Central and Southern Florida, was the brainchild of one, Al Hallowell, who had worked for many years in the trucking business in Florida. The idea upon which CAT was based was a novel one for the aggregate⁴ hauling business in Florida, and involved the use of double trailers. By using these double trailers, which required only one tractor and one driver, rather than the single trailers which were the norm in the aggregate hauling industry, a substantial reduction in costs could be realized.

[**4] Hallowell also recognized that most truckers of bulk aggregate use one-way hauls; after delivering their shipment of bulk aggregate they return with an empty load to the aggregate supplier. Obviously, a business which

* Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, was a member of the panel that heard oral arguments but due to his death on May 12, 1983 did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

¹ [15 U.S.C.A. § 15\(a\)](#) (*West Supp. 1983*) states in relevant part:

[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. . . .

² [15 U.S.C.A. § 1](#) (*West Supp. 1983*) states in relevant part:

[HN2](#) [↑] 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.

³ As discussed in Section V(B) below, we also have serious reservations regarding CAT's proof of damages. See *infra* text accompanying note 55.

⁴ The term "aggregate" refers to sand, gravel, slag, crushed stone and like materials which are mixed with a cementing material to form concrete, cement, mortar, or asphalt. Such materials are key ingredients in the construction industry.

relied on two-way hauling could maximize the use of its equipment and reduce the cost of transporting each trailer of aggregate.⁵

The Florida aggregate industry historically has been geographically divided into two separate markets. Each of these markets is supplied primarily by rock mined within the particular market. One market centers around Brooksville, near Orlando in Central Florida. Aggregate produced in the Brooksville-Orlando market generally constitutes the primary supply for asphalt producers in the Central Florida area. The defendant, Florida Rock Industries, is one of the largest producers of aggregate in the state of Florida, and is one of [**5] the primary suppliers in the Brooksville-Orlando market area.⁶ The other geographical aggregate market in the state of Florida centers around the Miami and West Palm Beach area. Thus, the primary sources of aggregate materials used in the production of asphalt in Florida are the rock mines in the Miami market and the Brooksville-Orlando market. Finally, another important facet of the Brooksville-Orlando market is the production of sand materials, also used in the construction industry. Much of this sand is produced at Clermont, due east of Orlando.

At the time the Hallowell conceived the idea of using double trailers, a strong demand existed in the Miami market for the sand produced outside of Clermont in the Brooksville-Orlando market. See Record at 1066. Further, there was a strong demand in the Brooksville-Orlando market for the rock being produced by the Miami mines. [**6] According to testimony at trial, no existing hauling outfit had attempted to take advantage of the separation of these two markets. Hallowell therefore determined that the time was ripe for an aggregate trucking outfit which could meet the demand for sand in the Miami and West Palm Beach area and also introduce Miami rock into the Brooksville-Orlando area.

Miami and Orlando lie at opposite ends of a 200-mile north-south stretch of the Florida Turnpike. Hallowell's plan was to pick up sand in the Clermont area west of Orlando and truck it down to the West Palm Beach area alongside the Turnpike. After delivering the sand to his customers in West Palm Beach, he would then drive to the [*758] stone mines in the Miami area, load his double trailers with aggregate material and return to the Orlando area, delivering the Miami aggregate to asphalt producers in and around Orlando. Under this plan, CAT's truckers would engage only in two-way hauls. Further efficiencies would be realized by using the double trailers, which could carry twice the normal load.⁷

[**7] In the summer of 1977, Hallowell began efforts to implement this plan. First, he persuaded a friend, Dr. Ward, to contribute capital needed for starting up the operation. Dr. Ward contributed \$15,000 and, after Mr. Hallowell's own contribution, CAT was able to begin with operating capital of \$35,000.⁸

Next Hallowell set about designing the necessary trailers and securing their manufacture. Of critical importance to our narrative is Hallowell's choice of trailer. Rather than selecting the rear dump trailers that were generally used in the bulk aggregate hauling business in Central Florida, Hallowell chose to design his trucking operation around the use of bottom dump or "hopper" trailers. A rear dump trailer is emptied of its contents by tilting the entire trailer unit on a horizontal axis, thus allowing the aggregate to slide out the back door. The result is a relatively concentrated pile of aggregate. Record at 1059. With the hopper trailer, material [**8] is emptied through the bottom of the trailer by means of gull-wing type doors. If the driver is careful when unloading the result will be long, narrow, and neat "windrows" of aggregate material. Generally, regardless of the type of trailer used the purchaser of the aggregate will have to use a "payloader" or "front end loader" to move the deposited material into larger stockpiles.

⁵ Such a one-way haul is known as a "deadhead over." Obviously, the "trucker's dream" is a full load on both hauls. Record at 1084-85.

⁶ According to its president, Edward Baker, FRI is the largest producer of aggregate in the state of Florida. Record at 1557.

⁷ At trial, Hallowell estimated that sand which sold for \$1.50 a ton in Orlando would bring \$4.50 a ton in the Miami area. Conversely, rock selling for \$3.00 in the Miami area would sell for \$7.00 in the Orlando area.

⁸ Included in this figure was a bank loan of \$10,000.

It is possible, however, that this job may take longer and require greater effort when the material has been deposited in windrows by a hopper trailer.⁹

[**9] Hallowell next took his design to Walter Harkala of Hardey Manufacturing. Harkala agreed that there was merit to Hallowell's business plan, and after working out the financial details Hardey Manufacturing began to construct the necessary trailers. The manufacturing process proved to be a slow one. Because of the unique design features of the new trailers, in particular the mechanism for opening the gull-wing doors, production of the first set of trailers took approximately six months. Ultimately, Hardey would manufacture three sets of trailers, or six trailers in all. Harkala testified that eventually Hardey would have been able to manufacture 12 to 18 trailers per year. Record at 1042. This capability coincided with Hallowell's goal of putting a fleet of twenty trailers on the Turnpike, capable of delivering 1,000 tons of aggregate a day. Record at 1274.

While the trailers were being manufactured, Hallowell was taking care of other business. At that time, the state of Florida allowed the use of double trailers only on the Turnpike, not on any other state or federal highways. This complicated Hallowell's round trip concept, and necessitated the purchase or construction [**10] of a "staging area" at each end of the Turnpike. At the end of each haul, CAT would have to pull off the Turnpike into the staging area, [*759] whereupon the two trailers would be unhitched. A tractor would then haul each trailer separately to its delivery destination, and then back to the staging area where it would be exchanged for the other trailer. The same procedure would then be carried out in order to load the two trailers. After loading and rehitching, the double trailer unit would begin its return journey up the Turnpike.¹⁰

[**11] Next, Hallowell set about obtaining a Certificate of Public Necessity and Convenience from the Florida Public Service Commission. After failing to secure a 10-county Certificate from a friend, he arranged to purchase a statewide Certificate from the Osceola Construction Company in Pensacola for \$25,000. After purchasing two tractors from International Harvester¹¹ and receiving the first set of trailers from Hardey Manufacturing, Hallowell secured approval and licensing from the Turnpike Authority for his equipment and his drivers. By October of 1978, CAT was ready to begin operations.

Because the viability of CAT depended upon its ability to haul to both ends of the Florida Turnpike, the hours of operation of its customers and suppliers were extremely important. In particular, it was critical to CAT's success that there be a customer for Miami rock in the Orlando area that would be able to take deliveries 24 hours a day. Only with the [**12] unrestricted delivery schedule at the north end of the "circuit" could CAT hope to maximize the use of two-way hauling and operate at a profit. See Record at 1298-300, 1491-92, 1014-15.

By November of 1978, CAT had lined up customers at both ends of the Turnpike. Typically, CAT would begin a two-way haul by loading its trailers with sand at the north end of the trip. This sand would be supplied by a mine in the Clermont area which would be open 24 hours a day for loading. Once the loaded trailers had been individually shuttled to the staging area on the Turnpike they would be hitched together for the journey south. After a three -

⁹ Jerry DeGarmo, a former vice president for FRI, testified that regardless of the type of trailer used, the aggregate deposited would have to be picked up with a front-end loader and moved. Further, the difference in cost between moving rock dropped by a rear dump trailer and moving rock dropped by a bottom dump trailer "would be negligible." Apparently, any preference for the use of rear dump trailers stems from the reduced likelihood of inadvertently mixing the stockpiles in the delivery yards. See Record at 1023-30. The mixing of stockpiles containing different sizes or grades of aggregate could have disastrous results for the concrete or asphalt produced. Moreover, because concrete and asphalt producers are largely dependent upon public contracts, their products are subject to strict quality controls. See also *infra* note 18.

¹⁰ Eventually, Hallowell intended to station one cab permanently at each staging area to handle all off-Turnpike duties, including loading and unloading aggregate material. This would free up at least one driver to handle only over-the-road hauling down the Florida Turnpike. Maximum efficiency would be reached with the use of one over-the-road tractor running a continuous circuit between Orlando and West Palm Beach, and one shuttle tractor at each end of the turnpike servicing up to six hopper trailers. See Record at 1421-23.

¹¹ The cost of the first tractor was \$50,000, the second \$165,000.

hour journey, the sand would be delivered to construction outfits in the West Palm Beach area. CAT's first customer for Clermont sand was Mack Concrete. Later CAT changed over to Rinker Materials Corporation ("Rinker") because of more advantageous delivery hours.

Ideally, CAT would arrive at the Rinker Lake Worth plant in West Palm Beach just as it opened at 7 a.m. After dumping the sand at Rinker, each empty trailer would be shuttled back out to the Turnpike and hitched together for the trip to Rinker's stone mines in the Miami area.¹² Because [**13] Rinker's Miami stone operation generally closed its gates at 3:30 p.m., CAT would aim for a noon arrival at the Miami staging area. Here, once again each trailer would be unhitched and shuttled to the Rinker mine one at a time. Loading the trailers in this manner would take approximately two hours, allowing CAT to begin the journey north at approximately 2 p.m. in the afternoon. Because of the distance involved, as well as the time that would be lost in the shuttle maneuver at the staging area at the north end of the Turnpike, rarely could CAT arrive at its north delivery point for Miami rock earlier than 8 p.m. Hence the necessity for a customer at the north end with 24-hour delivery. See Record at 1281-83, 1491-92.

From November of 1978 until mid-August of 1979, CAT's northern delivery point customer for aggregate rock¹³ transported [*760] from Rinker in Miami was Southern Paving Co., which was located just south of Orlando [**14] on the Florida Turnpike. Southern Paving's Orlando facilities were open on a 24-hour basis. In June of 1979, CAT received its second shipment of double trailers from Hardey, and began using them in its deliveries between Miami and Orlando. On August 10, however, CAT was terminated by Southern Paving, and had to seek another customer on the northern end of its route which would be open on a 24-hour basis.¹⁴

CAT's first attempts to secure other purchasers of stone in the Orlando area proved [**15] fruitless. By late August, however, CAT was able to obtain the business of a customer which was open 24 hours a day, and on August 29 CAT began hauling rock from Rinker in Miami to Basic Asphalt Company ("Basic") in Orlando.

When negotiating with Basic, Hallowell had dealt directly with Scott Carlson, Basic's vice president. According to testimony at trial, Hallowell offered Carlson a shipping price for Miami stone that was \$.71 per ton less than what Carlson was paying other trucking outfits for the delivery of stone produced in the Orlando area. According to Hallowell, he and Carlson reached "an understanding or an agreement" that CAT would haul 5,000 tons of rock from Miami -- approximately two and one-half months of work. Record at 1290.¹⁵ CAT began hauling rock to Basic almost immediately and continued doing so until CAT was terminated on September 21, 1979.¹⁶ The events surrounding this termination by Basic form the basis for the present controversy.

[**16] According to Hallowell, Scott Carlson phoned his home on a Wednesday evening, when he was not home. Upon returning Carlson's call, Hallowell was told not to haul any more material to Basic. Hallowell testified that Carlson said:

Well, I got word from Florida Rock that they don't want us to get any more material out of Miami. . . . Al, these people came and told me that if I got any more rock out of Miami, they were damn sure going to shut off allocation from Brooksville.¹⁷

¹² Rinker owned two stone mines in the area: Rinker Lake Worth and FEC.

¹³ The type of stone being carried from Rinker in Miami to Southern Paving outside of Orlando was known as "three-eighths stone," and was customarily used for making asphalt.

¹⁴ In its original complaint, CAT alleged that Southern Paving had been coerced by one of its Orlando stone suppliers, Florida Crushed Stone, into terminating CAT's delivery of stone from Rinker in Miami. Subsequently, CAT stipulated to the granting of a summary judgment against it on its claim against Florida Crushed Stone. Record at 525.

¹⁵ Whether Carlson actually agreed to such an arrangement was a matter of some dispute at trial. See *infra* Section V(A).

¹⁶ Invoices show that CAT shipped rock one day, missed the following week for unexplained reasons, then shipped four days for each of the following two weeks. In all, CAT shipped approximately 850 tons of aggregate up until its termination.

Record at 1306. Hallowell then called Ted Baker, the president of FRI and an old friend, who said that he would look into the matter. On Saturday of that week, Baker called Hallowell back and told him that the threat had been a mistake and that Basic had complained about the way that CAT was delivering the aggregate.

[**17] According to officials for Basic and FRI, coercion was not involved in the termination of CAT. Rather, Hallowell's choice of hopper trailers instead of rear dump trailers resulted in the inadvertent mixing of different types of aggregate in the unloading areas.¹⁸ [**18] Further, there was testimony to [*761] the effect that more labor was needed to move the narrow windrows of aggregate deposited by a hopper trailer than would be necessary to move the more concentrated piles left by rear dump trailers.¹⁹ Thus, the defendants' position was that CAT's termination by Basic was merely a business decision based upon CAT's inability to perform as expected.²⁰

[**19] The Monday after CAT's termination by Basic, CAT began delivering the stone from Rinker in Miami to the Rinker South Orange Concrete Plant south of Orlando. The substitution of Rinker South Orange for Basic, however, suffered one major flaw: Rinker South Orange closed for deliveries at 5 p.m. Hallowell and his drivers testified that the original concept of one round trip every 18 to 20 hours was impossible under this arrangement. Although on occasion Rinker would remain open beyond 5 p.m., generally CAT was unable to complete its circuit of deliveries. As a result, CAT's drivers would have to lay over for the night in Orlando and make their deliveries at Rinker South Orange in the morning. Each such morning delivery meant a loss of \$500 for CAT. See Record at 1324-25.

CAT continued hauling from Rinker in Miami to Rinker South Orange for approximately 8 weeks. During this time, CAT was unable to find another 24-hour customer at the north end of the circuit. Unable to generate enough revenue to continue in business, CAT was forced to return its trailers to Hardey Manufacturing in December.²¹ At

¹⁷ The significance of the term "allocation" is discussed below at note 56. Testimony at trial disclosed that FRI was Basic's major supplier of aggregate. After Basic stopped receiving Miami rock from Rinker, through CAT, its only purchases for at least three months were from FRI.

¹⁸ Aggregate brought out of the Miami mines typically has a lighter specific gravity than aggregate found in the Brooksville-Orlando area. As a result, it is not perfectly interchangeable with the Brooksville rock. For this reason, the two types of aggregate could not be mixed in the same stockpile. Although asphalt might be comprised of several different types of rock, including both types of aggregate, a special mix would be required. Obviously, then, stockpiling different types of aggregate in the same yard would increase the likelihood of mixing those types, particularly if deliveries were made in a careless manner. The use of rear-dump loaders generally would minimize this risk. See Record at 1023-25.

Hopper trailers are most effective when the delivery facility utilizes "hoppers" for receiving the aggregate. The hopper consists essentially of a cone-shaped receptacle leading to a conveyer belt and covered by a grate. The hopper trailer is driven over the grated surface and its bottom doors are opened to allow aggregate to fall into the receptacle, where it is carried by the conveyer belt to a storage facility. If a particular customer used hoppers, there would be little chance of mixing different types of aggregate. Neither Southern Paving nor Basic used hoppers, however. As a result, unloading aggregate from a hopper trailer could be a more complicated operation. See Record at 1294.

¹⁹ On the other hand, there was testimony that the customer would have to use a payloader to move the delivery piles into more condensed stockpiles regardless of whether delivery was made by a rear-dump trailer or a hopper trailer. See Record at 1319.

²⁰ According to FRI's sales representative, Walter McFall, the person who allegedly threatened Basic, when he asked Jake Scherf of Basic why CAT had been terminated, Scherf responded:

Walter, it wouldn't work out. They were scattering the material all over our stockpile area. Each morning that I would come in, I would either have to get on the front end loader or one of my people would have to get on the front end loader and stockpile the material every morning. And it just didn't work out to [sic] their behalf.

Record at 1541. Hallowell and two of his drivers, however, testified that they had never received any complaints about the way in which they had delivered aggregate. According to Ted Baker, president of FRI, Carlson told him that if McFall had said anything to him that appeared to be a threat of economic coercion, "he would take that as a joke because he and Walter were very close friends." Record at 1563. According to Hallowell, Baker told him that "Walter McFall threatened them out there, but, hell, he was only kidding." Record at 1307.

approximately the same time, CAT's insurance policies were cancelled. By [**20] the end of the year, CAT had ceased all operations.

On March 10, 1980, CAT filed its complaint against FRI alleging violations of [§§ 1](#) and [2](#) of the Sherman Antitrust Act. CAT alleged that FRI, as a major supplier of construction aggregate in the Central Florida area, had coerced Basic into an agreement to cease purchasing aggregate hauled by CAT from competing Miami aggregate mines. Subsequently, CAT dropped its [§ 2](#) claim against FRI, and proceeded to trial only on the [§ 1](#) claim. The case was submitted to the jury on a theory of per se illegality and on April 17 the jury returned a \$300,000 verdict for CAT. Damages were trebled pursuant to [15 U.S.C.A. § 15\(a\)](#) and FRI noticed this appeal.

[*762] FRI alleges the following errors: (1) CAT lacked standing to sue under § 4 of the Clayton Act; (2) CAT's failure to show any restraint [**21] on interstate commerce deprived the court of subject matter jurisdiction; (3) the court erred in instructing the jury under a theory of per se illegality; (4) the alleged antitrust violation by FRI did not injure CAT or force it out of business; and (5) there was insufficient evidence to support the \$300,000 damage award. After a close examination of the record, we conclude that the trial court did indeed err in sending this case to the jury under an instruction on per se illegality. Accordingly, we remand for a new trial.

II. STANDING

Section 4 of the Clayton Antitrust Act provides a private cause of action for damages to:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws

[15 U.S.C.A. § 15 \(West Supp.1983\)](#). Read literally, this provision would confer antitrust standing on business organizations far removed from those areas of the economy actually affected by an anticompetitive act. To eliminate the possibility of remote liability, courts have interpreted the "by reason of" language of § 4 as creating a requirement of standing. [HN3↑](#) [**22] The test for standing adopted by this circuit²² is the "target area" test: The plaintiff must show that he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry. E.g., [Associated Radio Service Co. v. Page Airways, Inc.](#), 624 F.2d 1342, 1362 (5th Cir.1980), cert. denied, 450 U.S. 1030, 101 S. Ct. 1740, 68 L. Ed. 2d 226 (1981); [Larry R. George Sales Co. v. Cool Attic Corp.](#), 587 F.2d 266, 270-72 (5th Cir. 1979); [Donovan Construction Co. of Minnesota v. Florida Telephone Corp.](#), 564 F.2d 1191, 1192 (5th Cir.1977), cert. denied, 435 U.S. 1007, 98 S. Ct. 1878, 56 L. Ed. 2d 389 (1978); [Yoder Brothers, Inc. v. California-Florida Plant Corp.](#), 537 F.2d 1347, 1359 (5th Cir.1976), cert. denied, 429 U.S. 1094, 97 S. Ct. 1108, 51 L. Ed. 2d 540 (1977); [Southern Concrete Co. v. U.S. Steel Corp.](#), 535 F.2d 313, 316 (5th Cir.1976), cert. denied, 429 U.S. 1096, 97 S. Ct. 1113, 51 L. Ed. 2d 543 (1977); [Tugboat, Inc. v. Mobile Towing Co.](#), 534 F.2d 1172, 1175 (5th Cir.1976); [**23] [Jeffrey v. Southwestern Bell](#), 518 F.2d 1129, 1131 (5th Cir.1975); [Battle v. Liberty National Life Ins. Co.](#), 493 F.2d 39, 49 & n. 10 (5th Cir. 1974), cert. denied, 419 U.S. 1110, 95 S. Ct. 784, 42 L. Ed. 2d 807 (1975). See generally [Associated General Contractors of California, Inc. v. California State Council of Carpenters](#), 459 U.S. 519, - & n. 33, 103 S. Ct. 897, 907-08 & n. 33, 74 L. Ed. 2d 723, 736-37 & n. 33 (1983) (discussing various tests used by courts of appeals).²³ Thus, the task before this court

²¹ For a brief period shortly before its demise, CAT resumed doing a more limited form of business with Southern Paving. See Record at 1377-83.

²² In [Bonner v. City of Prichard](#), 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id. at 1209*. Cf. [Stein v. Reynolds Securities, Inc.](#), 667 F.2d 33 (11th Cir.1982) (adopting as binding precedent all post-September 30, 1981, decisions of Unit B of former Fifth Circuit).

²³ Only rarely has the Supreme Court spoken directly to the issue of standing. See [Associated General Contractors of California, Inc. v. California State Council of Carpenters](#), *supra*; [Hawaii v. Standard Oil Co.](#), 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972); [Perkins v. Standard Oil](#), 395 U.S. 642, 89 S. Ct. 1871, 23 L. Ed. 2d 599 (1969). In [Blue Shield of Virginia v. McCready](#), 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982), the Court did not rely directly on any of the various tests used by the courts of appeals. It also expressed no opinion as to the relative utility of these tests. In concluding that the plaintiff in that case

is to [HN4](#) [↑] identify the area or areas of the economy adversely affected by the alleged anticompetitive act and then to determine whether the claimed injury occurred within those areas. See [Yoder Brothers, Inc. v. California-Florida Plant Corp., 537 F.2d at 1359](#). By engaging in this analysis, we can safely limit the class of [[*763](#)] potential plaintiffs to those persons who will most adequately vindicate the purposes of the antitrust laws. See [Jeffrey v. Southwestern Bell, 518 F.2d at 1131](#). [\[**24\]](#)

[\[**25\]](#) The starting point in our analysis is CAT's complaint against FRI. See [Yoder Brothers, Inc. v. California-Florida Plant Corp., 537 F.2d at 1359](#) [HNS](#) [↑] (standing to sue is preliminary matter to be evaluated upon allegations of complaint).²⁴ According to the complaint, FRI engages in two businesses relevant to our inquiry. FRI is:

A large producer of construction aggregate and sand used in the manufacturing of asphalt and also used in roadbuilding, construction fill and the manufacture of concrete in Florida.
....

Likewise, in addition to owning and operating aggregate and sand mines in Florida, the defendant, FRI, through majority stock interests, controls a significant portion of the hauling industry in Florida; specifically, the aggregate, sand and construction materials hauling business. Upon information and belief, plaintiff says that the defendant, FRI, controls approximately 35% of the hauling industry described above in Florida.

Record at 4.

[\[**26\]](#) The complaint describes FRI's alleged anticompetitive actions:

The nature of the economic coercion alleged herein essentially took the form of threatening [sic] to cut off the sale and supply of mined aggregate materials to such hauling customers unless they agreed to contract for the hauling of such products only from those aggregate haulers owned or controlled by the defendant FRI.
....

With respect to Basic Asphalt, agents or employees of the defendant FRI coerced Basic Asphalt into a contract, combination or conspiracy to terminate the then extant business relationship between the plaintiff and Basic Asphalt.

Record at 5-6.

CAT's standing argument apparently is two-fold. First, it argues that because FRI competes for the aggregate hauling business in Central Florida through its wholly owned subsidiary Florida Rock and Tank Lines, Inc. ("Tank Lines") then the relevant sector of the market affected by FRI's acts was the aggregate hauling industry.²⁵ Secondly, CAT argues that because its unique operation made possible the marketing of Miami stone in the Orlando area, its operation was an essential aspect of the aggregate production industry.

[\[**27\]](#) FRI contends that any alleged coercion was aimed at the competition in aggregate production and not in aggregate hauling. Thus, FRI argues that insofar as its acts were aimed at eliminating competition from Rinker's Miami stone mines, the sector of the market affected was the *production* of stone aggregate used in the Florida construction industry.

In our view, FRI characterizes CAT's allegations much too narrowly. The complaint clearly alleges that FRI attempted to eliminate competition from CAT in the aggregate hauling industry. According to the complaint, therefore, one area of the market that would be adversely affected by the alleged conduct of FRI would be the aggregate hauling industry. CAT clearly operated within this market; examination of the complaint thus demonstrates CAT's standing to challenge FRI's alleged anticompetitive behavior.

was "within that area of the economy . . . endangered by [the] breakdown of competitive conditions," however, *id.* at [102 S. Ct. at 2549, 73 L. Ed. 2d at 162](#), the Court implicitly sanctioned continued, flexible use of the "target area" test.

²⁴ [HNS](#) [↑] Ultimate proof of injury in fact is not required in order for a plaintiff to have standing to sue. [Yoder Brothers, Inc. v. California-Florida Plant Corp., 537 F.2d at 1360 n. 6](#). Otherwise, preliminary litigation over the threshold question of standing would result in a "trial on the merits."

²⁵ In 1979, Tank Lines owned and operated approximately 350 aggregate trucks in the state of Florida, which generated revenues of about \$10-12 million. Record at 1558-59.

FRI's contentions, however, appear to rest on two implicit assumptions which should be addressed. First, FRI contends that the evidence introduced at trial belies CAT's claim that the target market was the [*764] hauling industry. Rather, FRI suggests, the proof at trial indicated that the target market was the aggregate production [**28] industry. As we noted earlier, however, "standing to sue is a preliminary matter, to be evaluated upon the allegations of the complaint." [*Yoder Brothers, Inc. v. California-Florida Plant Corp., 537 F.2d at 1359.*](#) Even were we to go beyond the face of the complaint, we would disagree with FRI's contention. On the one hand, Mr. Hallowell's testimony, described earlier, does suggest that the precise target of FRI's coercion was competition from Rinker's Miami stone mines. Testimony by Walter McFall, the FRI agent who allegedly coerced Basic, suggests a different conclusion. Although McFall denied having threatened to cut off Basic's allocation of FRI rock, he did give his version of a conversation which occurred between himself and Jake Scherf, vice president in charge of production at Basic. According to McFall, CAT's hauling to Basic, and not the source of the rock being hauled, was the starting point for the conversation.²⁶ Thus, the record actually developed at trial is not conclusive, and suggests that both the aggregate production and the aggregate hauling industries were potential targets of FRI's acts.

[**29] This ambiguity in the testimony is related, in our view, to the second assumption implicit in FRI's argument: that only one discrete sector of the market may be the target for a particular anticompetitive act. Nothing in our cases, however, requires such a narrow interpretation of the target area test. In fact, the Supreme Court recently sanctioned an analysis of standing which expressly recognizes that different areas of the market may be so closely related that both may be targets of the same anticompetitive act. See [*Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 \(1982\).*](#)

Our analysis of standing is aimed at determining whether the plaintiff's injuries are merely indirect, secondary, or remote, [id. at 476-81, 102 S. Ct. at 2547-49, 73 L. Ed. 2d at 159-62;](#) its purpose is to ensure against potentially disastrous recoveries by those only tenuously harmed. [*Jeffrey v. Southwestern Bell, 518 F.2d at 1131.*](#) Few of the cases cited by FRI involve an anticompetitive act aimed at either or both of two closely related markets in which the defendant is engaged.²⁷ FRI, however, clearly has an economic [**30] interest in two separate markets: the construction aggregate [*765] production industry and the construction aggregate hauling industry. While these markets might generally be viewed as separate for most purposes, in the specific context of this case they are not. Even if FRI's conduct was aimed most directly at restraining competition for the production of aggregate, FRI must

²⁶ McFall testified as follows:

Well, I went in to talk to Jake as I do periodically, and I asked Jake the question. I said, "Jake, is it true that Construction Aggregate is hauling materials into your operation?" And Jake's answer was yes. He said they have hauled a few loads of material in here. And my next question to Jake is, "Is the material working out for you?" And Jake kind of nodded his head and said, "Not too well." I said, "Jake," I said, "You know our problems that we are having at Brooksville as far as the stockpiles of materials there. And you and I have discussed many times in the past about keeping your stockpile of material up." And Jake said, "I know that." "The only thing I can suggest to you is if you use a load of material or three loads a day, I would certainly replenish that material each day so that stockpile would not go down." I said, "Because at the quarry at Brooksville, if your stockpile should go down and you should need a large quantity of material say in the neighborhood of 40, 50, 60 loads in a short period of time, in a day or two period of time," I said, "Due to our stockpile conditions at Brooksville, I don't know whether we will be able to get you that large quantity of material or not."

Record at 1536-37.

²⁷ This is not a case like [*Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 \(5th Cir. 1980\), cert. denied, 450 U.S. 1030, 101 S. Ct. 1740, 68 L. Ed. 2d 226 \(1981\)*](#), in which the relationship between the plaintiff and the defendant was purely vertical in market terms. In *Page*, a supplier of Grumman Avionics equipment sued an installer of that equipment for attempting to drive out another installer. Thus, there was no direct competition between the plaintiff and the defendant. The only market in which the defendant had an interest in restraining competition was the installation of avionics equipment. Therefore, it was most appropriate in *Page* to allow a direct competitor of the defendant to attempt to vindicate the interests which underlie antitrust enforcement. [624 F.2d at 1362-63;](#) see [*Associated General Contractors of California, Inc. v. California State Council of Carpenters, supra, U.S. at - , 103 S. Ct. at 910-11, 74 L. Ed. 2d at 740-41.*](#)

have foreseen that the direct effect of such a restraint would be to eliminate an innovative competitor from the field of aggregate hauling -- a field in which FRI through its wholly owned subsidiary, Tank Lines, was a dominant factor.

[**31] The Supreme Court's recent decision in *Blue Shield of Virginia v. McCready, supra*, provides strong support for our position. In *McCready*, a Blue Cross subscriber denied reimbursement for the costs of treatment by a psychologist brought a § 1 claim against her insurer, whose policy it was to reimburse costs incurred only during treatment by a psychiatrist. Although acknowledging that the apparent goal of the conspiracy was to restrict competition by psychologists, the Court nonetheless held that the subscriber had standing to sue. First, the Court looked to the "physical and economic nexus" between the violation and the harm to the plaintiff:

The harm to McCready and her class was clearly foreseeable; *indeed, it was a necessary step in effecting the ends of the illegal conspiracy*. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "the type of loss that the claimed violations . . . would be likely to cause."

Id. at 479, 102 S. Ct. at 2549, 73 L. Ed. 2d at 161 (emphasis added) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)). [**32] Next, the Court turned to an examination of the relationship between the injury alleged and those injuries about which Congress was concerned when it provided private remedies under § 4 of the Clayton Act. Again, the Court focused on the inextricable relationship between the competitive injury the conspirators sought to inflict -- elimination of the psychologists as Blue Cross competitors -- and the injury suffered by the subscriber -- increased costs for psychologists' services. *457 U.S. at 483, 102 S. Ct. at 2550-51, 73 L. Ed. 2d at 163-64*. In our view, it is particularly significant that the Court recognized that *HN7* [↑] the "target area" test does not require a conspiratorial purpose to injure the *particular individual bringing suit*. *Id. at 479 n. 15, 102 S. Ct. at 2548 n. 15, 73 L. Ed. 2d at 161 n. 15*.

In the instant case, and on the basis of the Court's reasoning in *McCready*,²⁸ we cannot say that CAT's injury was too "fortuitous," "incidental," or "remote" to allow for a § 4 action. Rather, whatever the specific motivation behind FRI's act, injury [**33] to the aggregate hauling industry, and hence CAT, was a necessary step. Indeed, that FRI's subsidiary, Tank Lines, competed with CAT for the aggregate hauling business in Florida strongly suggests that FRI's goal was the elimination of CAT. Thus, the evidence supports the conclusion that the aggregate hauling industry in Florida was a sector of the economy which was endangered by a breakdown of competitive [*766] conditions. See *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d at 1359-61 (suit allowed by distributor of restricted product where more than one area of economy affected); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d at 1176-78 (union had standing to challenge anticompetitive behavior by owners of tugboats attempting to monopolize tugboat industry).

[**34] III. SUBJECT MATTER JURISDICTION

²⁸ Recently, the Supreme Court further refined the standing analysis used in *McCready*. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters, supra*, a union alleged that members of a contractors' trade association coerced member and nonmember contractors and landowners to give some of their business to nonunion contracting firms, thereby injuring unionized firms, as well as the business activities of the unions. In denying the union standing, the Court examined the following factors: (1) the causal connection between the alleged violation and the injury to the plaintiff; (2) the intent to cause harm to the plaintiff; (3) the nature of the injury, i.e., whether the plaintiff was either a consumer of the defendants' goods or a competitor of the defendants; and (4) the directness of the injury. The Court concluded that the plaintiff union was neither a consumer nor a competitor of the defendants; in particular, the Court noted that "the existence of more direct victims of the alleged conspiracy" (unionized firms) should ensure adequate protection of the markets *directly involved*. Finally, the Court found it significant that the type of harm allegedly suffered by the union was more clearly the concern of the labor laws. In our view, *Associated General Contractors* does not alter our conclusion.

FRI next contends that the trial court lacked subject matter jurisdiction because CAT failed to demonstrate the necessary restraint on interstate commerce. [HN8](#)²⁸ Absent an adequate showing by the plaintiff that the defendants' conspiracy will result "in restraint of trade or commerce among the several states," [15 U.S.C.A. § 1](#), the plaintiff's claim must be dismissed.

It is well established that [HN9](#)²⁹ jurisdiction under the Sherman Act does not require that the activities in question actually occur in interstate commerce. See [McLain v. Real Estate Board of New Orleans](#), [444 U.S. 232, 241, 100 S. Ct. 502, 508, 62 L. Ed. 2d 441 \(1980\)](#); [Brett v. First Federal Sav. & L. Ass'n](#), [461 F.2d 1155, 1157 \(5th Cir.1972\)](#). Rather, the reach of the Sherman Act is coextensive with Congress' power under the [Commerce Clause](#). See [McLain v. Real Estate Board of New Orleans](#), [444 U.S. at 241, 100 S. Ct. at 508](#); [United States v. Southeastern Underwriters Ass'n](#), [322 U.S. 533, 558, 64 S. Ct. 1162, 1176, 88 L. Ed. 1440 \(1944\)](#); [\[**35\] United States v. Cargo Service Stations Inc.](#), [657 F.2d 676, 679-80 \(5th Cir.1981\)](#), cert. denied, [455 U.S. 1017, 102 S. Ct. 1712, 72 L. Ed. 2d 135 \(1982\)](#); [Chatham Condominium Ass'n v. Century Village, Inc.](#), [597 F.2d 1002, 1007-08 \(5th Cir.1979\)](#).²⁹ The cases establish that the Sherman Act was intended to reach activities that "while wholly local in nature, nevertheless substantially affect interstate commerce." [McLain v. Real Estate Board of New Orleans](#), [444 U.S. at 241, 100 S. Ct. at 508](#) (emphasis added). [HN10](#)³⁰ The jurisdictional requirement of the Sherman Act may therefore be satisfied by proving either that the business activities occurred in commerce or that those activities had an effect on commerce. [Id. at 242, 100 S. Ct. at 509](#). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." [United States v. Women's Sportswear Association](#), [336 U.S. 460, 464, 69 S. Ct. 714, 716, 93 L. Ed. 805 \(1949\)](#); see [Hospital Building Co. v. Trustees of the Rex Hospital](#), [425 U.S. 738, 743, 96 S. Ct. 1848, 1851, 48 L. Ed. 2d 338 \(1976\)](#); [\[**36\] Gulf Oil Corp. v. Copp Paving Co.](#), [419 U.S. 186, 195, 95 S. Ct. 392, 398, 42 L. Ed. 2d 378 \(1974\)](#).³⁰

[**37] The plaintiff, CAT, is a Florida corporation engaged in business only within the state of Florida. Materials hauled by CAT originated in Florida rock and sand mines, and were delivered to Florida customers for use in construction projects within the state of Florida. The defendant, FRI, also is a Florida corporation, listed on the American Stock Exchange, which also engages in purely intrastate business. FRI produces sand and construction aggregate which are used in the manufacturing of concrete and asphalt. The record does not demonstrate the existence of any customers of either FRI or Basic in states other than Florida. Thus, it is clear that the "in commerce" or "flow of commerce" theory of jurisdiction is [\[*767\]](#) not available to CAT. Rather, CAT must rely on the "affecting commerce" branch of Sherman Act jurisdiction.

In [McLain v. Real Estate Board of New Orleans, supra](#), the Supreme Court discussed at length the appropriate analysis [HN13](#)³¹ under the "affecting commerce" test. "It is not sufficient merely to rely on identification of a relevant local activity and [\[**38\]](#) to presume an interrelationship with some unspecified aspect of interstate commerce." [444 U.S. at 242, 100 S. Ct. at 509](#). Rather, the plaintiff must allege and prove that the relevant local activity "has an effect on some other appreciable activity demonstrably in interstate commerce." [Id.](#) Further, the plaintiff must demonstrate that the local activities "as a matter of practical economics" have a not insubstantial effect on the interstate commerce involved. [Id. at 242-46, 100 S. Ct. at 509-11](#). See also [Hospital Building Co. v.](#)

²⁹ As we have stated:

[HN11](#)³² any challenge to subject matter jurisdiction in a Sherman Act case is necessarily resolved by answering the following question: Can Congress prohibit the challenged conduct under the [Commerce Clause](#)? If so, then the conduct is within the jurisdictional reach of the Sherman Act.

[Chatham Condominium Ass'n v. Century Village, Inc.](#), [597 F.2d at 1008](#).

³⁰ It is also well established that [HN12](#)³³ the existence or absence of an intent to affect interstate commerce is not dispositive when determining subject matter jurisdiction under the Sherman Act. See [Hospital Building Co. v. Trustee of the Rex Hospital](#), [425 U.S. at 744-45, 96 S. Ct. at 1852](#). Neither is it necessary to prove that the antitrust violation itself affected commerce. See [Western Waste Serv. v. Universal Waste Control](#), [616 F.2d 1094, 1097 \(9th Cir.\)](#), cert. denied, [449 U.S. 869, 101 S. Ct. 205, 66 L. Ed. 2d 88 \(1980\)](#).

Trustees of the Rex Hospital, 425 U.S. at 743-47, 96 S. Ct. at 1851-53; Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 202, 95 S. Ct. at 402.³¹

[**39] In our view, CAT introduced substantial evidence of its relationship with interstate markets. For example, the steel used to fabricate the trailers purchased by [*768] CAT was fabricated in Pennsylvania.³² The mechanism used to connect CAT's double trailers, called a "fifth wheel" or "dolly," was produced in Holland, Michigan. Further, the purchase of trailers by CAT was financed by the Ford Motor Credit Co., a national corporation. See McLain v. Real Estate Board of New Orleans, 444 U.S. at 245, 100 S. Ct. at 510; Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. at 743-45, 96 S. Ct. at 1851-52; United States v. Employing Plasterers Ass'n, 347 U.S. 186, 187-88, 74 S. Ct. 452, 453, 98 L. Ed. 618 (1954); Heille v. City of St. Paul, 671 F.2d 1134, 1136-37 (8th Cir.1982); Western Waste Serv. v. Universal Waste Control, 616 F.2d 1094, 1097 (9th Cir.), cert. denied, 449 U.S. 869, 101 S. Ct. 205, 66 L. Ed. 2d 88 (1980). Finally, the two tractors purchases by CAT to haul its double trailers were manufactured out of state by International Harvester. See [**40] Appellant's Brief, at 26; Record at 1034-38. Plaintiff's exhibit number 11 demonstrates that the sale of these tractors was financed by the International Harvester Credit Corporation pursuant to a retail contract between IHCC and CAT. This exhibit, a notice of repossession and private sale, originated in IHCC's Atlanta office. See Brett v. First Federal Sav. & L. Ass'n, 461 F.2d at 1157.

³¹ In *McLain*, the Court referred generally to the local activities of the defendant. Thus, *McLain* can be read as limiting our inquiry to the relationship between relevant local activities of the defendant and interstate commerce. See Western Waste Serv. v. Universal Waste Control, 616 F.2d at 1097 n. 2 (focus of inquiry is on defendant's business). In our view, such an analysis is too restrictive, and is not supported by the case law. First, *McLain* involved plaintiffs who were consumers rather than businesses. See also Chatham Condominium Ass'n v. Century Village, Inc., 597 F.2d 1002, 1005-10 (5th Cir.1979); City of Fort Lauderdale v. East Coast Asphalt Corp., 329 F.2d 871, 872-73 (5th Cir.), cert. denied, 379 U.S. 900, 85 S. Ct. 187, 13 L. Ed. 2d 175 (1964); cf. United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189, 74 S. Ct. 452, 454, 98 L. Ed. 618 (1954) (criminal prosecution); United States v. Cargo Service Stations, Inc., 657 F.2d 676, 678 (5th Cir.1980) (same), cert. denied, **455 U.S. 1017, 102 S. Ct. 1712, 72 L. Ed. 2d 135 (1982)**. In such cases there will be little alternative to concentrating on the defendant's activities.

More importantly, however, the antitrust laws are concerned primarily with the integrity of interstate markets. The starting place for analysis, therefore, is the relationship between the defendant's business and interstate markets, in particular the effect the defendant's business will have on those markets. Most often this effect will be readily apparent because the defendant engages directly in interstate commerce, and any restrictive conduct has an immediate impact on the particular goods or services involved. See Kypta v. McDonald's Corp., 671 F.2d 1282 (11th Cir.), cert. denied, 459 U.S. 857, 103 S. Ct. 127, 74 L. Ed. 2d 109 (1982). Beginning the inquiry with an examination of the defendant's activities, however, does not mean that the plaintiff's relationship with interstate markets is irrelevant. Occasionally the relationship between the defendant and interstate commerce becomes apparent only by examining the relationship between the defendant and other businesses. Hypothetically, a business engaged in purely intrastate commerce could restrain trade in interstate commerce through its local conduct with regard to businesses that enjoy substantial ties to interstate commerce. Thus, when determining whether interstate commerce is affected by an alleged violation courts will often examine both the defendant's relationship with interstate markets and the plaintiff's. Such an approach makes good sense because injury to the plaintiff may result directly in injury to the market. See, e.g., Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. 738, 741, 96 S. Ct. 1848, 1850, 48 L. Ed. 2d 338 (1976) (local actions by defendants to block relocation of hospital adversely affects interstate commerce with regard to medicines and supplies purchased by hospital); Lehrman v. Gulf Oil Corp., 464 F.2d 26, 34-35 (5th Cir.) (demise of plaintiff's business had impact on interstate flow of goods he would have sold) (alternative holding), cert. denied, **409 U.S. 1077, 93 S. Ct. 687, 34 L. Ed. 2d 665 (1972)**; Heille v. City of St. Paul, 671 F.2d 1134, 1137 (8th Cir.1982) (examining both plaintiff's and defendant's use of goods manufactured out-of-state); Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 819 (9th Cir.1980) (examining, *inter alia*, plaintiff's relationship with out-of-state corporations), cert. denied, **456 U.S. 1011, 102 S. Ct. 2308, 73 L. Ed. 2d 1308 (1982)**. See generally, I E. Kintner, Federal Antitrust Law § 6.5, at 294 n. 41 (1980); I P. Areeda & D. Turner, Antitrust Law para. 232, at 234 (1978) (necessary relationship between defendant and interstate commerce may "consist in injuring plaintiffs who purchase supplies from interstate markets"). In our view, therefore, the proper inquiry is one which focuses on the interstate markets involved in both the defendant's and the plaintiff's operations, and seeks to determine whether the defendant's business conduct will likely make its presence known in those markets.

³² Moreover, the company which manufactured CAT's trailers was a division of an international corporation. Record at 1046-47.

The foregoing evidence demonstrates that the local conduct of the defendant with regard to the plaintiff will have a substantial effect on interstate markets. In particular, we note that at the time that CAT ceased operations it possessed but two tractors and three sets of double trailers. As envisioned, however, CAT ultimately would have had a need for at least 20 trailer units as well as a corresponding number of tractors with which to haul those units, and the financing with [**41] which to purchase the tractors and trailers. If FRI was indeed responsible for the demise of CAT, then it necessarily follows that FRI is equally responsible for the decrease in demand for the tractors and trailers which CAT would have consumed. In our view, this presents the likelihood of a not insubstantial effect on interstate commerce. See [*Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. at 743-46, 96 S. Ct. at 1851-53*](#) (defendants' efforts to block relocation of plaintiff hospital adversely affects interstate commerce with regard to medicines and supplies purchased by hospital); [*Western Waste Serv. v. Universal Waste Control, 616 F.2d at 1097.*](#)

In addition to the foregoing argument, CAT has pursued a second theory of jurisdiction. According to CAT's complaint:

Florida Rock and its subsidiaries currently have gross sales of more than \$90 million, a substantial amount of which consisted of sales of concrete, concrete products, sand, aggregate, road base materials, and hauling services used in the construction of roads, highways, airports and intercoastal waterways in Florida and other states, used in interstate travel [**42] and commerce. Monies used in the purchase of such products and materials for construction of roads, highways, and airports are, in large part, Federal funds, collected and redistributed in interstate commerce. Sales of Florida Rock products, and utilization of said materials and services, have a direct, substantial effect upon interstate commerce.

Record at 2. Thus, CAT argues that the use of FRI's products in instrumentalities of interstate commerce gives rise to jurisdiction under the Sherman Act. Further, at trial there was testimony that FRI's co-conspirator, Basic, had since 1978 been a supplier of construction materials for federally funded road projects. Record at 1553-54. In addition, CAT introduced uncontested evidence that it had transported to an asphalt plant in Florida rock that ultimately was used in the construction of Interstate 95. Finally, rock hauled by CAT to Southern Paving was used in the construction of Orlando International Airport. Record at 1275-76. Thus, the evidence demonstrates that the defendant and the plaintiff [*769] engage in the production and transportation of materials which are necessary components of instrumentalities [**43] of interstate commerce.

In other statutory contexts, the Supreme Court has relied upon this "instrumentalities" theory to uphold the scope of Congress' regulatory enactments. See [*Mitchell v. C.W. Vollmer & Co., 349 U.S. 427, 428-30, 75 S. Ct. 860, 861-62, 99 L. Ed. 1196 \(1954\)*](#) (repair of facilities of interstate commerce is activity in commerce within meaning of Fair Labor Standards Act); [*Alstate Construction Co. v. Durkin, 345 U.S. 13, 15-16, 73 S. Ct. 565, 566-67, 97 L. Ed. 745 \(1953\)*](#) (production of road surfacing products for local use in interstate highways constitutes interstate commerce because of relationship to instrumentality or facility of commerce). See also [*City of Fort Lauderdale v. East Coast Asphalt Corp., 329 F.2d 871, 873 \(5th Cir.\)*](#) (conspiracy to fix prices of materials used in construction of interstate highways has necessary effect on commerce under Sherman Act), cert. denied, 379 U.S. 900, 85 S. Ct. 187, 13 L. Ed. 2d 175 (1964). Because the Sherman Act sweeps as broadly as the [*commerce clause*](#) allows, CAT's argument would seem to have merit.

Both parties, however, have devoted much attention [**44] to the Supreme Court's decision in [*Gulf Oil Corp. v. Copp Paving Co., supra*](#). Copp had its genesis in the Ninth Circuit's decision in [*In re Western Liquid Asphalt Cases, 487 F.2d 202 \(9th Cir. 1973\)*](#). In the Asphalt Cases, the plaintiffs, processors of asphaltic concrete, brought claims against producers of asphaltic oil under §§ 1 and 2 of the Sherman Act, §§ 3 and 7 of the Clayton Act, [*15 U.S.C.A. §§ 14 & 18 \(West Supp. 1983\)*](#), and § 2(a) of the Robinson-Patman Price Discrimination Act, [*15 U.S.C.A. § 13\(a\) \(West Supp. 1983\)*](#). The Ninth Circuit analogized the case to [*Alstate Construction Co. v. Durkin, supra*](#), in which the Supreme Court held that businesses engaged in the local production of road surfacing products for local use in interstate highways were operating in commerce because of their relationship to an instrumentality or facility of interstate commerce. See [*487 F.2d at 205*](#). After concluding that the production of materials used in the construction of interstate highways was "in commerce" for purposes of the Sherman Act, the Ninth Circuit went on

to hold that [**45] the same activities also were in commerce for purposes of the Robinson-Patman and Clayton Acts. See *id. at 206*. In granting certiorari, the Supreme Court limited its inquiry to whether jurisdiction was established under the Robinson-Patman and Clayton Acts. See [419 U.S. at 193, 95 S. Ct. at 397](#). Significantly, the Robinson-Patman Act and §§ 3 and 7 of the Clayton Act contain jurisdictional language that, read literally, is much narrower than that contained in the Sherman Act; each provision restrains the anti-competitive conduct only of persons "engaged in commerce." See generally Comment, 21 Vill.L. Rev. 721 (1976) (discussing jurisdictional elements under the various antitrust acts). In reversing the Ninth Circuit's finding of subject matter jurisdiction under the Robinson-Patman and Clayton Acts, the Court held that only anticompetitive action actually occurring "within the flow of interstate commerce" is actionable. [419 U.S. at 195, 95 S. Ct. at 398](#). The Court thus disavowed the Ninth Circuit's use of a test focusing on the relationship of the defendant's activities to an instrumentality of interstate commerce.

[**46] FRI admits that technically the Court's holding was limited to the narrower bases for subject matter jurisdiction which exist under the Robinson-Patman Act and §§ 3 and 7 of the Clayton Act. The Court clearly was concerned with Congress' *intent* when utilizing the "in commerce" language in those provisions. The Court cautioned that the plaintiff:

would have us expand the concept of the flow of commerce by incorporating categories of activities that are perceptibly connected to its instrumentalities. But whatever merit this categorical inclusion-and-exclusion approach may have when dealing with the language and purposes of other regulatory enactments, it does not carry over to the context of the Robinson-Patman and Clayton Acts. The chain of connection has no logical end [**770] point. The universe of arguably included activities would be broad and its limits nebulous in the extreme More importantly, to the extent that those limits could be defined at all, the definition would in no way be anchored in the economic realities of interstate markets, the intensely practical concerns that underlie the purposes of the antitrust laws.

In short, assuming, arguendo, [**47] that the

facially narrow language of the Clayton and Robinson-Patman Acts was intended to denote something more than the relatively restrictive flow of commerce concept, we think the nexus approach would be an irrational way to proceed. The justification for an expansive interpretation of the "in commerce" language, if such an interpretation is viable at all, *must rest on a congressional intent that the acts reach all practices, even those of local character, harmful to the national marketplace*.

Id. at 198-99, 95 S. Ct. at 400 (emphasis added). However, as the Supreme Court has made clear, just such an expansive interpretation was intended by Congress under the Sherman Act. See *Hospital Building Co. v. Trustees of the Rex Hospital*, [425 U.S. at 743 n. 2, 96 S. Ct. at 1852 n. 2](#) (decisions by Court have permitted reach of Sherman Act to expand along with expanding notions of Congressional power); *Alstate Construction Co. v. Durkin*, [345 U.S. at 14-16, 73 S. Ct. at 566-567](#).

FRI argues, however, that the Court's reasoning necessarily implicates jurisdiction under the Sherman Act because the Court counseled [**48] against relying on "nominal connections between commerce and activities that may have no significant economic effect on interstate markets." [419 U.S. at 199, 95 S. Ct. at 400](#). During the course of its ruling, the Court clearly dismissed the instrumentality theory as a basis for satisfying the "in commerce" language of the Robinson-Patman Act and §§ 3 and 7 of the Clayton Act. Nonetheless, the impact of *Copp* on Sherman Act jurisdiction is far from clear. Without deciding whether §§ 3 and 7 of the Clayton Act would admit of an "affecting commerce" theory the Court declared that effects on commerce could *not be presumed* from the mere use of materials in the production of instrumentalities of commerce. *Id. at 202, 95 S. Ct. at 402*. This holding, though technically limited to §§ 3 and 7 of the Clayton Act, casts some doubt on reliance on a relationship to instrumentalities of commerce under the Sherman Act. It casts some doubt on what would otherwise seem to be a logical approach in applying the "affecting commerce" theory in the Sherman Act context, namely to consider

effects on interstate instrumentalities as one kind of effect on commerce; or **[**49]** in other words to consider the instrumentalities theory as a subset of the "affecting commerce theory."³³

[50]** Whether or not *Copp* places limits on a litigant's ability to claim jurisdiction under the Sherman Act through relationships to **[*771]** instrumentalities of interstate commerce is, in the last analysis, not necessary to resolve this case.³⁴ As we concluded above, CAT sufficiently demonstrated an effect on commerce by virtue of injury to interstate markets resulting from the defendant's alleged activities. We thus proceed to the merits of this dispute.

[51] IV. PER SE OR RULE OF REASON**

FRI's next contention is that the trial court erred in submitting this case to the jury under a theory of per se illegality.³⁵ **[**52]** The complaint reveals that CAT's theory of liability was that FRI and Basic created and enforced a boycott

³³ The movement of people has long been held to constitute commerce. Thus, businesses lying near interstate highways and serving interstate customers have the effect on commerce necessary to invoke jurisdiction under the Sherman Act. See *United States v. Cargo Service Stations*, 657 F.2d at 680, and cases cited therein. Obviously, the movement of people interstate, as well as the movement of goods in commerce, depends upon the elimination of impediments to that movement. Such impediments may consist of a scarcity of businesses serving interstate movement, e.g., gasoline stations and motels; see *id.*; they may also consist of conditions which physically restrict such travel in a more direct way, such as the absence or destruction of the means of travel.

On the other hand, earlier Supreme Court cases determining whether Congress could regulate those engaged in the production of instrumentalities of commerce were concerned with statutes referring to those "engaged in commerce" or "engaged in the production of goods for commerce." See e.g., *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 73 S. Ct. 565, 97 L. Ed. 745 (1952); *Overstreet v. North Shore Corp.*, 318 U.S. 125, 63 S. Ct. 494, 87 L. Ed. 656 (1943); *Pedersen v. Delaware, Lackawanna & West. R.R.*, 229 U.S. 146, 33 S. Ct. 648, 57 L. Ed. 1125 (1913). This suggests that technically the "instrumentalities" theory is the offspring of the older "flow of commerce" theory. See *Thornhill Pub. Co. v. General Tel. & Electronics*, 594 F.2d 730, 737 (9th Cir. 1979) (treating "instrumentalities" theory as a type of "in commerce test").

³⁴ It is worth noting that two well-known authorities have stated their reluctance to believe that the Supreme Court intended to narrow the scope of the Sherman Act, particularly in light of the Court's subsequent decision in *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976). Indeed, they point out that rarely has the Court required anything more than a reasonable presumption that certain activities affect interstate commerce. See I P. Areeda & D. Turner, *supra* note 31, para. 232, at 237-41. Moreover, *Copp* may represent no more than a deferential treatment of the district court's finding on that particular record of no substantial impact on interstate commerce. *419 U.S. at 202-03, 95 S. Ct. at 402*.

However, the only other court to address a Sherman Act instrumentalities claim since *Copp* has expressed reluctance to apply the instrumentality theory to find the necessary effect on commerce to support Sherman Act jurisdiction. See *Thornhill Pub. Co. v. General Tel. & Electronics*, 594 F.2d at 737.

³⁵ The trial court instructed the jury in part as follows:

There are four essential elements which the plaintiff must prove by a preponderance of the evidence in order to establish its claim under the Sherman Act, that is this provision of the **antitrust law** as follows: First, that there was a combination or a conspiracy between the defendant, Florida Rock Industries, and the Basic Asphalt Company to put the plaintiff out of the business. And that would be complied with if that occurred even though Basic Asphalt was nonwilling or a reluctant party to that particular agreement. But unless the plaintiff proves that, it cannot recover. Next, it must prove that such a combination or conspiracy constituted an unreasonable restraint on interstate commerce as hereafter defined.

* * * *

The second element which plaintiff must prove to establish his claim is that the alleged threatened activity amounted to an unreasonable restraint [sic] trade. Not all restraints of trade are unreasonable. All business agreements restrain trade in some way. But only unreasonable restraints are illegal.

aimed at driving the plaintiff out of business. Record at 6. At the charge conference conducted by the trial court, CAT thus argued that the case should be submitted to the jury under an instruction on per se illegality; under such an instruction CAT would not need to prove an anticompetitive effect in a relevant product and geographic market. See [Muenster\[*772\] Butane, Inc. v. Stewart Co., 651 F.2d 292, 295 \(5th Cir. 1981\) HN14](#) [↑] (under rule of reason plaintiff must demonstrate anticompetitive effect in relevant market). Rather, the finding by the jury that FRI conspired with Basic to terminate CAT's services would suffice to support a verdict against FRI.³⁶

FRI, on the other hand, submits that this case involves, at most, either an exclusive dealing arrangement between Basic and FRI or a requirements contract whereby Basic agreed to purchase all of its rock supplies from FRI. Incidental to such an agreement would be the termination of CAT's services as a transporter of rock from Rinker's competing mines in the Miami area. Under either of these theories a rule of reason instruction would have been required.

Since [Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 \(1911\)](#), [*53] the Sherman Act [HN15](#) [↑] prohibition against "every" agreement in restraint of trade has been interpreted by the federal courts to forbid only "unreasonable restraints." [Id. at 59-60, 31 S. Ct. at 515](#); see [United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362 \(5th Cir. 1980\)](#). However, in *Standard Oil* as well as subsequent cases the Supreme Court has declared some restraints "inherently unreasonable" or "per se unlawful." Thus:

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.

[Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 \(1958\)](#); See [Continental TV v. GTE Sylvania, Inc., 433 U.S. 36, 50, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 \(1977\)](#). The Supreme

In sum and substance, I would suggest that you consider these questions. First, was the plaintiff, that is CAT, forced out of business because it lost the Basic Asphalt Company account? Now, if your answer to this question is no, you would cease your deliberations and promptly give a verdict for the defendant.

Now, if your answer to that question is yes, then did Basic Asphalt terminate the plaintiff because Florida Rock Industries threatened to cut off Basic Asphalt's allocation of aggregate unless it terminated the plaintiff? If your answer to this question is no, again you would cease your deliberations and return a verdict for the defendant.

If your answer is yes, then did the fact that the plaintiff was forced out of business have a not insubstantial adverse affect upon interstate commerce by lessening competition or any other way? Now, if your answer to this is no, then again you must cease your deliberations and return a verdict for the defendant.

Record Excerpts at 26-36. Later, the trial court was asked to repeat a portion of its charge:

The Court: All right. First was the plaintiff, Construction Aggregate Transport, Inc. -- is that the correct name?

Mr. Schwartz: Yes sir.

The Court: Forced out of business because it lost the Basic Asphalt Company Account? Next, did Basic Asphalt terminate the plaintiff because Florida Rock Industries threatened to cut off Basic Asphalt's allocation of aggregate unless it terminated the plaintiff? Now, if you answer either of those questions no, that would be the end of the case.

Record Excerpts at 43. The trial court's instructions could have been clearer regarding the particular analysis (per se or rule of reason) being applied. Because the plaintiff did not introduce evidence of the relevant market, the case must be considered submitted under a per se theory. Neither party has argued or assumed otherwise.

³⁶ For general discussions of rule of reason analysis, see [National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-92, 98 S. Ct. 1355, 1363-65, 55 L. Ed. 2d 637 \(1978\)](#); P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues (Federal Judicial Center 1981). For a discussion of the historical development of both per se and rule of reason analysis, see I. E. Kintner, *supra* note 31, §§ 8.2, 8.3, at 350-70.

Court has stressed, however, that [HN16](#) "per se rules of illegality" are appropriate only when they relate to conduct that is manifestly anticompetitive." [433 U.S. at 49-50, 97 S. Ct. at 2557](#).

To date, the rule of per se illegality has been applied to the following types of competitive restraints: horizontal and vertical price fixing agreements, see [United States v. Socony Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 \(1940\)](#); [Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 \(1911\)](#); horizontal division of markets between competitors, see [Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 \(1951\)](#); tying arrangements, see [Northern Pacific Ry. Co. v. United States, supra](#); and concerted refusals to deal or group boycotts. See [Fashion Originators Guild of America v. FTC, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 \(1941\)](#). Proof of the foregoing types of restraints results in automatic condemnation solely because of the obvious restrictive effects on competition. CAT contends that the restraint involved in the case before this court falls within that category [**55](#) of restraints referred to as concerted refusals to deal or group boycotts.³⁷

It is well established that [HN17](#) a merchant, whether he be a manufacturer, distributor, wholesaler, or retailer, may choose with whom he will do business and with whom he will not do business; such action generally does not violate the antitrust laws. Thus, the manufacturer can deal or not deal with customers "for reasons sufficient to itself." [Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 614 \[*773\] 34 S. Ct. 951, 955, 58 L. Ed. 1490 \(1914\)](#); [**56 Universal Brands, Inc. v. Philip Morris, Inc., 546 F.2d 30, 33 \(5th Cir.1977\)](#). This sort of arrangement, referred to as "exclusive dealing," does not give rise to antitrust liability without proof of actual competitive injury. Implicit in the freedom to deal exclusively with one merchant, of course, is the freedom to refuse to deal with a competitor of that merchant. Again, such a unilateral exercise of business judgment is free from scrutiny in the absence of proof of competitive harm, or other underlying illegal behavior. See [Packard Motor Car Co. v. Webster Motor Car Co., 100 U.S. App. D.C. 161, 243 F.2d 418, 420 \(D.C.Cir.\), cert. denied, 355 U.S. 822, 78 S. Ct. 29, 2 L. Ed. 2d 38 \(1957\)](#). [HN18](#) When the merchant goes beyond this unilateral choice, however, and combines with other merchants to deal or not to deal only with a specific customer, the legal consequences are vastly different. Such an agreement between independent merchants is known as a "concerted refusal to deal" and is generally subject to the per se rule of illegality. [**57](#) See [Radiant Burners v. Peoples Gas Light & Coke Co., 364 U.S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358 \(1961\)](#) (per curiam); [Klor's v. Broadway-Hale Stores, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 \(1959\)](#); [Fashion Originators Guild v. FTC, supra](#).

CAT contends that this is precisely the type of agreement which was entered into between FRI, the rock supplier, and Basic, the purchaser of the rock. By conspiring not to utilize the services of CAT in hauling aggregate material, FRI and Basic would thus be guilty of a boycott of, or concerted refusal to deal with CAT.

Neither party has been able to bring to our attention a case involving the somewhat unique relationships between supplier, customer and transporter which are present in this case. Nonetheless, in our view the agreement here does not sufficiently resemble those arrangements which have been considered to be illegal per se in other cases. First, it is important to remember that [HN19](#) a concerted refusal to deal essentially is an agreement among two or more parties that each will engage [**58](#) in an individual refusal to deal with a particular customer or customers. In the case before us, however, we have only one business entity refusing to deal with the plaintiff: the ultimate customer of FRI's rock, Basic Asphalt. That FRI may have instigated Basic's refusal to deal does not create the plurality of "refusals" necessary for the arrangement to be called a group boycott. Compare [Radiant Burners v. Peoples Gas Light & Coke Co., 364 U.S. at 659-60, 81 S. Ct. at 367](#) (refusal by association comprised of gas companies and gas burner manufacturers to sell gas to purchasers of plaintiff manufacturer's gas burner was illegal per se as a group boycott); [Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. at 212-13, 79 S. Ct. at 709-10](#) (agreement by manufacturers to sell only to defendant department store and not plaintiff's department store constituted group boycott); [Fashion Originators Guild v. FTC, 312 U.S. at 465-66, 61 S. Ct. at 706](#) (refusal by manufacturers of textiles and original design dresses to sell to retailers purchasing "copycat" designs from

³⁷ These two terms are commonly used interchangeably. See [St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 540-45, 98 S. Ct. 2923, 2929-31, 57 L. Ed. 2d 932 \(1978\)](#); [United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1354 \(5th Cir.1980\)](#); [Bauer, Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination, 79 Colum.L.Rev. 685 n. 5 \(1979\)](#).

competing manufacturers constituted illegal group boycott); *with Abadir & Co. v. First Mississippi Corp.*, 651 F.2d 422, 426-28 (5th Cir. 1981) [**59] (manufacturer's agreement with one dealer not to sell to other dealer did not constitute group boycott); *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1004-07 (5th Cir.) (conspiracy between manufacturer and distributor not to deal with plaintiff distributor did not constitute group boycott), cert. denied, 454 U.S. 827, 102 S. Ct. 119, 70 L. Ed. 2d 102 (1981); *Daniels v. All Steel Equipment, Inc.*, 590 F.2d 111, 113 (5th Cir. 1979); *H. & B. Equipment Co. v. International Harvester*, 577 F.2d 239, 245-46 (5th Cir. 1978); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 131-32 (2d Cir.) (en banc) (manufacturer's termination of plaintiff-dealer at behest of competing dealer was not a group boycott), cert. denied, 439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978); *Universal Brands, Inc. v. Philip Morris, Inc.*, 546 F.2d at 33-34 (no per se violation for manufacturer or supplier to agree with distributor to give him exclusive franchise unless part of an illegal boycott); *Packard* [*774] *Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d at 420-21 [**60] (manufacturer's termination of small dealers at request of large dealer was exclusive dealing arrangement and not illegal per se). Thus, [HN20](#)↑ the touchstone of an illegal group boycott or concerted refusal to deal is the agreement between two or more merchants not to deal with another merchant when, in the absence of such an agreement, the conspiring merchants would normally have been free to deal with that merchant.

In the instant case, FRI does not itself arrange for or hire businesses to transport rock from its mines to its customers. Therefore, regardless of whether CAT's termination was the result of an agreement between FRI and Basic, there exists only one refusal to deal: that between Basic and CAT. The foregoing analysis of the alleged arrangement thus suggests that it is much closer to a unilateral refusal to deal. If so, then CAT's allegation of conspiracy between FRI and Basic would be subject to rule of reason analysis. See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961); *Standard Oil Co. v. United States*, 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949). [**61]

Aside from whether the agreement between FRI and Basic fits into the classic group boycott arrangement, however, the case law surrounding restraints on trade provides an alternative type of analysis. This analysis distinguishes between restraints which are horizontal in nature and those which may be considered vertical in nature. See generally *Continental TV v. GTE Sylvania*, 433 U.S. at 54-59, 97 S. Ct. at 2559-2562.³⁸ Horizontal combinations are cartels or agreements *among competitors*. Such agreements generally restrain competition among enterprises at the same level of distribution. Vertical restraints, on the other hand, are generally agreements between persons or firms occupying different levels in the chain of distribution of a specific product. *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d at 295.³⁹ [**63] As such, the effect of a purely vertical restraint will be to

³⁸ For a valuable critique of the relationship between these alternative analyses of concerted refusals to deal, see generally Bauer, *supra* note 37.

³⁹ Professor, now Judge, Bork has stated that:

A restraint -- whether on price, territory, or any other item -- is vertical . . . when a firm operating at one level of an industry places restraints upon rivalry at another level for its own benefit.

R. Bork, *The Antitrust Paradox* 288 (1978); see Bauer, *supra* note 37, at 692 & n. 45.

If we examine the restraints alleged by CAT in terms of the underlying agreement (as we must given the plaintiff's allegation of conspiracy), then we see that the agreement is between entities occupying different levels -- rock supplier and purchaser of rock. Likewise, the agreement which FRI initiated, and in which Basic acquiesced, *restrains* competition at a level different from that occupied by FRI. The primary restraint is upon competition among transporters of aggregate. Although this may redound to the benefit of FRI's trucking subsidiary, the restraint was *initiated* by FRI. Arguably, the restraint may endanger competition among purchasers of rock. This too however, constitutes a different level in the chain of production. We see, then, that in this case the arrangement is almost purely vertical; the agreement is between, and the restraint acts upon, entities at different levels in the market. In contrast, a horizontal arrangement involves agreement among entities operating at the same level. Such an agreement generally will restrain competition *at that level* of the market. Finally, on occasion entities on the same market level will seek to have an entity at a different level impose restrictions upon them. Such putative vertical arrangements are in reality horizontal: the actual agreement is among competitors, and the effect is to restrain competition at their level, although the

restrain competition at a level other than that from whence the restraint was initiated.⁴⁰ The classic example of a per se violation is an agreement between:

Competitors at the same level of the market structure to allocate territories in order to minimize competition. **[**62]** Such concerted **[*775]** action is usually termed a "horizontal" restraint, in contradistinction to *combinations of persons at different levels* of the market structure, e.g., manufacturers and distributors, which are termed "vertical" restraints.

United States v. Topco Associates, 405 U.S. 596, 608, 92 S. Ct. 1126, 1133, 31 L. Ed. 2d 515 (1972) (emphasis added).

CAT contends that the restraint involved in this case is horizontal rather than vertical in nature. Specifically, it argues that the "horizontal aspect" necessary to bring this case within the rule of per se illegality is provided by FRI's aggregate hauling subsidiary, Tank Lines, which competes at the same market level as CAT. According to this argument, it is irrelevant that the parties to the alleged conspiracy are arranged in a completely vertical configuration so long as FRI competes with CAT through its trucking subsidiary. In our view, this argument is without merit.⁴¹

[64]** The case law demonstrates that there are several types of arrangements which may be characterized as horizontal, thus warranting the per se prohibition. First is the arrangement in which two or more businesses all operating at the same level in the chain of distribution agree to do business with one customer to the exclusion of a competitor of that customer. See *Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. at 207-10, 79 S. Ct. at 705-08*. It is not necessary for the target of the boycott to operate at the same market level as the conspirators; the danger lies in allowing an entire industry, as opposed to an individual merchant in that industry, to restrict the sale of its goods thereby potentially restricting output at the cost of increased prices to the consumers.⁴² See also *ComTel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982)*.

[65]** Another type of horizontal arrangement prohibited outright by the Sherman Act is that in which two or more merchants agree to sell their goods to a customer conditioned upon that customer's refusal to purchase goods manufactured by a competitor of the merchants. See *Fashion Originators Guild v. FTC, 312 U.S. at 461-63, 61 S. Ct. at 705-06*. In this situation, both the parties to the agreement and the target of the agreement occupy the same relative level in the chain of distribution. Again, such a restraint on trade directly implicates concerns for an industry's ability to restrict output by reducing the number of competitors.

vehicle for the restraint occupies a different level. See *United States v. Topco Associates, 405 U.S. 596, 608-09, 92 S. Ct. 1126, 1133-34, 31 L. Ed. 2d 515 (1972)*; *Sports Center, Inc. v. Riddell, Inc., 673 F.2d 786, 791 n.4 (5th Cir. 1982)*.

⁴⁰ As the Supreme Court made clear in the *Sylvania* case, a restraint on trade at a level different than that of the "initiator" of the agreement is often tolerated because it may lead to greater competition at that "initiating" level. See *infra* note 48.

⁴¹ Implicit in the argument is treatment of Tank Lines, not a party to this litigation, as a co-conspirator of Basic and FRI. This assumption apparently stems from the relationship between Tank Lines and FRI. There is no evidence that officials of Tank Lines were involved in or had knowledge of the alleged conspiracy.

⁴² In *Klor's*, ten manufacturers conspired, at the behest of a competitor of Klor's, either not to sell goods to Klor's or to sell only at higher prices. The Supreme Court focused generally on the possible injury to retailers in Klor's position. See *359 U.S. at 210-13, 79 S. Ct. at 708-10*. However, the Court also stressed that the agreement deprived "manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to [Klor's competitor]." The Court also contrasted the case with one where a dealer agrees to an exclusive distributorship. *Id. at 212-13, 79 S. Ct. at 709-10*. The necessary implication is that the feature which renders one agreement horizontal and the other vertical is the mutual agreement between entities on the same market level. See *Gough v. Rossmoor Corp., 585 F.2d 381, 387 n. 7 (9th Cir. 1978)*, cert. denied, *440 U.S. 936, 99 S. Ct. 1280, 59 L. Ed. 2d 494 (1979)*; McCormick, *Group Boycotts -- Per Se or Not Per Se, That is the Question*, 7 Seton Hall L.Rev. 703, 760 (1976) (*Klor's* case is complex because it involved both horizontal and vertical restraints).

Finally, the ban on horizontal restraints encompasses purportedly vertical arrangements which are actually horizontal agreements in disguise. See [United States v. Topco Associates, 405 U.S. at 608-12, 92 S. Ct. at 1133-35](#). In such situations, businesses at the same market level, most often distributors, seek to have restraints imposed upon them by their supplier or manufacturer. The actual goal of such an arrangement, however, may be to organize *among themselves* how the distributors will carry [\[*776\]](#) on their [\[**66\]](#) respective operations.⁴³ Such an agreement represents one of the most dangerous threats to competition, since it can have few purposes other than requiring the manufacturer to restrict output. See R. Bork, *The Antitrust Paradox* 389 (1978) (retailers who agree to horizontal restraint not desired by manufacturer are almost certainly attempting to restrict output for sake of monopoly gains). See generally L. Sullivan, *Antitrust* § 83 (1977) (discussing various types of boycotts).

The foregoing examples of horizontal activity condemned by the antitrust laws all have one feature in common: they involve agreements between more than one entity at the [\[**67\]](#) same level of the market. The key to per se illegality in such cases, therefore, is not the relationship of the target to the members of the conspiracy.⁴⁴ Conversely, that one of the conspirators may operate as a direct competitor of the plaintiff is not dispositive. See [Oreck Corp. v. Whirlpool Corp., 579 F.2d at 131](#) (Whirlpool, manufacturer, at instigation of Sears, retailer, terminated its sales of vacuum cleaners to Oreck, who functioned at the same level as Sears). In fact, if it were true that participation in the conspiracy by an entity which operates on the plaintiff's market level were sufficient to establish that horizontal aspect necessary for per se illegality, then the category of horizontal restraints would completely swallow the category of vertical restraints. For example, every exclusive dealing agreement between manufacturer and customer, though vertical as between its members, necessarily involves the exclusion of an entity which operates on the same market level as either the customer or the manufacturer. To declare that such an arrangement is therefore horizontal in nature would convert all restrictions such as vertical territorial agreements [\[**68\]](#) into per se violations. Such a result is directly contrary to the holding in the *Sylvania* case. See [433 U.S. at 58-59, 97 S. Ct. at 2561-2562](#).

[\[**69\]](#) CAT argues that the cases involving manufacturer-distributor chains should not control. While these arrangements are slightly different from the one involved here, such differences should not lead us to embark on a completely novel analysis of horizontal restraints.⁴⁵ [\[**70\]](#) In our view, the finding of an absence of a horizontal aspect in this case is well supported by precedent. See, e.g., [Abadir & Co. v. First Mississippi Corp., 651 F.2d at 424-26;](#)⁴⁶ [Red Diamond \[*777\] Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d at 1004-07](#) (conspiracy between

⁴³ Thus, in *Topco* the putative vertical restraint was actually a mutual, and thus horizontal restraint among competing distributors regarding the allocation of territory. [405 U.S. at 608-10, 92 S. Ct. at 1133-34](#). For one court's analysis of a similar situation, see [Sports Center, Inc. v. Riddell, Inc., supra note 39.](#)

⁴⁴ One commentator has stated:

The danger to the market begins with aggregates of units at the same level. Any horizontal combination of sellers [which attempts to exclude a business from access to the market] . . . would seem to be per se illegal, regardless whether the coercive pressure is directed at the victim or the victim's customers; so long as two or more defendants are on the same level of distribution, it would not seem to make any difference whether the party denied access to the market by the combination's refusal to deal is (1) on a different level from one or more members of the combination, or (2) is or is not a competitor.

Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?* 27 Rutgers L.Rev. 773, 793 (1974) (footnotes omitted). Professor Gerhart points out that "attempts to synthesize the group boycott cases are legion." Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 Sup.Ct.Rev. 319, 324 n. 16 (1983).

⁴⁵ One example of a classic refusal to deal, a vertical restraint, involves a purchaser refusing to buy from a seller. In the instant case, Basic is the purchaser of trucking services, and has refused to buy from CAT. When the purchaser refuses to buy because he is obligated to purchase from another source, the arrangement becomes one of exclusive dealing. The uniqueness of this case stems from the involvement of two products -- rock and transportation. The potential significance of this aspect is discussed below.

manufacturer and distributor to exclude plaintiff-distributor not a horizontal agreement merely because manufacturer also conducts limited operations at plaintiff's level of the market); [*Daniels v. All Steel Equipment, Inc.*, 590 F.2d at 113](#) (conspiracy between manufacturer and dealer to eliminate plaintiff-dealer does not constitute horizontal boycott); [*H. & B. Equipment Co. v. International Harvester*, 577 F.2d at 245-46](#) (conspiracy between manufacturer and distributor horizontal only when source of conspiracy is combination of distributors).

[**71] In contending for a rule of per se illegality, both CAT and the district court relied on the former Fifth Circuit's decision in [*E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*, 467 F.2d 178 \(5th Cir. 1972\)](#), cert. denied, 409 U.S. 1109, 93 S. Ct. 912, 34 L. Ed. 2d 690 (1973). In *McQuade*, a group of airlines published a consolidated listing of available tour programs in the Caribbean. On at least two occasions the airlines, through their tour manual committee, refused to list the plaintiff's tours in their programs and instead listed tours by a competitor. Although the court refused to apply a rule of per se illegality on the facts before it, the opinion contains dicta which tend to support CAT's argument. First, the court cited *Klors* as a case "involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some members of the combination." [*Id. at 186*](#). Actually, however, the conspiracy or combination in *Klors* included both vertical and horizontal agreements. While one of the conspirators, Broadway-Hale, was a retailer, and thus [**72] vertical with respect to the other conspirators, the remaining conspirators were all suppliers and horizontal with respect to each other. Second, the court summarized the case law dealing with collective refusals to deal in a manner which suggests that the primary consideration is whether exclusionary or coercive conduct has occurred:

In all of these cases, the touchstone of per se illegality has been the purpose and effect of the arrangement in question. Where exclusionary or coercive conduct has been present, the arrangements have been viewed as "naked restraints of trade," and have fallen victim to the per se rule.

[*Id. at 187*](#). In our view, however, this dictum in *McQuade* does not survive the Supreme Court's decision in [*Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 \(1977\)](#). *Sylvania* makes it clear that [**HN21**](#) the "touchstone" of per [*778] se illegality is not the presence of exclusionary conduct in the particular case but rather is the market impact of the kind of restrictions in [**73] question. See [*id. at 50-59, 97 S.*](#)

⁴⁶ In *Abadir*, the plaintiff, Abadir & Co., was an independent trader dealing in various chemicals, including urea -- an inorganic chemical compound used worldwide for fertilizer and other industrial uses. The defendant, First Mississippi Corp., was engaged in the distribution and sale of urea. The defendant agreed to sell a certain quantity of urea to the plaintiff, conditioned upon the plaintiff's agreement to resell urea for consumption only in Asia. Subsequently, the defendant discovered that Abadir had resold the urea for consumption in the United States. The defendant then terminated its contract with Abadir and sold directly to Abadir's American customer, effectively eliminating competition from Abadir. In Abadir's antitrust action against First Mississippi, the plaintiff alleged that the contract between it and the defendant was an illegal horizontal market-dividing agreement, since First Mississippi engaged in the distribution of urea in competition with its distributors, such as Abadir. A panel of the Former Fifth Circuit, however, held otherwise. In doing so, the court recognized that the requirement of a horizontal aspect is not satisfied by the mere fact that the initiator of the restraint engages in some degree of competition on the plaintiff's market level. Rather, the court recognized that in essence the original agreement between Abadir and First Mississippi was simply a vertical agreement imposed by one merchant upon another occupying a different level in the market. [*651 F.2d at 425*](#). Thus, the court looked to the policies justifying the distinction between vertical and horizontal restraints, and tempered its analysis with those general considerations which militate against expansion of the per se categories:

Departure from the rule of reason standard must be based upon demonstrable economic effect rather than -- as in [[*United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 \(1967\)](#)] -- upon formalistic line drawing. . . . It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act. . . . The usual assumption is that a per se rule would grow out of a history of rule of reason cases all arriving at the same verdict. . . . When the courts are uncertain of the competitive significance of a particular type of restraint they decline to apply the per se label.

Ct. at 2557-2562.⁴⁷ "Departure from the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." Id. at 58-59, 97 S. Ct. at 2561-2562.⁴⁸

[**74] CAT attempts to bolster its argument by citation to the Sixth Circuit's recent decision in Com-Tel, Inc. v. DuKane Corp., supra. *Com-Tel* involved a boycott initiated by one distributor which pressured its manufacturer, which in turn enforced the boycott among other distributors. The plaintiff, a competing distributor which was thereby barred from purchasing products from either the manufacturer or the boycotting distributors, brought suit, alleging a concerted refusal to deal. The Sixth Circuit held that the boycott in question was horizontal in nature, thus warranting an instruction on per se illegality. The court declared that the acquiescence, or participation by other distributors in the plan not to sell goods to the plaintiff provided the horizontal aspect necessary for per se illegality. 669 F.2d at 412-14. Although the court noted that some commentators had suggested that the presence of one conspirator, i.e., the initiating distributor, at a level horizontal to the plaintiff would provide a sufficient horizontal aspect, the court expressed no opinion as to the validity of such a proposition. See id. at 412-13 & n. 16.

In our [**75] view, CAT reads *Com-Tel* too broadly. The defendant there had argued that more than one conspirator, or "numerosity," was required at each market level of the boycott. The court's lengthy discussion of the numerosity issue was therefore aimed only at showing that the existence of a boycott does not depend upon the specific market level at which the boycott occurs; so long as there exists an agreement *among competitors at some level*, there will be a sufficient horizontal aspect. Thus, HN22[1] the key inquiry when determining whether a particular arrangement is horizontal or vertical is not the presence of a conspirator on the plaintiff's market level ("horizontal" to the plaintiff) but whether the conspiratorial agreement is *between* entities which are *horizontally arranged* at some level in the market.⁴⁹

⁴⁷ In fact, *McQuade* has been cited as an example of an attempt to temper the harshness of the per se rule when there is a clear absence of anticompetitive effects, notwithstanding that the arrangement in question seems to constitute a classic boycott. See McCormick, *supra* note 42, at 744-46.

⁴⁸ The court in *Sylvania* announced that the primary concern of the antitrust laws is the protection of interbrand competition, occasionally at a cost to intrabrand competition. 433 U.S. at 58-59, 97 S. Ct. at 2561-62. We note that many unilateral refusals to deal or exclusive dealing situations necessarily involve an effect on interbrand competition. The decision by a distributor to carry only a particular manufacturer's line of products, to the exclusion of another manufacturer's line, may reduce the ability of the excluded manufacturer to market his goods. Nonetheless, this is not the type of negative impact on interbrand competition against which the Supreme Court's analysis in *Sylvania* was aimed. Rather, the Court was concerned with those types of arrangements in which competitors agree *among themselves* to take certain courses of action. The distinction rests on an economic assumption that when a manufacturer or supplier restricts his business vis-a-vis his customers or distributors he is attempting to compete more effectively against the manufacturers and suppliers of other brands. The result will be vigorous interbrand or industry-wide competition. See id. at 54-56, 97 S. Ct. at 2559-2560. On the other hand, the rule of per se illegality for horizontal agreements is based on another economic assumption -- that when business entities which operate at the same market level reach an agreement as to the conduct of their businesses, there is a strong likelihood that the net effect will be to restrict the output of products in an entire industry, thereby *restraining* interbrand competition. Such restraints in turn thwart such goals as consumer welfare and the efficient allocation of resources:

"Horizontal" agreements among competitors . . . threaten the achievement of antitrust goals by eliminating competition among the participants and thereby allowing them to enhance their collective profits to the detriment of consumers.

P. Areeda, *supra* note 36, at 16.

⁴⁹ As the court in *Com-Tel* pointed out, the arrangement in Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959), was condemned even though there was only one conspirator on the boycotted level -- the numerosity requirement was satisfied at the boycotting level. Conversely, in United States v. General Motors, 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966), horizontal numerosity existed at the boycotted level, among the target's competing distributors, all of whom were parties to the boycotting agreement.

In Blackburn v. Crum & Forster, 611 F.2d 102 (5th Cir.), cert. denied, 447 U.S. 906, 100 S. Ct. 2989, 64 L. Ed. 2d 856 (1980), a panel of the former Fifth Circuit stated that the per se rule against concerted refusals to deal applies only when "the plaintiff, the

[**76] [*779] We therefore conclude that the arrangement in question cannot be labeled a horizontal restraint of trade.⁵⁰ [**77] This result, however, does not necessarily dictate a rule of reason analysis. As the Supreme Court noted in *Sylvania*, particular types of vertical restrictions may nonetheless require per se prohibition. See [433 U.S. at 58, 97 S. Ct. at 2561](#). We agree with FRI that the arrangement here is much closer to a unilateral refusal to deal than it is to a horizontal boycott. However, if the evidence will sustain a finding that FRI's conduct falls under one of the categories of per se illegality set forth earlier in this opinion, we need not remand for a new trial.⁵¹

As discussed earlier, the conspiracy alleged is unique in that the evidence suggests it was aimed at two different targets. One target was FRI's competitor in rock production, Rinker. The other target was CAT's innovative transportation operation which made possible the sale of Rinker stone in the Orlando market. By coercing Basic to exclude CAT's trucking operation, FRI could restrict the importation of its competitor's stone. Similarly, by discouraging its customers from purchasing stone [*780] from Rinker, FRI could restrict competition in the aggregate hauling industry, thus potentially benefiting its subsidiary, Tank Lines. In our view, the particular arrangement involved is quite similar to a tying arrangement: for purposes of this lawsuit FRI's stone, upon which Basic [*78] was dependent, would be the tying product, while the tied product would be the transportation of this stone.⁵²

excluded party, is on the same competitive level with one member of the conspiracy. In other words, in such cases it may be proper to infer anticompetitive motive and effect because the conspiracy has a horizontal aspect." [Id. at 104](#). Because there was no evidence of agreement between the alleged conspirators in *Blackburn*, the foregoing statement was unnecessary to decide the case. Further, the court's opinion that a horizontal restraint necessarily involves one conspirator on the plaintiff's level is doubtful, at best. Of course, most concerted refusals to deal or boycotts will involve at least one conspirator on the target's level, since there generally will be at least one "beneficiary" at that level of the refusal by the boycotters to deal with the target. See, e.g., [Radiant Burners v. Peoples Gas Light & Coke Co.](#), 364 U.S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358 (1961); [Klor's, Inc. v. Broadway-Hale Stores, Inc.](#), 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959); [Fashion Originators' Guild of America v. FTC](#), 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941). That this factor is not necessary in order to find a horizontal restraint, however, is implicit in many of the Supreme Court cases which resulted from prosecutions by the United States. For example, in [United States v. Sealy, Inc.](#), 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967), the Court struck down as per se illegal a scheme whereby competing manufacturers were licensed and allocated territories in which to sell bedding products under the Sealy name. In determining whether the arrangement was vertical or horizontal, the Court focused on the relative market levels of the parties to the agreement, and not upon the particular level of the market which was being injured. See also [Timken Roller Bearing Co. v. United States](#), 341 U.S. 593, 595-96, 71 S. Ct. 971, 973, 95 L. Ed. 1199 (1951) (territorial restrictions among manufacturers); [Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.](#), 471 F.2d 894, 899 (5th Cir.) (per se violation for competitors at same level of market to allocate territories), cert. denied, 412 U.S. 923, 93 S. Ct. 2736, 37 L. Ed. 2d 150 (1973); [A.H. Cox & Co. v. Star Machinery Co.](#), 653 F.2d 1302, 1306 (9th Cir. 1981); [National Tire Wholesale, Inc. v. The Washington Post Co.](#), 441 F. Supp. 81, 87 (D.D.C. 1977) (horizontal restraint requires collaboration among competitors), aff'd without opinion, [194 U.S. App. D.C. 81, 595 F.2d 888 \(D.C. Cir. 1979\)](#).

⁵⁰ CAT's final argument is that the use of coercion in bringing about the agreement is a per se violation regardless of whether the agreement is vertical or horizontal. We reject this contention. See [Associated Radio Service Co. v. Page Airways, Inc.](#), 624 F.2d 1342 (5th Cir. 1980), cert. denied, 450 U.S. 1030, 101 S. Ct. 1740, 68 L. Ed. 2d 226 (1981); [Northwest Power Products, Inc. v. Omard Industries](#), 576 F.2d 83 (5th Cir. 1978), cert. denied, 439 U.S. 1116, 99 S. Ct. 1021, 59 L. Ed. 2d 75 (1979); [Oreck Corp. v. Whirlpool Corp.](#), 579 F.2d 126 (2d Cir.) (en banc), cert. denied, 439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978). "The use of unfair means resulting in the substitution of one competitor for another without more does not violate the antitrust laws." [Manufacturing Research Corp. v. Greenlee Tool Co.](#), 693 F.2d 1037, 1043 (11th Cir. 1982).

⁵¹ To reiterate, those categories include horizontal and vertical price fixing agreements, division of markets between competitors, tying arrangements, and group boycotts. We have already eliminated the last category. Additionally, there is no contention by CAT that FRI has engaged in any practices regarding prices.

⁵² Actually, the tied product would be the agreement *not* to utilize CAT's services in the transportation of stone. See [Northern Pacific Ry. Co. v. United States](#), 356 U.S. at 5-6, 78 S. Ct. at 518 (1958) (tying [HN23](#) 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 product, or at least agrees that he will not purchase that product from any other supplier).

[**79] If we examine the policies behind the prohibition on tying agreements, we see that the arrangement in the instant case directly implicates those policies. The primary concern is the restriction of competition in the market for the tied product. See *Kypta v. McDonalds Corp.*, 671 F.2d 1282, 1284 (11th Cir.), cert. denied, 459 U.S. 857, 103 S. Ct. 127, 74 L. Ed. 2d 109 (1982); *Southern Concrete Co. v. United States Steel Corp.*, 535 F.2d at 316-17. Tying arrangements are thus discouraged because:

They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time [*781] buyers are forced to forgo their free choice between competing products.

Fortner Enterprises v. U.S. Steel Corp., 394 U.S. 495, 498-99, 89 S. Ct. 1252, 1256, 22 L. Ed. 2d 495 (1969); see, *International Salt Co. v. United States*, 332 U.S. 392, 396-98, 68 S. Ct. 12, 15-16, 92 L. Ed. 2d (1947); *Heattransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 975-77 (5th Cir. 1977), [*80] cert. denied, 434 U.S. 1087, 98 S. Ct. 1282, 55 L. Ed. 2d 792 (1978). In the case at bar, FRI threatened to cut off its supply of rock to Basic unless Basic

Thus, if Hallowell's version of FRI's "threat" is accurate, it does not constitute a classic tying arrangement: Basic was not required to purchase the tied product, aggregate transportation, from FRI, but was merely admonished not to purchase it from CAT. The distinction potentially is of great significance. In *Kentucky Fried Chicken v. Diversified Packaging*, 549 F.2d 368 (5th Cir. 1977), a panel of the former Fifth Circuit stated that:

HN24 [When the victim of an alleged tie-in is not required to buy a single unit of the tied product from the tying party or from any source in which the tying party has an interest or on whose sales the tying party earns a commission, the arrangement simply does not constitute a tie.]

Id. at 378-79. Thus, *Kentucky Fried Chicken* provides that to constitute a tie the arrangement must economically benefit the alleged perpetrator with regard to the tied product. That case, however, involved franchise restrictions: The franchisee of the defendant franchisor was required to purchase certain products from either the franchisor or one of a group of suppliers approved by the franchisor. The record demonstrated that no supplier who met the product specifications required by the franchisor had ever failed to gain approval. *Id. at 380*. Further, there was no evidence that the franchisor had coerced the franchisee into purchasing its supplies.

Franchising inevitably creates a tension between free competition and the need of the franchisor to maintain the quality and reputation of its trademark. In such situations, as the court recognized, allowing franchisors to set quality requirements with regard to the purchase of certain products can actually *enhance* competition. *Id. at 379-80*. These special concerns, however, may be limited to franchise disputes. In the case before us, CAT clearly was foreclosed from doing business with Basic, compare *id. at 378*, and there appears to be no competition-enhancing justification for allowing FRI to restrict competition in the tied market. Instead, this case directly implicates those concerns over barriers to entry which justify per se treatment for tying arrangements.

Aside from the franchise problem, the facts of *Northern Pacific* are similar to those of *Kentucky Fried Chicken*. In *Northern Pacific*, the Railroad sold and leased land on condition that goods produced on the land would be shipped over its lines, provided that its rates were equal to those of competing carriers. *356 U.S. at 3, 78 S. Ct. at 517*. Thus, the case did not involve an "absolute" tie of the second product. The Court's discussion of the cost loophole in this tie, however, suggests that every effort to use power in one market to influence competition in another should arouse Sherman Act concern. See *id. at 11-12, 78 S. Ct. at 521* (even if tie subject to many exceptions, essential fact remains that agreements are binding obligations which deny defendant's competitors access to fenced-off market on same terms as defendant). See generally, Note, *Tie Out -- A Case for the Extension of Tying Theory*, 35 Ohio S.L.J. 140 (1974).

Finally, it is possible that although FRI did not expressly require Basic to secure shipping services from Tank Lines, the effect of the coercion was to ensure that Tank Lines would be CAT's substitute. Even under *Kentucky Fried Chicken* such an effect would warrant per se treatment. See *id. at 377-78*. The record is ambiguous on this point; it is clear that Tank Lines did haul rock to Basic, but it is not certain that it was the exclusive transporter of Basic's rock during the critical period after CAT's termination.

terminated the hauling services of CAT. Therefore, if CAT's allegations are true, FRI attempted to transfer its market power in the aggregate supplying industry over to the aggregate hauling industry. The effect of this transfer would be to erect a barrier against competition in the tied industry, i.e., hauling; this barrier is prohibited by the Sherman Act.⁵³

[**81] As noted earlier, tying arrangements are among those rare categories of cases subject to a rule of per se illegality. See [Kentucky Fried Chicken v. Diversified Packaging, 549 F.2d 368, 374 \(5th Cir.1977\)](#). On the other hand, the specific application of the per se rule in such cases is somewhat unique. Normally, automatic condemnation under the per se rule occurs merely upon a finding that the defendant engaged in the restrictive conduct alleged; proof of anticompetitive effect in a relevant market need not be demonstrated. [HN25](#)[↑] Tying arrangements, however, are subject to a special qualification that the party enforcing the tying agreement must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." [Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 6, 78 S. Ct. 514, 518 2 L. Ed. 2d 545](#); see [Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1037 \(5th Cir.\)](#), cert. denied, 454 U.S. 860, 102 S. Ct. 315, 70 L. Ed. 2d 158 (1981); [**82] [Heattransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d at 975](#); [Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 47-49 \(5th Cir.1976\)](#); [Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321, 323 \(5th Cir.1974\)](#). As the Supreme Court pointed out in *Northern Pacific*, [HN26](#)[↑] the economic power which must be demonstrated need not rise to the level of monopoly power or even dominant power in the market. See [356 U.S. at 11, 78 S. Ct. at 521](#). [HN27](#)[↑] "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from its uniqueness in its attributes." [Fortner Enterprises v. U.S. Steel Corp., 394 U.S. at 503, 89 S. Ct. at 1258](#). Thus, "the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." [Id. at 504, 89 S. Ct. at 1259](#). [**83]

At trial, however, CAT pursued only the "concerted refusal to deal" theory of liability, and did not introduce evidence of FRI's ability to raise prices with respect to an appreciable number of its customers. As a result, the trial court did not instruct the jury as to the need to find that FRI possessed sufficient market power to restrain competition in the market for the tied product. See [Heattransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d at 977-78](#) & n. 12 (example of per se instruction for tying arrangement); [Carpa, Inc. v. Ward Foods, Inc., 536 F.2d at 49](#) (same). Thus, [**82] even if CAT was entitled to proceed under a theory of tying, a question we do not decide, the judgment for CAT must be reversed and the cause remanded to the district court for a new trial.⁵⁴

[**84] V. CAUSATION AND DAMAGES

⁵³ Professors Kaysen and Turner have stated:

A tie-in always operates to raise the barriers to entry in the market of the tied good to the level of those in the market for the tying good: the seller who would supply the one can do so only if he can also supply the other, since he must be able to displace the whole package which the tying seller offers. Developing a substitute for the tying product may be very difficult, if not impossible. Thus, tying tends to spread market power into markets where it would not otherwise exist: for example, few firms are prepared to supply machines like those of IBM, whereas many may be prepared to supply punch cards.

C. Kaysen and D. Turner, Antitrust Policy 157 (1959). But See R. Bork, *supra* note 39, at 366-81. Professor, now Judge, Posner has suggested that the real evil of tie-ins is that they enable a monopolist of the tying product to generate greater monopoly profits by engaging in price discrimination. See R. Posner, [Antitrust Law](#) 171-84 (1976).

⁵⁴ See [Doran v. Petroleum Management Corp., 576 F.2d 91, 93 \(5th Cir.1978\)](#) (parties free on remand to present by amendment new issues not inconsistent with appellate decision) (*quoting Jones v. St. Paul Fire & Marine Co., 108 F.2d 123, 124 (5th Cir.1939)*). See also [GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980, 1004 n. 41 \(9th Cir.1976\)](#) (en banc) (remanding for new trial under rule of reason where trial court erred in applying per se theory of illegality), aff'd, [433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 \(1977\)](#).

HN28[] Under § 4 of the Clayton Act, a private plaintiff who has demonstrated a violation of the Sherman Act also must prove "an injury to his business resulting from the defendant's wrongful actions, and some indication of the amount of the damage done." *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 694 (5th Cir. 1975) (quoting *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir. 1974), cert. denied, 419 U.S. 987, 95 S. Ct. 246, 42 L. Ed. 2d 260 (1974); cert. denied, 424 U.S. 943, 96 S. Ct. 1412, 47 L. Ed. 2d 349 (1976); see *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-63, 101 S. Ct. 1923, 1926-27, 68 L. Ed. 2d 442 (1981); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 114-15 & n. 9, 89 S. Ct. 1562, 1571-72 & n. 9, 23 L. Ed. 2d 129 (1969); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65, 90 L. Ed. 652, 66 S. Ct. 574 (1946); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581 [***851 (5th Cir.)] (on remand from *451 U.S. 557, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)*), cert. denied, 459 U.S. 908, 103 S. Ct. 212, 74 L. Ed. 2d 169 (1982)). FRI's final contentions are that CAT failed to introduce sufficient probative evidence of the fact of injury, and that CAT's evidence with regard to the quantum of damages resulting from the alleged injury was insubstantial. Regarding the damages issue, FRI specifically objects to the reliance by plaintiff's expert on a "pro forma" prepared by Hallowell when testifying as to CAT's profitability. In our view, CAT did introduce "substantial evidence" that FRI's actions, assuming they violated the Sherman Act, resulted in cognizable injury to CAT's business enterprise. See *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 846-48 (5th Cir.), cert. denied, 454 U.S. 1125, 102 S. Ct. 975, 71 L. Ed. 2d 113 (1981). Further, we think that plaintiff introduced barely enough evidence as to damages to withstand a directed verdict. See *Boeing v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). Because we remand for a new trial for other reasons, see *supra* [***86] Section IV, we need not determine whether appellants should have been granted a new trial solely on the damages issue. Moreover, given the complexity of this case, the possibility that the plaintiff at retrial will rely on new theories with regard to liability, and the deficiencies discussed below in CAT's evidence with respect to damages, we would in any event decline to exercise our discretion to order a new trial only as to liability.⁵⁵ We take the opportunity below, however, to express our concern over the apparent weaknesses in CAT's evidence with regard to damages. See *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 999 (5th Cir. 1976).

A. Fact of Injury

Our first task is to determine whether there is a causal relation between the alleged antitrust violation and an injury to plaintiff's business. *Copper Liquor, Inc. v. Adolph Coors Co.*, 509 F.2d 758, 759 [***871 (5th Cir.)] (per curiam), *denying petition for rehearing*, 506 F.2d 934 (5th Cir. 1975). The plaintiff must introduce substantial probative facts demonstrating that some damage flowed from the unlawful conspiracy. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. at 123-25, 89 S. Ct. at 1576-77; *Jot-Em-Down Store (JEDS), Inc. v. Cotter & Co.*, 651 F.2d 245, 247 (5th Cir. 1981) (causation must be proved by sufficient evidence); *Malcolm v. Marathon Oil Co.*, 642 F.2d at [***873] 848 (requiring evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions); *Shumate & Co. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147, 152-53 (5th Cir.) (incumbent upon plaintiff to produce some credible evidence to support allegations of injury), cert. denied, 423 U.S. 868, 96 S. Ct. 131, 46 L. Ed. 2d 97 (1975). On the other hand, **HN29**[] "it is enough that the illegality is shown to be a material cause of the injury; a [***88] plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. at 114 n. 9, 89 S. Ct. at 1571 n. 9; see *Foremost-McKesson v. Instrumentation Laboratory*, 527 F.2d 417, 420 (5th Cir. 1976) (plaintiff must present substantial evidence that illegal practices by defendant were material cause of plaintiff's injuries); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d at 20 (where damages may have been caused by number of factors plaintiff need not prove defendant's actions were sole proximate cause; plaintiff must only show with fair degree of certainty that defendant's conduct materially contributed to injury).

FRI advances three arguments to demonstrate that CAT was not injured by its alleged anticompetitive acts. First, FRI contends that Basic's limited purchases of stone subsequent to its termination of CAT demonstrate that Basic soon would have terminated CAT without any prodding by FRI.

⁵ See generally *Williams v. Slade*, 431 F.2d 605, 608-09 (5th Cir. 1970).

According to Hallowell, he and Scott Carlson of Basic had an understanding whereby CAT would deliver 5,000 tons [**89] of Miami rock to Basic. At CAT's current rate of delivery, this would have generated approximately two to two and one-half months of hauling. Hallowell believed that this length of time with the 24-hour customer would allow CAT to establish itself on a firm footing. Hallowell also testified that at the time he met with Carlson he was accompanied by one of his drivers, Charles Justice. Justice corroborated this testimony, and also testified as to the 5,000-ton agreement between Hallowell and Carlson. Carlson, on the other hand, denied the existence of an agreement involving 5,000 tons, and could not recall the presence of anyone other than Hallowell during their negotiations. This testimony, however, is undercut by the testimony of one of Basic's own employees, Robert Peters, who stated that Hallowell *had* been accompanied by another man.

FRI contends that the evidence at trial refutes CAT's claim of an understanding to deliver 5,000 tons to Basic. From the time that CAT was terminated until the end of 1979, a period of approximately three months, Basic received a total of only eight shipments of rock, totaling approximately 200 tons; all were delivered the last three days [**90] of November, and all were purchased from FRI. Thus, FRI argues that even though CAT was forced to use Rinker South Orange, a non 24-hour customer, as its northern terminus, this changeover resulted in greater revenues for CAT than it would have earned had it not been terminated by Basic.

The record, however, establishes that during the relevant time period rock produced in the Brooksville-Orlando market was in short supply.⁵⁶ CAT's introduction of Miami rock into the Brooksville-Orlando market was the only alternative to rock produced in that market. Moreover, it was uncontested [784] at trial that Basic had a continual debt problem with FRI; Basic's debt at the time of the events in question was variously estimated at from \$90,000 to \$150,000.

[**91] Our examination of the record persuades us that there is a sufficient basis for rejecting FRI's contention. As discussed above, Carlson's recollection of the events surrounding the hiring of CAT was contradicted in at least one significant regard by the testimony of a fellow employee.⁵⁷ Further, the evidence of rock shortages in the Brooksville-Orlando market, combined with Basic's position as a substantial debtor of FRI, could lead a reasonable juror to conclude that Basic's subsequent course of dealing with FRI is not indicative of how it would have behaved had it continued to enjoy a steady supply of cheaper rock from the Miami area. See [Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d at 1362.](#)

FRI next argues that even if CAT had not been terminated by Basic it soon would have been terminated at the south end of its circuit by its sand customer, [**92] Rinker. According to John Dicks, Rinker's Regions Operations Manager, Rinker did not anticipate a long-term relation with CAT, and Hallowell had been aware of this. Dicks stated that Rinker normally purchased its sand directly from the Miami market. In his view, Miami sand was a better grade than that produced in the Clermont area. He further testified that Rinker's reasons for bringing in Orlando sand was a temporary shortage in the Miami supply. Thus, as soon as it would be able to, Rinker intended to switch back over to the Miami supply.⁵⁸ The evidence is clear, however, that until CAT collapsed it was still

⁵⁶ There was some dispute at trial as to whether FRI's rock was "on allocation." Apparently, during the early 1970's FRI had attempted to cope with chronic shortages of rock by allocating a specific percentage to each of its customers. According to employees of FRI, this practice was abandoned shortly thereafter due to complaints by its customers. At trial, Hallowell and other CAT employees all claimed that during the time period here involved FRI was again allocating rock on some type of percentage basis among its customers. Employees of FRI denied this. In our view, whether or not FRI was in fact pursuing such a course of conduct is a relatively minor issue. All parties seem to have agreed that the demand for Orlando rock exceeded its current supply. See also *supra* note 26 (statement by employee of FRI regarding "stockpile conditions").

⁵⁷ Moreover, soon after CAT began hauling stone to Basic, Basic established an apparently open-ended line of credit with Rinker Miami.

⁵⁸ There was also evidence that at approximately the same time that CAT went out of business, Rinker opened up a rail spur from its Miami stone mines to its plant at City Point, fifty miles south of Orlando. According to Dicks, this spur allowed Rinker itself to ship its Miami rock to City Point by train, and from there by truck into the Orlando market. At the time of trial, Rinker was shipping approximately 30 cars a day; it had the capacity to ship more. It is not clear what relevance this evidence has to the

transporting sand south to Rinker's West Palm Beach plant and was still transporting rock north from Rinker Miami to Rinker South Orange. Finally, FRI's argument as to the probability that CAT would have been terminated by Rinker may well be relevant to the quantum of damages for which FRI is liable. It does not, however, have any bearing on the loss of revenue CAT may have suffered during the remaining two months of its operations, during which time Rinker remained its customer. Thus, this argument by FRI has no bearing on the fact of injury issue.

[**93] Finally, FRI contends that CAT did not discharge its obligation to mitigate damages. See [Gulf City, Inc. v. Wilson Sporting Goods, Inc., 555 F.2d 426, 436 \(5th Cir.1977\)](#); [Lehrman v. Gulf Oil Corp., 464 F.2d 26, 46-47 \(5th Cir.\)](#), cert. denied, 409 U.S. 1077, 93 S. Ct. 687, 34 L. Ed. 2d 665 (1972). In our view, this contention is without merit. Immediately after its termination by Basic, CAT secured as a customer for Miami stone the Rinker South Orange plant. CAT continued with Rinker as a customer until it ceased operations. FRI contends, however, that since CAT's viability depended upon securing a 24-hour customer, CAT's relationship with Rinker, a limited delivery time customer, was an insufficient effort to mitigate. According to testimony by one of Hallowell's employees, however, CAT had exhausted the available 24-hour customers. See Record at 1499. The record simply does not demonstrate [*785] that CAT's inability to secure a 24-hour customer was the result of its own "business calculus." [Zenith Radio Corp. v. Hazeltine Research](#), 395 U.S. at 128, 89 S. Ct. at 1579.

We thus conclude that the [**94] record does not demonstrate that "complete absence of substantial probative facts" necessary to allow us to overturn the jury's determination of causation. [Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 902 \(5th Cir.\)](#), cert. denied, 412 U.S. 923, 93 S. Ct. 2736, 37 L. Ed. 2d 150 (1973); see [Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 953 \(5th Cir.\)](#), rehearing denied, [509 F.2d 758 \(5th Cir.1975\)](#) (per curiam). The unrebutted testimony by Hallowell, Justice, and FRI's former vice-president, Jerry DeGarmo, established that CAT's viability depended upon securing and maintaining the 24-hour customer at the north terminus of its haul.⁵⁹ Moreover, CAT's invoices demonstrate that the last week it shipped stone to Basic Asphalt its revenue was approximately \$2,100. During that week a total of sixteen trailer-loads were delivered in a period of five days. By the beginning of November, CAT was delivering only two trailer-loads of stone per day to Rinker's non-24-hour plant at South Orange, and its revenue had dropped to approximately \$1,300 per week. From this evidence, a juror could reasonably [**95] infer that FRI's action in coercing the termination of CAT by Basic was a material cause of some economic damage to CAT.⁶⁰

case at hand. There is no evidence to suggest that Rinker was doing any more than shipping its own rock from Miami to its own asphalt plants in the Orlando area; in other words, Rinker's ability to satisfy its own rock needs in the Orlando area does not necessarily bear upon the demand of producers such as Basic for Miami rock. Moreover, Dicks himself conceded that if CAT had been able to stay in business long enough to reach its anticipated goal of hauling 1,000 tons a day at a competitive price Rinker South Orange may have agreed to stay open on a 24-hour basis in order to continue doing business with CAT. See Record at 1075-81.

⁵⁹ In [H & B Equipment Co. v. International Harvester, 577 F.2d 239 \(5th Cir.1978\)](#), a panel of the former Fifth Circuit stated that "isolated self-serving statements" of the plaintiff's corporate officers are insufficient to establish antitrust causation. In our view, *H & B Equipment* is distinguishable: There, statements by plaintiff's corporate officer provided the sole basis for an inference of causation. [Id. at 247](#). Nor did the plaintiff present any expert testimony as to its ability to penetrate the market and maintain a viable market position. *Id.* In the case at bar, Hallowell's testimony was corroborated by a former officer of FRI. Further, it is uncontested that each one-way haul by CAT which resulted from its inability to secure a 24-hour customer at the northern terminus resulted in a loss of revenue for that haul.

⁶⁰ The cases relied upon by FRI to demonstrate the absence of causation are readily distinguishable. For example, [Copper Liquor, Inc. v. Adolph Coors Co., 509 F.2d 758 \(5th Cir.1975\)](#) (per curiam), denying petition for rehearing, [506 F.2d 934](#), involved a complaint by a beer retailer who operated at a substantial profit both before and after the alleged antitrust violation. According to the plaintiff, his supply of Coors beer had been cut off because he failed to abide by the defendant's pricing and quality restrictions. The plaintiff, however, used Coors only as a "loss leader" in order to draw customers into the store to purchase other goods. The court rejected his claim of injury and damages because the plaintiff presented no itemized product-by-product records to show the impact on the sale of other products resulting from his loss of Coors beer. Essentially, the only evidence introduced was the plaintiff's gross bank deposit records, which did not reflect product-by-product effects. More importantly, however, although the plaintiff had available to him daily sales records which would have been extremely probative, he made no attempt to introduce these records. The court concluded that when relative degrees of profitability are concerned, as opposed to

[**96] B. Amount of Damages

[HN30](#) Once the fact of causation is established, the burden of proving damages is much less severe. [Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.](#) 471 F.2d at 902; see [J. Truett Payne Co. v. Chrysler Motors Corp.](#), 451 U.S. at 566-67, 101 S. Ct. at 1929-30; [Zenith Radio Corp. v. Hazeltine Research](#), 395 U.S. at 124, 89 S. Ct. at 1577; [Malcolm v. Marathon Oil Co.](#), 642 F.2d at 858; [Household Goods Carriers' Bureau v. Terrell](#), 452 F.2d at 159. This rule of leniency with regard to proof of damages is necessary because:

[*786] 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. [Thus] . . . the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

[Bigelow v. RKO Radio Pictures](#), 327 U.S. at 264-65, 66 S. Ct. at 580; [**97] see [Lehrman v. Gulf Oil Corp.](#), 464 F.2d at 45. On the other hand, [HN31](#) although the question of damages requires that the court "enter into the realm of the imprecise and the uncertain," we must reverse the jury's verdict if it becomes apparent that its judgment was based on speculation and guesswork. [Zenith Radio Corp. v. Hazeltine Research](#), 395 U.S. at 124, 89 S. Ct. at 1577. Our task is to ensure that the jury rendered a just and reasonable estimate based on relevant data. *Id.*

FRI has argued vigorously that CAT's evidence with regard to the amount of damages is overly speculative and insufficient to support the verdict. In particular, FRI contends that testimony by plaintiff's expert, Dr. Frederick Raffa, as well as certain charts used by Dr. Raffa, were so deficient that they should have been held inadmissible. Our review of the record satisfies us that CAT's evidence of damages was barely sufficient to withstand a directed verdict.⁶¹ However, we have grave reservations regarding much of Dr. Raffa's testimony. Because we reverse and remand [**98] for a new trial on the basis of the erroneous per se instruction, in the interests of judicial economy we will discuss below our concerns about the evidence.

CAT's theory of damages was that had it been able to continue delivering to Basic it could have stabilized its costs and revenues to the point where it could have begun expanding its operation. Because FRI was the cause of its termination by Basic, then FRI is responsible for the loss of all future profits which could have been earned by CAT. [HN32](#) Loss of future profits is a well-established basis [**99] for determining the measure of economic injury resulting from an anticompetitive act which forces the victim out of business. See [H & B Equipment Co. v. International Harvester](#), 577 F.2d at 246-47; [Lehrman v. Gulf Oil Corp.](#), 464 F.2d at 44-45; [Household Goods Carriers' Bureau v. Terrell](#), 452 F.2d 152, 159-60 (5th Cir. 1971) (en banc). Accordingly, the trial court instructed the jury on this theory of future profits.⁶²

the destruction of a going concern, there can be no evidentiary substitute for accurate sales and inventory records. Clearly, *Copper Liquor* does not govern the case before this court.

Similarly, in [Shumate & Co. v. National Ass'n of Securities Dealers, Inc.](#), 509 F.2d 147 (5th Cir.), cert. denied, 423 U.S. 868, 96 S. Ct. 131, 46 L. Ed. 2d 97 (1975), plaintiff failed to produce any relevant data bearing upon injury and damages other than his own unsupported testimony. See also [Kestenbaum v. Falstaff Brewing Corp.](#), 514 F.2d 690 (5th Cir. 1975) (no injury from price fixing scheme where plaintiff conceded he would have voluntarily taken action which defendant sought to coerce, and where plaintiff failed to introduce any evidence of reduction in sales), cert. denied, 424 U.S. 943, 96 S. Ct. 1412, 47 L. Ed. 2d 349 (1976).

⁶¹ In particular, CAT's receipts demonstrate a clear decrease in revenues subsequent to its termination by Basic at the behest of FRI. See [Malcolm v. Marathon Oil Co.](#), 642 F.2d at 858-60 & n. 24 (when plaintiff has offered sufficient evidence of fact of damage directed verdict on *amount* of damages is proper only in most unusual circumstances).

⁶² The trial court stated in part:

[**100] The precise manner in which the plaintiff arrived at a calculation for lost future profits was hotly disputed at trial. The plaintiff relied exclusively on the testimony of Dr. Raffa, who took as his starting point the pro forma prepared by Hallowell during the planning stages of CAT.⁶³ The first [**787] page of the pro forma contained a breakdown of expected income from hauling both sand and stone; the income arrived at by Hallowell was 94.2 cents per running mile. The second page of the pro forma contained a breakdown of the estimated costs of operation, including driver's salaries, fuel, equipment payments, tires, insurance, repairs, licenses, bookkeeping and other overhead, phone bills, and turnpike tolls. Hallowell's pro forma arrived at an estimated cost of 75 cents per running mile, with an overall profit of 19.2 cents per running mile or 19.8 percent.

[**101] Using this pro forma as well as the actual revenues as reflected in CAT's invoices, Raffa established a historical revenue pattern. This revenue pattern included three specific historic periods: a start-up period during which CAT earned an average weekly revenue of approximately \$1,600; a normalized period during which CAT earned an average weekly revenue of approximately \$3,000 per week; and a slow down period beginning with CAT's termination by Southern Paving. Next, Raffa established a projection of the normalized period over time, using the base revenue of \$3,000 per week. In order to establish a projection of CAT's growth, Raffa relied upon two statistical proxies. With regard to CAT's sand hauling, Raffa relied upon the growth rate in residential building permit activity in the West Palm Beach area -- the area and industry in which CAT's sand would be utilized. As a proxy for CAT's rock hauling business, Raffa relied upon the Florida Department of State Transportation's historical data on asphalt road construction in the Central Florida area -- the likely destination of rock hauled by CAT. Weighing the relevant growth rates on the basis of those percentages of CAT's [**102] business respectively devoted to sand and rock hauling,⁶⁴ Raffa arrived at an estimated annual growth rate for CAT's business of 7.58%. Next, Raffa annualized the estimated weekly revenue of CAT during its normalized period. Multiplying this annualized revenue by the weighted growth rate, Raffa determined that CAT's revenue for 1980 had it continued in business would have been \$169,240. This revenue would have increased over a 10-year period, until by 1989 it would have amounted to \$303,638.

Next, Raffa computed expected annual costs. In doing so he relied exclusively upon the pro forma, as well as on interviews with Hallowell. He did not rely on actual costs as represented by cancelled checks. Based on the pro forma estimates he arrived at an annualized cost of \$123,720; when subtracted [**103] from the revenue figure this yielded a projected net profit for 1980 of approximately \$36,000. Over a ten-year period,⁶⁵ Raffa calculated that CAT's profits would have amounted to over \$500,000. Reduced by an annual interest rate of 8% this amounted to a present value of approximately \$355,000.

The use of a projection of anticipated profits by an antitrust plaintiff in proving damages is entirely acceptable so long as the projection when reduced to present cash value leads to a reasonable estimate of the damages caused by the violation based upon the evidence.

Now, you may elect to use any formula or theory that you consider reasonable for a reasonable estimate or an approximation provided that it is based upon the evidence in the case and the loss stated by the court. Now, in considering the elements of future profits and in determining what damages, if any, were sustained by the plaintiff, if it is entitled to recover, you are instructed that if because of the violation of the antitrust laws plaintiff was unable to earn that profit which it could have earned but for the violation of the antitrust laws, the plaintiff was, in fact, damaged . . .

Now, the fact that a plaintiff's business may have been new or unestablished is not fatal to the amount of damages constituting that profit.

Record at 1218.

⁶³This two-page pro forma was a statement of expected income and expenditures with regard to the planned operation of the new business. Record at 855. During CAT's existence the figures contained in the pro forma were never updated, despite changes in the costs of various items such as fuel.

⁶⁴The relevant growth rates were 10.48% for residential building, and 5.1% for road construction. Road hauling produced 57.7% of CAT's revenue, while sand hauling resulted in 43.3% of that revenue. Record at 863-66.

⁶⁵Dr. Raffa testified that he used a ten-year period because Department of Labor statistics indicated that Hallowell could reasonably be expected to continue working for that period of time. In addition, he relied upon Hallowell's own representations.

FRI's expert witness, Dr. Sanford Berg, used a similar methodology in that he relied upon the pro forma revenue estimates and calculated annualized figures based on the revenue during CAT's normalized period of operations. However, his sources differed in one significant respect: he did not rely upon the pro forma's cost estimates but chose instead to use cancelled business checks to reconstruct actual cash outlays during this period. According to Berg, he and [**104] an assistant reviewed each check drawn on CAT's bank account and attempted to place them into the cost categories used on the pro forma. It is not surprising that Dr. Berg arrived at a different conclusion as to CAT's profitability during the normalized [*788] period. Whereas Dr. Raffa had estimated annual costs at approximately \$123,000, Dr. Berg arrived at a figure of \$175,000. This figure translated into an annual loss of over \$18,000, or 11.7%. See Defendant's Exhibit 6.

This wide disparity in cost figures is partially explained by Dr. Berg's detailed itemization of the pro forma category listed as "bookkeeping, billing, overhead and supervision." According to the pro forma, the annual cost for these operations would have been \$10,000. Dr. Berg broke this category down further, however, and arrived at a much larger figure -- approximately \$41,000. A good deal of this difference lies in Hallowell's admission that his own salary was included in this fund.⁶⁶ In addition to these expenses which were not reflected in the pro forma estimates, Dr. Berg's investigation turned up an additional \$61,776 of debt for which CAT had not yet made payments.⁶⁷ Most of these [**105] expenses, such as withholding taxes, could be termed recurring expenses rather than start-up expenses, and hence would be incurred during any normalized period of operations.⁶⁸

[**106] Dr. Raffa testified that for a business as young as CAT he would not expect records of actual cash outlays to be entirely accurate. In his judgment, use of the pro forma was a reasonable source for his calculations. Dr. Raffa admitted, however, that he had not been provided copies of the cancelled checks prior to making his study of CAT's operations. He further conceded that he would prefer, when possible, to be provided an actual experience of costs. Finally, although he had made some effort to supplement the pro forma with evidence of CAT's actual expenses, he admitted relying upon Hallowell's representations that CAT's actual expenses had been close to those estimates provided by the pro forma.⁶⁹

⁶⁶ Thus, although the estimated cost for items in this category was \$10,000, Dr. Berg's calculation of checks actually made payable to Hallowell as salary amounted to almost \$22,000. This did not include other items also included in this category, such as road expense (\$6,500), car payments (\$2,800), and miscellaneous expenses (\$7,100).

⁶⁷ For example, although according to CAT's disbursements for salary it had been withholding federal and state income taxes from its employees, it had never actually paid such taxes to the authorities. Thus, CAT had incurred tax liability of over \$35,000. In addition, CAT had incurred a liability of over \$7,000 with the Florida Department of Transportation for payment of highway tolls.

⁶⁸ Implicit in the methodology used by both experts, the annualization of costs and revenues incurred during the normalized period of operation, was an effort to separate out recurring costs from start-up costs. Calculations based on the pro forma would facilitate this task, since each category could readily be assigned the label of either recurring or start-up costs. Dr. Berg testified that he encountered some difficulty in attempting to determine from the cancelled checks whether or not certain outlays belonged in one category or another. Dr. Berg further testified that occasionally he was not able to determine whether a particular expenditure was made during the normalized period as opposed to either the start-up period or the slow-down period. A case in point would be the downpayment on the trailers which CAT purchased. Because of manufacturing flaws in these trailers, which were returned several times to the manufacturer, CAT's deadline for the downpayment was delayed by several months. If the actual payment was made during the normalized period, the expense nonetheless should be considered a part of start-up expenses, including this expenditure during the normalized period would tend to skew Dr. Berg's calculation of annual expenses. On the other hand, since CAT intended to continue ordering sets of trailers at an increased rate, and not simply to operate on the first sets of trailers manufactured, it is possible that inclusion of this expense actually resulted in a more accurate calculation.

⁶⁹ In at least one category the pro forma clearly was inaccurate. Hallowell had based his fuel costs per mile upon an estimate that diesel fuel would cost 55 cents a gallon. Soon after CAT began operations, however, the price of fuel rose to approximately \$1. At one point during his testimony, Dr. Raffa indicated he relied on the original figure of 55 cents. At another point, he seemed to suggest that he had updated the cost to 85 cents a gallon. Even this estimate, however, falls far short of the mark.

[**107] The most problematic aspect of Dr. Raffa's reliance on the pro forma, however, was the mathematical conclusion contained in the document itself. In order to calculate revenue per running mile, Hallowell [*789] had used a figure of 548 miles, or one round trip, from Miami to Orlando and back. When calculating the cost per running mile, however, Hallowell had used a figure of 800 miles per round trip. Dr. Berg testified that use of the much larger figure when calculating costs would reduce considerably the calculation of cost per running mile. Dr. Raffa testified that he did not know why the differing mileage figures had been used. Various of CAT's witnesses, including Hallowell, were questioned at length as to use of the 800-mile figure; none of these witnesses provided a satisfactory explanation.⁷⁰

[**108] Although we are mindful of [HN33](#)⁷¹ the lesser standard of sufficiency which controls once the fact of causation has been established, an expert's projection of future profits must be supported by proven facts. See [Chrysler Credit Corp. v. J. Truett Payne Co.](#), 670 F.2d at 582; [Terrell v. Household Goods Carriers' Bureau](#), 494 F.2d at 24. The available evidence, however, suggests that the estimates of profits contained in the pro forma were distorted and that CAT's actual experience with expenditures differed significantly from those estimates. Moreover, Dr. Raffa not only failed to review available evidence of actual costs, but also failed to demonstrate why that evidence was not more accurate than the estimates upon which he relied.⁷¹ [**110] At retrial, therefore, the trial court should reconsider its decision to admit Dr. Raffa's testimony based upon the pro forma, unless CAT sufficiently explains the apparent inconsistencies in its pro forma and its failure to consider the evidence of actual costs. See [Georgia Kaolin Int'l v. M/V Grand Justice](#), 644 F.2d 412, 417 (5th Cir. 1981) [**109] (judgment based on testimony by expert who relied on demonstrably incorrect statistics cannot stand; case remanded to district court for redetermination of issue); [Eastern Air Lines, Inc. v. McDonnell Douglas Corp.](#), 532 F.2d at 998-1000 (where practical court should exclude particular assumptions or other aspects of expert testimony which considered individually do not meet minimum of probative value); [Herman Schwabe, Inc. v. United Shoe Machinery Corp.](#), 297 F.2d 906, 911-13 (2d Cir.) (expert testimony inadmissible where basic assumption as to market share plaintiff would have garnered is completely unsupported), cert. denied, 369 U.S. 865, 82 S. Ct. 1031, 8 L. Ed. 2d 85 (1962).⁷²

[*790] VI. CONCLUSION

⁷⁰ The thrust of Hallowell's explanation appears to be that although revenue was calculated on the basis of using one set of trailers during the first few months of CAT's operation, the costs were calculated upon the basis of the ideal utilization of CAT's resources at a time when it would have between 10 and 20 trailers on the road. Hallowell testified that maximum utilization would result when CAT would have sufficient equipment to run its tractors exclusively on the Florida Turnpike between the Palm Beach exit and the Orlando exit. At the same time, CAT would rely upon tractors stationed at these exits to actually conduct the shuttle operation of pulling each trailer to the various delivery and loading points. Apparently, the mileage between Turnpike exits would be approximately 800 miles per round trip, excluding the shuttle operations. Regardless of the viability of this plan, we agree with FRI that use of the two different mileage figures to calculate revenue per running mile results in a distortion of CAT's profit margin.

⁷¹ FRI cites [Copper Liquor, Inc. v. Adolph Coors Co.](#), 506 F.2d 934 (5th Cir.), aff'd on rehearing, 509 F.2d 758 (5th Cir. 1975) (per curiam), for the proposition that testimony as to lost future profits must be based upon the best available evidence. We would not go so far, however. In *Copper Liquor* the plaintiff had established a long track record of profitability, and had available to it accurate sales and inventory records. In such a situation, reliance on general operating statements and income tax records clearly is insufficient. *Copper Liquor* does not control when, as here, the plaintiff enjoyed only a brief existence. See [Greene v. General Foods Corp.](#), 517 F.2d 635, 665-66 & n. 23 (5th Cir. 1975) (to support jury verdict expert's assumptions and methodology need not be most preferable ones), cert. denied, 424 U.S. 942, 96 S. Ct. 1409, 47 L. Ed. 2d 348 (1976).

⁷² We note, in passing, that CAT seems to have proceeded under the assumption that in order to prove lost future profits it must demonstrate that the business destroyed was operating at a profit. Such is clearly not the law in this circuit. See [Terrell v. Household Goods Carriers' Bureau](#), 494 F.2d at 24 (plaintiff may proceed under lost profits theory even if business had never been profitable so long as each element of projection is supported by proven facts). Accord, [Murphy Tugboat Co. v. Crowley](#), 658 F.2d 1256, 1260-63 (9th Cir. 1981), cert. denied, 455 U.S. 1018, 102 S. Ct. 1713, 72 L. Ed. 2d 135 (1982). Thus, plaintiff's case for damages does not necessarily depend upon showing CAT's profit-making ability during the normalized period of operations. When, however, the expert's opinion is based on the assumption that an entity was profitable, then the validity of the expert's ultimate opinion depends upon the accuracy of that assumption.

710 F.2d 752, *790L^A1983 U.S. App. LEXIS 25371, **109

On the basis of the foregoing discussion, the judgment is reversed [**111] and the cause is remanded to the district court for retrial under the correct rule of reason theory of liability⁷³ and for retrial on the issue of damages.

REVERSED and REMANDED.

End of Document

⁷³ Should plaintiff choose to pursue a tying theory, and produce sufficient evidence to warrant same, a qualified "per se" instruction would be appropriate.



Jet Courier Services, Inc. v. Federal Reserve Bank

United States Court of Appeals for the Sixth Circuit

May 24, 1983, Cause Argued ; July 29, 1983, Decided

No. 83-3128

Reporter

713 F.2d 1221 *; 1983 U.S. App. LEXIS 25350 **; 1983-2 Trade Cas. (CCH) P65,549

Jet Courier Services, Inc., PDQ Air Services, Inc., Dixie Airways, Inc., Plaintiffs-Appellants, v. Federal Reserve Bank Of Atlanta, Federal Reserve Bank of Boston, Federal Reserve Bank of Chicago, Federal Reserve Bank of Cleveland, Federal Reserve Bank of Dallas, Federal Reserve Bank of Kansas City, Federal Reserve Bank of Minneapolis, Federal Reserve Bank of New York, Federal Reserve Bank of Philadelphia, Federal Reserve Bank of Richmond, Federal Reserve Bank of St. Louis, Federal Reserve Bank of San Francisco, and Board of Governors of the Federal Reserve System, Defendants-Appellees

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Southern District of Ohio.

Disposition: The judgment of the district court is affirmed.

Core Terms

federal reserve bank, pricing, clearing, banks, collection service, member bank, principles, couriers, Sherman Act, schedules, air, constitutional requirement, depository institutions, district court, third party, federal court, collection, indirect, redress

LexisNexis® Headnotes

Banking Law > Regulators > US Federal Reserve System > Federal Reserve Act

Banking Law > Regulators > US Federal Reserve System > General Overview

Banking Law > Regulators > US Federal Reserve System > Member Banks

[HN1](#) [down arrow] US Federal Reserve System, Federal Reserve Act

See Federal Reserve Act § 11A, [12 U.S.C.S. § 248a \(1976 ed., Supp. IV\)](#).

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

713 F.2d 1221, *1221 (1983 U.S. App. LEXIS 25350, **1

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN2 Standards of Review, Abuse of Discretion

The Administrative Procedure Act, [5 U.S.C.S. § 706\(2\)\(A\)](#) provides for review of agency action which is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Administrative Law > Judicial Review > Reviewability > Standing

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

HN3 Reviewability, Standing

Administrative Procedure Act § 10(a), [5 U.S.C.S. § 702 \(1976\)](#), limits standing to a person who suffers legal wrong because of an agency action or is adversely affected or aggrieved by such action within the meaning of a relevant statute.

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

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

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

HN4 Justiciability, Case & Controversy Requirements

Standing involves both constitutional (case or controversy) requirements and prudential considerations.

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

HN5 Case or Controversy, Standing

U.S. Const. art. III, requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.

Constitutional Law > The Judiciary > Case or Controversy > Advisory Opinions

Environmental Law > Land Use & Zoning > Constitutional Limits

Constitutional Law > ... > Case or Controversy > Standing > Third Party Standing

HN6 Case or Controversy, Advisory Opinions

The plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. In addition even when the plaintiff has alleged redressable injury sufficient to meet the requirements of U.S. Const. art. III, courts must refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches. Finally, the plaintiff's complaint must fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

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

[**HN7**](#) Justiciability, Standing

In considering the question of standing, both the trial and appellate courts must accept all material allegations of the complaint as true and must construe the complaint in favor of the plaintiff. Affidavits which particularize the allegations of fact must also be considered.

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

[**HN8**](#) Case or Controversy, Standing

Though the injury to a plaintiff need not be direct to satisfy the constitutional requirement, it must at least be traceable to the challenged action of the defendant and must be an injury that the requested legal action will be likely to redress.

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

Environmental Law > Land Use & Zoning > Constitutional Limits

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

[**HN9**](#) Preliminary Considerations, Justiciability

The question of standing concerns, apart from the case or controversy test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

[**HN10**](#) Remedies, Injunctions

Sherman Act § [2. U.S.C.S. § 2 \(1976\)](#), makes "every person" who monopolizes, attempts to monopolize, or combines or conspires with any other person to monopolize, trade or commerce among the states guilty of a misdemeanor. [15 U.S.C.S. § 2 \(1976\)](#).

Antitrust & Trade Law > Exemptions & Immunities > General Overview

[HN11](#) [down] Antitrust & Trade Law, Exemptions & Immunities

As an agency of the federal government the Federal Reserve System may not be sued under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#)

Counsel: Glenn V. Whitaker, (LC), Graydon, Head and Ritchey, Cincinnati, Ohio, Daniel B. Silver, Lee C. Buchheit, Vincent Alventosa, Eric C. Jeffrey, Cleary, Gottlieb, Steen & Hamilton, Washington, District of Columbia, for Appellant.

Christopher K. Barnes, United States Attorney, Cincinnati, Ohio, Donetta D. Wiethe, James F. McDaniel, Esq., Cincinnati, Ohio, Mark Rutzick, Federal Programs Branch, Civ. Div., Washington, District of Columbia, for Appellee.

Judges: Lively and Contie, Circuit Judges, and Siler, District Judge. *

Opinion by: LIVELY

Opinion

[*1222] LIVELY, Circuit Judge.

In this action three private air couriers sought to enjoin the Board of Governors of the Federal Reserve System (the Board) and the twelve regional Federal Reserve Banks from implementing an order which modified their check collection services. The program sought to be enjoined extended the time for presentment of checks and established [*2] a schedule of fees to be charged by Federal Reserve Banks for check collection services. The district court dismissed the action and this court granted an expedited appeal.

I.

For many years prior to 1980 the Federal Reserve Banks performed check collection services for member banks without charge. The earnings on reserves which member banks were required to maintain on deposit with the Federal Reserve Banks made this free service possible. As part of a general overhaul of the government's regulation of the banking industry Congress enacted the Monetary Control Act of 1980, Pub. L. 96-221, 94 Stat. 132 (The MCA). One feature [*1223] of the MCA is a provision by which many banks in the United States that are not now members will eventually be required to maintain reserve accounts with the Federal Reserve System. Further, services such as check clearing formerly provided to member banks only will be made available to all banks, regardless of whether or not they are members. The services will no longer be free of charge, however. [HN1](#) [up] Section 107 of the MCA added a new Section 11A to the Federal [*3] Reserve Act, codified as [12 U.S.C. § 248a \(1976 ed., Supp. IV\)](#):

[§ 248a. Pricing of services](#)

(a) Publication of pricing principles and proposed schedule of fees; effective date of schedule of fees

* The Honorable Eugene Siler, Judge, U.S. District Courts for the Eastern and Western Districts of Kentucky, sitting by designation.

Not later than the first day of the sixth month after March 31, 1980; the Board shall publish for public comment a set of pricing principles in accordance with this section and a proposed schedule of fees based upon those principles for Federal Reserve bank services to depository institutions, and not later than the first day of the eighteenth month after March 31, 1980, the Board shall begin to put into effect a schedule of fees for such services which is based on those principles.

(b) Covered services

The services which shall be covered by the schedule of fees under subsection (a) of this section are --

- (1) currency and coin services;
 - (2) check clearing and collection services;
 - (3) wire transfer services;
 - (4) automated clearinghouse services;
 - (5) settlement services;
 - (6) securities safekeeping services;
 - (7) Federal Reserve float; and
- (8) any new services which the Federal Reserve System offers, including **[**4]** but not limited to payment services to effectuate the electronic transfer of funds.

(c) Criteria applicable

The schedule of fees prescribed pursuant to this section shall be based on the following principles:

- (1) All Federal Reserve bank services covered by the fee schedule shall be priced explicitly.
- (2) All Federal Reserve bank services covered by the fee schedule shall be available to nonmember depository institutions and such services shall be priced at the same fee schedule applicable to member banks, except that nonmembers shall be subject to any other terms, including a requirement of balances sufficient for clearing purposes, that the Board may determine are applicable to member banks.
- (3) Over the long run, fees shall be established on the basis of all direct and indirect costs actually incurred in providing the Federal Reserve services priced, including interest on items credited prior to actual collection, overhead, and an allocation of imputed costs which takes into account the taxes that would have been paid and the return on capital that would have been provided had the services been furnished by a private business firm, except that the pricing **[**5]** principles shall give due regard to competitive factors and the provision of an adequate level of such services nationwide.
- (4) Interest on items credited prior to collection shall be charged at the current rate applicable in the market for Federal funds.

(d) Budgetary consequences of decline in volume of services

The Board shall require reductions in the operating budgets of the Federal Reserve banks commensurate with any actual or projected decline in the volume of services to be provided by such banks. The full amount of any savings so realized shall be paid into the United States Treasury.

In their complaint, filed February 17, 1983, the plaintiffs charged that the Board violated Section 107 of the MCA by directing the Reserve Banks to begin implementing previously determined new fee schedules, deposit deadlines and funds availability schedules for check collection services on **[*1224]** February 24, 1983. The plaintiffs asserted that the fees, presentment and availability schedules violated the MCA by tending to create a monopoly or near monopoly for the Federal Reserve Banks in the market for check collection and transportation services in violation of **[**6]** a congressional mandate that Reserve Banks compete on a fair and equal basis with their commercial clearing bank counterparts. This unfair competition was achieved, the plaintiffs claimed, by establishing fee schedules which failed to cover the full cost of the services offered by the Federal Reserve Banks. The plaintiffs charged that the fee schedules for use of the Interdistrict Transportation System (ITS), a component of the check clearing operations conducted by the Federal Reserve System had no relation to the cost of services actually offered and reflected "a deliberate pattern of predatory pricing." The ITS performs services for the Federal Reserve Banks and the banks which use their check collection services which is similar to that performed by the plaintiffs and other air couriers for private clearing banks and their check collection customers.

The plaintiffs based their demand for injunctive relief on claimed violation of the pricing criteria contained in [12 U.S.C. § 248a\(c\)](#), *supra*, alleged failure to publish the plan for comment sufficiently in advance of the effective date and an asserted violation of [Section 2](#) of the Sherman Act, [15 U.S.C. § 2](#) [**71](#) (1976).¹ The plaintiffs filed a motion for a temporary restraining order with supporting affidavits and the Board and one Reserve Bank filed responses in opposition to the motion, also supported by affidavits. After conducting a hearing the district court dismissed the action on February 22, 1983, upon concluding that the plaintiffs lacked standing to sue under the MCA and that the complaint failed to state a claim upon which relief could be granted under the Sherman Act. Both the district court and this court denied motions to stay the judgment of dismissal.

[**8] II.

We agree with the district court that the plaintiffs lack standing under the relevant statute,² the MCA. The plaintiffs are not banks and do not function as check processing or clearing centers. They are private air couriers which contract with banks other than Federal Reserve Banks that perform check collection services. None of the banks which utilize the transportation services of the plaintiffs joined in bringing this action.

A.

The requirement that a plaintiff must have "standing" in order to bring an action in a federal court has been long recognized, and has been the subject of many decisions. The most recent Supreme Court statement on the subject is contained [\[**9\]](#) in [Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 70 L. Ed. 2d 700, 102 S. Ct. 752 \(1982\)](#). In *Valley Forge* the court noted that [HN4](#)[↑] standing involves both constitutional ("case" or "controversy") requirements and prudential considerations. After discussing some ambiguity concerning the nature of the standing requirement arising from earlier decisions, the Court identified the "irreducible minimum" constitutional requirement as follows:

A recent line of decisions, however, has resolved that ambiguity, at least to the following extent: at an irreducible minimum, [HN5](#)[↑] Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual [\[*1225\]](#) or threatened injury as a result of the putatively illegal conduct of the defendant," [Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 \[60 L. Ed. 2d 66, 99 S. Ct. 1601\] \(1979\)](#), and that the injury "fairly can [\[**10\]](#) be traced to the challenged action" and "is likely to be redressed by a favorable decision," [Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 \[48 L. Ed. 2d 450, 96 S. Ct. 1917\] \(1976\)](#). In this manner does Art. III limit the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen, supra* at 97.

[454 U.S. at 472](#) (footnote omitted). The Court also outlined the governing prudential considerations:

Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that [HN6](#)[↑] "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. at 499. In addition even when the plaintiff has alleged redressable injury [\[**11\]](#) sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract

¹ Though the plaintiffs did not cite the Administrative Procedure Act (APA), [5 U.S.C. § 551 \(1976\)](#) et seq., in their complaint, it is evident from the fact that they sought to enjoin action of the Federal Reserve "not in accordance with law" that they were seeking review under the APA. [HN2](#)[↑] More specifically, [5 U.S.C. § 706\(2\)\(A\)](#) provides for review of agency action which is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." The plaintiffs did assert subject matter jurisdiction under [28 U.S.C. § 1331](#) (federal question jurisdiction).

² [HN3](#)[↑] Section 10(a) of the APA, [5 U.S.C. § 702](#), limits standing to a person who suffers legal wrong because of an agency action or is adversely affected or aggrieved by such action "within the meaning of a relevant statute"

questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. *Id.* at 499-500. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 [25 L. Ed. 2d 184, 90 S. Ct. 827] (1970).

[454 U.S. at 474-75](#) (footnotes omitted). Other federal courts have been required to deal with the standing issue on many occasions. We note particularly that the opinion of the court in *Community Nutrition Institute v. Block*, 225 U.S. App. D.C. 387, 698 F.2d 1239, 1245-46 (D.C. Cir. 1983), contains a valuable discussion of the principles of standing. See also *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981), cert. denied, 455 U.S. 939, 71 L. Ed. 2d 650, 102 S. Ct. 1430 (1982).

B.

Standing is **[**12]** a threshold question in every federal case. [HN7](#) In considering the question both the trial and appellate courts must accept all material allegations of the complaint as true and must construe the complaint in favor of the plaintiff. Affidavits which particularize the allegations of fact must also be considered. *Warth v. Seldin*, 422 U.S. 490, 501, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). Treating the complaint before us in this manner, the plaintiffs will lose business because their bank customers which provide check collection services will be unable to compete with the Federal Reserve Banks because of their below-cost pricing and will stop utilizing the services of private air couriers. Several affidavits by bank officials filed in support of the plaintiffs' position contain this prediction. The fact that the plaintiffs will suffer indirect rather than direct injury as a result of the Board's action does not necessarily deprive them of standing for failure to meet the constitutional requirement of injury. The Court discussed this issue in *Warth v. Seldin, supra*, 422 U.S. at 504-05: **[**13]**

The fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing. When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. E.g., *Roe v. Wade*, 410 U.S. 113, 124 [35 L. Ed. 2d 147, 93 S. Ct. 705] (1973). But it may make it substantially more difficult **[*1226]** to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.

[HN8](#) Though the injury to a plaintiff need not be direct to satisfy the constitutional requirement, it must at least be traceable to the challenged action of the defendant and must be an injury that the requested legal action will be likely to redress. In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976), **[**14]** the Court found that plaintiffs who claimed they would be denied medical services by hospitals which would refuse to admit indigent patients as the result of a ruling of the Internal Revenue Services lacked standing to contest validity of the ruling. The Court found it purely speculative whether a hospital's denial of services to one of the plaintiffs could fairly be traced to the IRS ruling, and stated the constitutional requirement of injury as follows:

"Although the law of standing has been greatly changed in [recent] years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R. S. v. Richard D.*, 410 U.S. at 617 ²² In other words, the "case or controversy" limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the

²² The reference in *Linda R.S.* to "a statute expressly conferring standing" was in recognition of Congress' power to create new interests the invasion of which will confer standing. See 410 U.S., at 617 n. 3; *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 [34 L. Ed. 2d 415, 93 S. Ct. 364] (1972). When Congress has so acted, the requirements of Art. III remain: "The plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth v. Seldin, supra*, at 501. See also, *United States v. SCRAP*, 412 U.S. 669 [37 L. Ed. 2d 254, 93 S. Ct. 2405] (1973); cf. *Sierra Club v. Morton, supra* [405 U.S. 727], at 732 n. 3.

challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.

[**15] [426 U.S. at 41-42.](#)

The defendants argue that it is purely speculative whether any injury plaintiffs might suffer from business decisions of their present customers would result from the implementation of new schedules of fees and presentation times by the Board. They rely principally on this court's decision in [Young v. Klutznick, supra](#), where the injury complained of would occur only if the Michigan legislature took or refrained from taking actions which might result in a dilution of representation in Congress for residents of Detroit. This case is distinguishable. Here, if the affidavits of customers of the air couriers are credited, these couriers will suffer economic losses flowing from actions which the private banks will take in response to the revised schedules of the Federal Reserve Banks. Though the injury alleged by the plaintiffs is indirect, it is "distinct and palpable" and "fairly traceable" to the action of the Board of Governors. [Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72, 57 L. Ed. 2d 595, 98 S. Ct. 2620 \(1978\)](#). We believe the plaintiffs have sufficiently alleged a "personal" [**16] stake," *Id.*, in the outcome of the controversy and have demonstrated a likelihood that their injury would be redressed by a favorable decision. Thus they have satisfied the constitutional requirements for standing. [Community Nutrition Institute v. Block, supra, 698 F.2d at 1244.](#)

C.

Even though the constitutional requirements for standing are satisfied, those based on prudential considerations must also be met in order for a plaintiff to go forward with an action. In [Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 25 L. Ed. 2d 184, 90 S. Ct. 827 \(1970\)](#), the Supreme Court described the non-constitutional requirement [*1227] which is pertinent to this case as follows:

HNg[↑] It [the question of standing] concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

We have examined the text of Section 107 of [**17] the MCA in vain for any indication that Congress sought to protect the competitive position of private air couriers in requiring the Board of Governors to adopt and publish a set of pricing principles and a proposed schedule of fees for its services. Among the covered services for which a schedule of fees is required is "check clearing and collection services." [12 U.S.C. § 248a\(b\).](#) The statute does not break these services down into their component parts. There is no indication that Congress was concerned with the source of the various components of these services. What is clear is that the covered services offered by Federal Reserve Banks are to be priced explicitly, are to be made available to nonmember depository institutions at the same fees charged member banks, and that "over the long run, fees shall be established on the basis of all direct and indirect costs actually incurred in providing the Federal Reserve services priced. . . ." U.S.C. [§ 248a\(c\).](#) These criteria are concerned with the depository institutions which use the services offered by the Federal Reserve, not with third parties who provide similar services, and certainly not with others who [**18] furnish some of the components of the services offered by such third parties. We find the legislative history of the MCA equally devoid of any indication that Congress intended to protect the competitive position of the plaintiffs. There are references in the floor debate on the bill which became the MCA to competition in bank services by the "private sector." E.g., remarks by Senator Proxmire, 126 Cong. Rec. 53167 (daily ed. March 17, 1980). However, these references are to the banks and clearing houses which provide "both complementary and substitute systems to the Federal Reserve." *Id.* There is no indication of congressional concern with the means by which the private sector operates the complementary and substitute systems. House Conference Report No. 96-842, reprinted in [1980] U.S. Code Cong. & Adm. News, Vol. 1, p. 301, notes that the Federal Reserve Board is required to make an annual detailed report to Congress of its costs for the services offered and the means by which fees are determined "and the impact of its service offerings and the fees charged on competing or potentially competing service providers, depository institutions and private consumers." The [**19] "service providers" are those private institutions offering check clearing services, not third parties such as the plaintiffs which perform some of the steps in the check clearing

process. We conclude that the air couriers are not "service providers," and it is clear they are neither depository institutions nor private consumers.

The only case similar to the present case of which we are aware is [Bank Stationers Association v. Board of Governors, 704 F.2d 1233 \(11th Cir. 1983\)](#). There printers of personal checks brought suit to enjoin the Federal Reserve Board of Governors from charging fees for automated clearing house services which are insufficient to cover the cost of providing such services. Automated clearinghouse services make transfers by computer, which eliminate the need for printed checks. The court held that the plaintiffs had sufficiently alleged injury in fact, but had not demonstrated that they were arguably within the zone of interests which Congress sought to protect in enacting the MCA. Like the stationers, the air couriers do not provide check clearing services. They only perform functions for those private check clearing establishments which provide **[**20]** such services and those depository institutions which use such private providers. The competitive concerns of the statute do not reach the level of the plaintiffs' activities. Thus we conclude they are not arguably within the zone of interests which Congress sought to protect in enacting the MCA.

[*1228] III.

The other ground on which the plaintiffs sought injunctive relief requires little discussion. [HN10](#) [Section 2](#) of the Sherman Act makes "every person" who monopolizes, attempts to monopolize, or combines or conspires with any other person to monopolize, trade or commerce among the states guilty of a misdemeanor. [15 U.S.C. § 2 \(1976\)](#). The plaintiffs contend that the Federal Reserve Banks are corporations and therefore persons within the Sherman Act which defines "persons" to include corporations.

The district court held that none of the defendants in this action is a person within the meaning of this [antitrust law](#). We agree. The argument of the plaintiffs overlooks the fact that the Federal Reserve Banks are not private business corporations, but are part of a **[**21]** system created by Congress to perform important governmental functions. The Federal Reserve System, consisting of the Board of Governors and the twelve Federal Reserve Banks, functions as the nation's chief money manager. It is this nation's central bank, performing a vital governmental role. The court in [Federal Reserve Bank of Boston v. Commissioner of Corporations and Taxation, 499 F.2d 60, 62-63 \(1st Cir. 1972\)](#), described this role as follows:

While savings and loan associations may in many ways be analogized to private corporations, federal reserve banks, by contrast, are plainly and predominantly fiscal arms of the federal government. Their interests seem indistinguishable from those of the sovereign. . . .

There are twelve such banks in the nation, of which the plaintiff is one. They were created and are operated in furtherance of the national fiscal policy. They are not operated for the profit of shareholders, and do not provide ordinary commercial banking services; their stockholders, the member banks, lack the powers and rights customarily vested in shareholders of a private corporation. Federal reserve banks act as depositories for money **[**22]** held in the United States Treasury and as fiscal and monetary agents of the United States. [12 U.S.C. § 391](#). They hold the legal reserves of member banks, issue currency, facilitate check clearance and collection, and have supervisory duties as to member banks. They also provide important services for the Treasury with respect to the public debt and the issuance, handling and redemption of government securities. The limited income generated is used to pay expenses and dividends limited to 6 percent. Any remaining earnings are paid into the surplus fund, [12 U.S.C. § 289](#), where they may be used by the United States Treasury to supplement the gold reserve. Should a federal reserve bank go into liquidation, any surplus becomes the property of the United States, [12 U.S.C. § 290](#). See generally Board of Governors, The Federal Reserve System: Purposes and Functions (5th ed. 1969).

(Footnote omitted).

[HN11](#) As an agency of the federal government the Federal Reserve System may not be sued under the Sherman Act. In [Sea-Land Service, Inc. v. Alaska Railroad, 212 U.S. App. D.C. 197, 659 F.2d 243 \(D.C. Cir. 1981\)](#), **[**23]** cert. denied, 455 U.S. 919, 71 L. Ed. 2d 459, 102 S. Ct. 1274 (1982), the court held that an entity wholly owned and operated by the United States was not amenable to suit under the Sherman Act. See also [Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., Inc., 632 F.2d 680 \(7th Cir. 1980\)](#). The plaintiffs

argue that *Sea-Land Service* is not controlling because there the government was the sole owner of the railroad whereas it is not the sole owner of the Federal Reserve Banks, which do have private shareholders. We think this distinction is immaterial. It is the role of the Federal Reserve System as manager of the fiscal affairs of the federal government and the money supply of the nation which places the Reserve Banks outside the Sherman Act definition of persons. In a different context the Supreme Court has held that where monopoly results from "valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." [Eastern Railroad Presidents Conference v. Noerr, Motor Freight, Inc., 365 U.S. 127, 136, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#). In promulgating the [*1229] [**24] schedules complained of by the plaintiffs the Board was following the directions of Congress in the MCA; it was engaged in "valid governmental action."

The judgment of the district court is affirmed.

End of Document



Custom Auto Body, Inc. v. Aetna Casualty & Surety Co.

United States District Court for the District of Rhode Island.

August 3, 1983

C.A. No. 78-0301.

Reporter

1983 U.S. Dist. LEXIS 14941 *; 1983-2 Trade Cas. (CCH) P65,629

Custom Auto Body, Inc. v. Aetna Casualty and Surety Co.

Core Terms

insureds, shops, provider, repair shop, insurance company, summary judgment, repair, insurance business, automobile repair, allegations, boycott, purchases, recommends, antitrust, regulated, rule of reason, Sherman Act, policyholders, estimate, automobile insurance, McCarran-Ferguson Act, concerted, output, genuine issue, price fixing, repair costs, repair work, body shop, constitutes, defamatory

Counsel: [*1] Robert Testa and Ralph J. Gonnella, Providence, R.I., for plaintiff

Robert W. Lovegreen and Robert C. Burns, Providence, R.I., for defendant

Opinion by: PETTINE

Opinion

Opinion

PETTINE, SR. J.: This case presents a broad antitrust challenge by an independent auto body repair shop to the practices employed by Aetna Casualty & Surety Company (Aetna) to settle claims in Rhode Island. The plaintiff's essential claim is that the defendant has combined and conspired with others to coerce and intimidate independent automobile repair shops to accept insufficient remuneration for the services. The defendant is said to have carried out this conspiracy in violation of [Section 1](#) of the Sherman Act.¹ Plaintiff seeks treble damages and injunctive relief from this Court pursuant to [15 U.S.C. §§ 15](#) and [26](#). The complaint also alleges a state law claim for slander the defendant has moved for summary judgment on both counts. For the reasons set forth below, the defendant's motion is granted in part and denied in part.

¹ [Section 1](#) of the Sherman Act provides that:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

[15 U.S.C. § 1](#).

[*2] I. Facts and Allegations

The Court will consider first the antitrust claims made by plaintiff. The plaintiff makes the following four allegations:

- (1) the defendant has established vertical provider agreements with certain recommended or preferred repair shops which fix the price of automobile repairs;
- (2) the defendant has engaged in a horizontal price-fixing conspiracy with other insurance companies;
- (3) the defendant has combined with its insureds to aggregate buying power and thereby restrain trade in the automobile repair industry; and
- (4) the defendant has combined with its insureds, certain preferred shops, and certain independent damage appraisers to boycott plaintiff's shop.²

[*3] Before analyzing these specific claims, a general description of the claims settlement practices used by the automobile insurance industry in general and by Aetna in particular may be useful.

The focus of this case is on the market interaction of automobile insurance companies and automobile repair shops. Such interaction is inevitable given the nature of the parties' respective businesses. An automobile insurance company in the course of its business issues policies of insurance which obligate it to undertake the repair of damaged automobiles owned by its insureds. In theory the insurance company could discharge its obligations under the insurance policy after the occurrence of an insurable event by performing any necessary repair work itself. In general, however, insurance companies have not chosen to pursue this option. Instead, they allow their insureds to select an automobile repair shop at which repairs can be performed, and agree to reimburse their insureds for the cost of such repairs.

The potential problems which may be created by this system of reimbursement are obvious. If an insured is guaranteed reimbursement up to any amount spent on repairs, there will be **[*4]** little incentive to shop around to secure an advantageous price for repair work. Any money spent will ultimately be reimbursed, so an insured will be relatively indifferent in choosing between high-priced and low-priced repair shops.

Automobile insurance companies deal with this problem by specifying in the contract of insurance that they will only be responsible for the competitive cost of repair. If the insured incurs expenses in excess of the competitive cost of repair, he will have to pay the excess out of his own pocket. This arrangement gives the insured a powerful incentive to shop around until he finds a repair shop that is willing to work for the competitive price specified by the insurance company.

Problems with this approach may arise if the insurance company has set the competitive cost for repair work at a price which is so low that insureds find it difficult to locate a repair shop that is willing to perform the necessary repairs at the specified price. To ensure customer satisfaction, the insurance company may have to identify for its insureds several repair shops that are willing to perform repair work for the competitive price established by the company. **[*5]** This ability to recommend particular shops may in turn give the insurance company significant market leverage in dealing with repair shops. For example, it would be possible for an insurance company to agree to recommend a substantial volume of business to repair shops that are willing to work for a lower price than is usually charged.

² Plaintiff also contends that agreements between the defendant and certain insurance adjustment firms violate the Sherman Act. Objection and Opposition at 12. But plaintiff fails to advance any theory under which the Court could find such contracts to be illegal restraints of trade. It does not suggest that the contracts with adjusters by themselves restrain trade, nor does it indicate that such agreements facilitate other types of illegal combinations. The Court therefore concludes that plaintiff's allegations as to the illegality of the defendant's agreements with insurance adjusters are without merit.

Aetna has submitted detailed affidavits which describe the specific procedures it uses in settling claims. The contents of these affidavits have not been directly controverted by the plaintiff. The defendant's submissions state that when an automobile owned by an Aetna insured is damaged, the insured is requested to have the damaged vehicle inspected before it is repaired. The insured is encouraged to use one of Aetna's drive-in claim centers, but he or she is not required to do so. After inspecting the car, an Aetna appraiser will prepare an estimate of the competitive cost of replacement parts, the amount of time required to make the necessary repairs, and the hourly rate charged for labor. Aetna frequently uses a publication known as a crash manual to determine the amount of time required for a particular job and the suggested retail prices [*6] for replacement parts. The third component -- the hourly labor rate -- is determined through an informal survey of rates being charged by various local shops. Aetna attempts to set the rate which it will pay at the lowest level that the insured could obtain on his own without undue inconvenience.

After receiving their estimate, Aetna's policyholders remain free to select the repair shop at which they wish to have repair work done. If the shop selected is unwilling to work for the amount of Aetna's estimate, Aetna will attempt to negotiate an acceptable price. If negotiations fail, the car owner must choose between paying any amount in excess of the estimate himself or having his car repaired elsewhere. Aetna, however, guarantees its insureds that repairs can be obtained for the amount of its estimate, and it will furnish its insureds with the names of two or three repair shops that will perform the necessary work for the estimated amount. Aetna states that it selects the shops that it recommends based on its experience with shops in the area. It denies having any agreement with the shops that it recommends whereby the insurance company agrees to recommend such shops in return [*7] for a commitment by the recommended or preferred shop to accept Aetna's estimate. Aetna's affidavits also state that it determines the competitive cost of repairs unilaterally and independently without consultation with other insurance companies.

II. Summary Judgment Standard

Aetna's submissions must be viewed in light of the standards which govern motions for summary judgment. Because the question of the appropriateness of summary judgment in this case is a close one, the Court deems it advisable to set forth the applicable standard at some length.

Rule 56 of the Federal Rules provides that a court may not grant summary judgment unless it is satisfied that there are no genuine issues of material facts and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party seeking summary judgment has the burden of affirmatively demonstrating that there is no genuine issue of fact on every material issue raised by the pleadings. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970); Mack v. Cape Elizabeth School Board, 553 F. 2d 720, 722 (1st Cir. 1977). This is so even if the movant is the defendant, and would have no burden whatsoever if the [*8] case were to go to trial. Mack v. Cape Elizabeth School Board, supra, at 722. In determining whether genuine issues exist, the Court is required to view the record in the light most favorable to the opponent of the motion, and must indulge all reasonable inferences favorable to the opponent. Thyssen Plastik Anger KG v. Induplas, Inc., 596 F. 2d 400, 401 (1st Cir. 1978); Hahn v. Sargent 523 F. 2d 461, 464 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976).

The First Circuit requires this Court to be highly circumspect in granting summary judgment. It has held that summary judgment is not appropriate where there exists the "slightest doubt" as to any material fact. United States v. DelMonte de Puerto Rico, Inc., 586 F. 2d 870, 872 (1st Cir. 1978) (quoting Peckham v. Ronrico Corp., 171 F. 2d 653, 657 (1st Cir. 1948)). The United States Supreme Court has likewise counselled that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962) (footnote omitted). [*9]³

³ The Court is nevertheless aware that the First Circuit has recently warned that Poller should not "become a magic wand waved indiscriminately by those opposing summary judgment motions in antitrust actions." White v. The Hearst Corp., 669 F. 2d 14, 17 (1st Cir. 1982), quoting Mutual Fund Investors v. Putnam Management Co., 553 F. 2d 620, 624 (9th Cir. 1977).

The Court recognizes, however, that summary judgment may be warranted even in the litigation of complex antitrust cases. The Supreme Court has made it clear that [Rule 56](#) cannot be read out of antitrust cases, and that plaintiffs should not be afforded a full-dress trial if the trial court is satisfied that there exists no significant probative evidence tending to support the complaint. [*First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90 \(1968\); White v. The Hearst Corp., 669 F. 2d 14, 17 \(1st Cir. 1982\).*](#)

III. Agreements Between Aetna and Preferred Automobile Repair Shops

Turning now to a consideration of plaintiff's allegations in light of the summary judgment standard, the Court will analyze first what appears to be the plaintiff's principal contention.⁴ The plaintiff maintains that [*10] Aetna has entered into price-fixing agreements with certain preferred auto body repair shops, and that such agreements are per se illegal under the Sherman Act. The defendant makes three arguments in response. First, it contends that no such agreements exist. Second, it contends that even if such agreements exist, they are immune from antitrust scrutiny by reason of the McCarran-Ferguson Act, [*15 U.S.C. §§ 1011 et seq.*](#) Finally, defendant maintains that vertical agreements between insurance companies and automobile repair shops (sometimes referred to as provider agreements) do not contravene [Section 1](#) of the Sherman Act. These contentions will be considered seriatim.

[*11] A. Proof of the Agreement

To prove a violation of [Section 1](#) of the Sherman Act, plaintiff must first show that the defendant entered into a contract, combination or conspiracy. As the First Circuit recently observed, "in the field of Sherman Act violations a conspiracy, as in other proscribed conspiracies, imports a plurality of persons acting in concert to attain a common goal or purpose." [*White v. The Hearst Corp., 669 F. 2d 14, 18 \(1st Cir. 1982\).*](#) See [*American Tobacco Co. v. United States, 328 U.S. 781, 810 \(1946\)*](#). In this case, the defendant contends that it did not enter into any agreement with automobile repair shops, and that the necessary concert of action is therefore lacking.

The defendant has supported this contention by submitting affidavits which flatly deny the existence of any agreement with an auto body repair shop with respect to anything other than the price to be charged for a particular job. Despite these sworn submissions, the Court believes that a triable issue of fact exists on this question. The defendant admits that it recommends particular repair shops if its policyholders request a recommendation. Aetna also admits that it determines which shops [*12] to recommend by considering which shops have been willing to work for the amount of Aetna's estimate. The repair shops which have been recommended are no doubt aware of this, and are likewise aware that an increase in rates which Aetna deems unacceptable will jeopardize future referrals.

While the question is a close one, the Court believes that the economic realities of this situation are such that a reasonable trier of fact could infer the existence of informal agreements between Aetna and the repair shops agree to accept Aetna's the repair shops that it recommends, whereby such shops agree to accept Aetna's estimate in return for receiving referrals from Aetna. It is true that any such agreement does not guarantee a shop that it will receive a specific amount of business. It is also true that repair shops remain free at any time to alter their prices if

⁴ A threshold objection by defendant to this Court's jurisdiction can be disposed of without extended discussion. The defendant contends that the Court lacks subject matter jurisdiction over this case because plaintiff has failed to establish that the alleged restraint of trade affects interstate commerce. See [*15 U.S.C. § 1*](#) (prohibiting "restraint of trade among the several States, or with foreign nations . . ."). The defendant concedes that many of the parts and supplies which plaintiff purchases in the course of its business come from outside of Rhode Island. Defendant's Memorandum of Law at 24. The defendant argues, however, that the effect of any alleged illegalities is merely to divert business from one body shop to another without affecting the total volume intrastate business or the total amount of parts and supplies purchased in interstate commerce. However, if plaintiff is successful in showing that the provider agreements between Aetna and certain body shops are used to limit the quality of repair work performed, the requisite effect on interstate commerce could be shown. This possibility that the defendant's practices as a matter of practical economics may affect interstate commerce is sufficient to satisfy the Sherman Act's jurisdictional requirement. [*McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 242-43 \(1980\); Cordova Simonpetri Insurance Agency, Inc. v. Chase Manhattan Bank N.A., 649 F. 2d 36, 45 \(1st Cir. 1981\).*](#)

they are willing to risk a loss of Aetna referrals. This, however, suggests only that any agreement which exists is not very specific and can be altered at the will of the parties. It does not affirmatively demonstrate a lack of concerted action.

On similar facts, the district court in *Quality Auto Body, Inc. v. Allstate* [*13] *Insurance Co., 1980-2 TRADE CASES P63,507 (N.D. Ill. 1980)*, aff'd, *660 F. 2d 1195 (7th Cir. 1981)*, cert. denied, *102 S. Ct. 1717 (1982)*, reached the same conclusion. It noted that:

The court would be blind to economic reality, however, if it did not recognize that the policies of the defendants, well known to every body shop, create powerful incentives to adhere to the insurance companies' guidelines. Body shops know that if they follow the prevailing competitive rate, they can expect to have insurance company work referred to them. These incentives and this knowledge could be said to create informal vertical agreements between the insurance companies and certain body shops. Indeed, it appears that in some manner each insurance company communicates its guidelines to the shops with which it deals, and that shops following these guidelines are awarded by being placed on each company's list (however informally that list is maintained) of preferred shops. From these facts, the trier of fact could draw the inference that at least some body shops have agreed to perform body work for a set price. Thus, viewing the facts in the light most favorable to the plaintiff, the court will, [*14] for the purposes of this motion, assume that informal vertical arrangements, between the defendants and certain "preferred" body shops, exist. Accordingly, these practices, in addition to the explicit agreements that are a part of the Allstate direct repair program must be scrutinized under the Act.

Id. at 76,694-95.

B. McCarran-Ferguson Immunity

The McCarran-Ferguson Act provides in relevant part that the Sherman Act and Clayton Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." *15 U.S.C. § 1012(b)*. The Act further provides that, "Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *15 U.S.C. § 1013(b)*. The Act thus exempts the provider agreements in question from the operation of the antitrust laws only if: (1) they constitute the "business of insurance"; (2) they are regulated by state law; and (3) they do not constitute boycotts, coercion, or intimidation. *Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 210 n. 4 (1979)*.

The plaintiff argues that the defendant's [*15] provider agreements do not constitute the business of insurance, and therefore are not exempt under McCarran-Ferguson. It relies primarily on the Supreme Court's decision in *Royal Drug*.⁵ That case presented an antitrust challenge to provider agreements between a health insurance company and certain pharmacies. Under the agreements, participating pharmacies agreed to accept limited reimbursement for dispensing drugs to persons covered by the insurer's health plan.⁶ In return, the health insurance policy made it financially advantageous for plan members to deal with participating drug stores.⁷ The Supreme Court was called upon to determine whether such agreements constituted the business of insurance for McCarran-Ferguson purposes.

⁵ The reasoning and analysis in *Royal Drug* were closely followed in the Supreme Court's most recent decision on McCarran-Ferguson immunity. See *Union Labor Life Insurance Co. v. Pireno, 50 U.S.L.W. 4911, 4913* (U.S. June 29, 1982).

⁶ Participating pharmacies agreed to charge plan members only \$2 for any prescription drug they dispensed. The health insurance company reimbursed participating pharmacies for only the actual cost of all drugs dispensed to plan members. The pharmacies in the plan thus received only a \$2 markup on all drugs sold to plan members. *Royal Drug at 209*.

⁷ Plan members dealing with participating pharmacies had to pay only \$2 for any prescription drug. Members who dealt with nonparticipating pharmacies had to pay the full price charged by the pharmacy, and received reimbursement amounting to only 75% of the difference between the price of the drug and \$2. *Id.*

[*16] Since the McCarran-Ferguson Act does not define "the business of insurance," the Court sought to determine whether the provider agreements fell "within the ordinary understanding of that phrase, illuminated by any light to be found in the structure of the Act and its legislative history." [Royal Drug at 211](#). The Court observed that the primary elements of insurance are the spreading and underwriting of a policyholder's risk. The Court added that the business of insurance is also commonly understood to relate to the contract between the insurer and insured. [Id. at 215](#).

The provider agreements at issue fit neither of these descriptions of the business of insurance. The agreements did not involve any spreading or underwriting of risk, nor did they constitute a contract between insurer and insured. At most the provider agreements were a convenient method of minimizing the insurance company's costs. As such, they were legally indistinguishable from a host of other costcutting arrangements which constituted the business of insurance companies, but not the business of insurance. [Id. at 217](#). The Court also canvassed the legislative history of the McCarran-Ferguson Act and found full [*17] support for its conclusion that the provider agreement were not the business of insurance. [Id. at 217-24](#). This conclusion was further bolstered by the traditional canon of construction which requires exemptions from the antitrust laws to be narrowly construed. [Id. at 231](#).

The provider agreements in this case are legally indistinguishable from those found to fall outside the McCarran-Ferguson exemption in Royal Drug. They do not spread or underwrite a policyholder's risk, nor are they contracts between the insurer and insured. At best they are a means by which the defendant seeks to minimize costs and ensure customer satisfaction. While such agreements may constitute the business of insurance companies, they are not the business of insurance as defined in Royal Drug.⁸

[*18] The Fifth, Seventh and District of Columbia Circuits have reached the same conclusion with respect to informal provider agreements between automobile insurance companies and automobile insurance companies and automobile repair shops. *Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F. 2d 308, 336-37 (D.C. Cir. 1982); [Quality Auto Body, Inc. v. Allstate Insurance Co.](#), 660 F. 2d 1195, 1201 (7th Cir. 1981), cert. denied, [102 U.S. 1717 \(1982\)](#); [Liberty Glass Co. v. Allstate Insurance Co.](#), 607 F. 2d 135, 137-38 (5th Cir. 1979).

C. Legality of the Agreements

The plaintiff maintains that the provider agreements are illegal per se and should be found to violate the Sherman Act without regard to their utility. In support of this position it relies on [Dr. Miles Medical Co. v. John D. Park & Sons Co.](#), 220 U.S. 373, 408 (1911), and its progeny, which hold that vertical price fixing is illegal per se. Specifically, these cases hold that manufacturers and distributors may not place restrictions on the price which retailers may charge for resale of a product to the general public. It must be acknowledged that the provider agreements do not precisely fit this pattern. Plaintiff [*19] points out, however, that the relationship between Aetna and the automobile repair shops that is recommends is a vertical one, i.e. their businesses are situated at different levels of the market. It further maintains that Aetna agrees on prices with the preferred repair shops, and that this agreement constitutes vertical price fixing.

As the defendant points out, plaintiff's analysis misses the mark by a wide margin. Plaintiff acknowledges that defendant is properly characterized as a purchaser of repair services on behalf of its insureds. As a purchaser it is required to enter the marketplace, negotiate with sellers, and arrive at a mutually satisfactory price. This sort of "price-fixing" occurs whenever a purchase is made by a buyer. It certainly cannot be said to be illegal per se. [Quality Auto Body, Inc. v. Allstate Insurance Co.](#), 660 F. 2d 1195, 1202-03 (7th Cir. 1981), cert. denied, 102 S. Ct.

⁸ In *D & B Auto Body, Inc. v. Firemen's Fund Insurance Co.*, Civ. No. 79-0550, a case involving antitrust issues identical to those in the case at bar, the Court requested the participation of the Antitrust Division of the United States Department of Justice as amicus Curiae. In response to this invitation to this invitation, the Division submitted an excellent Memorandum of Law discussing the relevant issues. *D & B Auto Body* subsequently was dismissed pursuant to a stipulation by the parties. The Court nevertheless found the views of the Antitrust Division quite useful, and will cite them in this Opinion where appropriate. In connection with the McCarran-Ferguson immunity issue discussed above, the Court notes that the Justice Department agrees that the vertical provider agreements at issue do not constitute "the business of insurance" within the meaning of the McCarran-Ferguson Act. Memorandum of the United States at 6-7.

1717 (1982); *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania*, 481 F. 2d 80, 84 (3d Cir.), cert. denied, 414 U.S. 1093 (1973); *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 518 F. Supp. 1100, 1106-07 (D. Conn. 1981), aff'd, [*20] 675 F. 2d 502 (2d Cir. 1982); *Sausalito Pharmacy, Inc. v. Blue Shield of California*, 1981-1 TRADE CASES P63,885 at 75,607 (N.D. Cal. 1981).

As noted above, the type of vertical price fixing that has been condemned as illegal per se involves restrictions on a purchaser's freedom to resell the purchased product to a third person. See, e.g., *Albrecht v. The Herald Co.*, 390 U.S. 145; *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Under the provider agreements at issue here, there simply are not third persons to whom a resale is made. The agreements thus clearly do not come within the traditional classification of vertical price fixing which is condemned as illegal per se. *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*, *supra*, at 1107; *Sausalito Pharmacy, Inc. v. Blue Shield of California*, *supra*, at 75,607; *General Glass Co. v. Globe Glass and Trim Co.*, 1980-2 TRADE CASES P63,531 at 76,851 (N.D. Ill. 1980).

Despite this, the question arises whether the provider agreements should be held to constitute a new class of agreements which are illegal per se. The First Circuit has expressed some reluctance to add to "the per se pantheon [*21] recognized by the Supreme Court." *George R Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F. 2d 547, 560 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975). In this case it seems clear that a per se approach is inappropriate.

The Supreme Court has indicated that per se rules should only be applied where the purpose and effect of a restraint "threaten the proper operation of our predominantly free-market economy -- that it, [where] the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. . . ." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). Accord *Arizona v. Maricopa County Medical Society* (1982-2 TRADE CASES P64,792, 50 U.S.L.W. 4687, 4690) (U.S. June 15, 1982). Agreements that are per se illegal are characterized by "their pernicious effect on competition and lack of any redeeming virtue." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Far from lacking any redeeming virtue, the provider agreements in this case have a substantial pro-competitive effect. The defendant has concluded such agreements in an attempt to satisfy the needs of its insureds [*22] at the lowest possible price. The agreements themselves tend to encourage repair shops to compete with each other by offering lower prices to attract greater shares of insurance company work.

As the Seventh Circuit recently observed,

Defendants are simply taking steps to insure the best terms available in the marketplace and firmly indicating their position on price to the sellers (the body shops). As the Third Circuit explained in *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania*, 481 F. 2d 80 (3d Cir.), cert. denied, 414 U.S. 1093 (1973), "this pressure encourages [suppliers] to keep their costs down; and, for its own competitive advantage, [enables the insurer to pass] . . . along the savings thus realized to consumers. To be sure, [the insurer's] initiative makes life harder for commercial competitors. . . . The antitrust laws, however, protect competition, not competitors; and staff competition, not competitors; and staff competition is encouraged, not condemned."

Id. at 84.

Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1203 (7th Cir. 1981), cert. denied, 102 U.S. 1717 (1982); accord *Proctor v. State Farm Mutual Automobile Insurance* [*23] Co., 1980-81 TRADE CASES P63,591 at 77,141 (D.D.C. 1980), aff'd, 675 F. 2d 308 (D.C. Cir. 1982). Given this substantial positive effect on competition, it is clear that the provider agreements cannot be found to be illegal per se.

Having reached this conclusion, the question arises whether the effects and purpose of the provider agreements must also be analyzed under the rule of reason. Such an inquiry would certainly be in keeping with the usual practice in antitrust cases. See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 24-25 (1979) (holding that blanket licenses are not per se illegal, remanding to Court of Appeals for consideration of

licenses under rule of reason). In this case, however, plaintiff has focussed almost exclusively on the legality of the agreements under the per se rule. In a similar case, one court has ruled that where "plaintiffs have placed all their eggs in the per se basket," further scrutiny of the challenged agreements under the rule of reason is inappropriate. [Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc., 518 F. Supp. 1100, 1109](#), (D. Conn. 1981), aff'd, [675 F. 2d 502 \(2d Cir. \[*24\] 1982\)](#).

The Court does not believe that a similar approach is warranted in this case. Plaintiff by its general allegations has challenged the legality of the provider agreements under [Section 1](#) of the Sherman Act. While relying almost exclusively on its argument that the agreements are illegal per se, a reading of plaintiff's pleadings and submissions suggests that it has also raised the question of the agreements' legality under the rule of reason. In particular, plaintiff's allegation that the defendant has used its market power as a large-scale purchaser of automobile repair work to obtain the services of preferred shops at an artificially low price⁹ is sufficient to suggest that the agreements have an anticompetitive effect which must be analyzed under the rule of reason. Having determined that this issue is properly raised by the pleadings, the defendant as the movant for summary judgment has the burden of showing that no genuine issue of fact exists as to the legality of the agreements under the rule of reason.

Under the rule of reason the Court must assess the anticompetitive and procompetitive effects [^{*}25] of a particular agreement "by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." [National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 692 \(1978\)](#). The Court has already noted its opinion that the agreements in question have a substantial procompetitive effect in that they foster price competition between automobile repair shops. See [Chick's Auto Body v. State Farm Mutual Automobile Insurance Co., 168 N.J. Super. 68, 401 A. 2d 722, 731-32 \(1979\)](#), aff'd per curiam, [176 N.J. Super. 320, 423 A. 2d 311 \(1980\)](#) (agreements are "the very essence of competition"). Plaintiff alleges, however, that the agreements also have a significant anticompetitive effect. It contends that the defendant has used its position as a large-scale buyer to enter into provider agreements which depress the price of automobile repairs below competitive levels. In short, it contends that the defendant possesses monopsony¹⁰ power, and that it has concluded provider agreements to enable it to wield this power more effectively.¹¹

[^{*}26] To show an abuse of monopsony power, however, it is not enough merely to indicate that the defendant possesses significant market power because it makes purchases of repair services on a large scale. [Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1204 \(7th Cir. 1981\)](#), cert. denied, 102 S. Ct. 1717 (1982) (buyers' possession of significant market power not a violation of Sheman Act absent certain types of abuse). Plaintiff must point to some way in which the provider agreements restrict output or otherwise injure competition. See [Medical Arts Pharmacy, Inc. v. Blue Cross & Blue Shield, Inc., 675 F. 2d 502, 507 \(2d Cir. 1982\)](#) (provider agreements did not violate rule of reason where insurer had small market share and could not use monopsony power to obtain agreements with anti-competitive effect); [Sausalito Pharmacy, Inc. v. Blue Shield of California,](#)

⁹ See Plaintiff's Objection and Opposition at 3 and 11.

¹⁰ Monopsony is the economic term used to describe a market involving one buyer and numerous sellers. It is the counterpart in the buyer's market of monopoly.

¹¹ The vertical provider agreements might also have anticompetitive effects if they facilitated the creation of horizontal cartels between insurance companies or between automobile repair shops. [Workman v. State Farm Mutual Automobile Insurance Co., 520 F. Supp. 610, 615-17 \(N.D. Cal. 1981\)](#); Sausalito Pharmacy, Inc. v. Blue Shield of California, 1981-1 TRADE CASES at 75,609; Quality Auto Body, Inc. v. Allstate Insurance Co., 1980-2 TRADE CASES at 76,696. Likewise, the agreements might violate the rule of reason if they were used by automobile repair shops as an instrument of predatory pricing. Sausalito Pharmacy, Inc. v. Blue Shield of California, *supra*, at 75,609. There is no contention in this case that automobile repair shops have attempted to form a horizontal cartel or have engaged in predatory pricing. Plaintiff's contentions with respect to the existence of horizontal agreements between insurance companies are discussed in greater detail infra.

1981-1 TRADE CASES P63,885 at 75,609 (N.D. Cal. 1981) (no violation of rule of reason absent showing of intent in provider agreements to affect quantity or quality of services).¹²

[*27] To understand whether there is a significant possibility that the challenged provider agreements have the anticompetitive effect of restricting output, a more detailed understanding of the economics of monopsony may be necessary. Professors Areeda and Turner suggest that before a large-scale buyer will restrict output and thereby injure competition, three conditions must be satisfied. 4 P. Areeda & D. Turner, Antitrust Law P964 at 202 and n. 2 (1980). First, the buyer must possess significant market power in that its purchases are so numerous that they have an appreciable effect on total output. Second, the buyer must make its purchases in an industry which has a rising cost curve, i.e. one where each successive unit produced costs more to produce than the previous one. Finally, the buyer must possess the power to restrict its purchases to a particular amount. If all three conditions are present, a rational large-scale purchaser will limit its purchases to a smaller quantity of goods which are produced at a lower price than would be prevalent under conditions of free competition. Id. If the provider agreements in question were used to effectuate such a limitation, they would [*28] have a significant anticompetitive effect and would probably violate the rule of reason.

It is difficult to assess whether the three preconditions to abuse of monopsony power are present in this case. The parties have offered no evidence as to the market share of defendant, so it is impossible to assess whether it possesses sufficient market power to affect appreciable total output. Nor is there any evidence which indicates whether the automobile repair industry possesses a rising cost curve. At first glance, however, it might seem possible to reach a conclusion with respect to the third condition -- the ability of the defendant to restrict its purchases.

The defendant arguably does not possess this ability. Its obligation to purchase repair services is fixed by its contracts with its insureds. Upon the occurrence of an insurable event, the defendant must arrange for the repair of the damaged vehicle. There thus exists little discretion on the part of Aetna to determine the amount of repair work which it will purchase.

However, it would be open to the defendant to restrict the level of repair services purchased by arranging for its preferred shops to perform repairs of [*29] an inferior quality. I note that plaintiffs in other cases have alleged that insurance companies do precisely this, although their claims have not been substantiated. Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1204 n. 6 (7th Cir. 1981), cert. denied, 102 S. Ct. 1717 (1982);¹³ Workman v. State Farm Mutual Automobile Insurance Co., 520 F. Supp. 610, 621 (N.D. Cal. 1981). In any case, the Court is convinced that such a restriction of output is at least a possible result of the challenged provider

¹² The Justice Department takes the position that the vertical agreements in question do not violate the Sherman Act absent a showing that "insurance companies have the power to limit the amount of repair work performed for policyholders, that they refuse to deal with any competent repair shop in the same terms available to other repair shops, or that there are other facts that would render their actions unreasonably anticompetitive." Memorandum of the United States at 11.

¹³ The Seventh Circuit in this case noted that:

"When the rate is too low, some repair shops resort to dishonest practices in order to survive. These practices include: (1) charging for new parts but using old parts; (2) estimating parts that are not damaged; (3) straightening old parts but charging for new parts; (4) inflating labor hours; (5) billing for repairs which have not been performed; and (6) offering rebates and bribes to adjusters."

[Quality Auto Body, Inc. v. Allstate Insurance Co., supra, 1204 n. 6.](#)

The court went on to observe that, "Although these deplorable practices may be prevalent in the auto repair industry, in and of themselves they are not matters the antitrust laws were intended to address." Id. (emphasis in original). This Court agrees with the Seventh Circuit that unethical business practices which do not have a significant adverse effect on competition do not violate the antitrust laws. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F. 2d 547, 560-2 (1st Cir. 1974), cert. denied, **421 U. S. 1004 (1975)**. However, if dishonest business practices are the result of a concerted effort to restrict output, a significant adverse effect on competition may result, and the Sherman Act's rule of reason may be violated.

agreements.¹⁴ As a result, I cannot say on this record that plaintiff would be unable to show at trial that the provider agreements have the anticompetitive effect of restricting production and that such agreements therefore violate the rule of reason. For this reason the defendant's motions for summary judgment must be denied.

[*30] I wish to note, however, that the question of the appropriateness of summary judgment in this case is a very close one. This is because plaintiff has raised the question of the possible abuse of monopsony power in a very oblique fashion. As a consequence, the defendant undoubtedly lacked proper notice as to what it was required to refute in order to prevail on its motion. The Court also considers it highly unlikely that the provider agreements are in fact being used by defendant to exert monopsony power and to restrict output. There is certainly nothing in the record which would point to this. But plaintiff, as nonmovant, does not bear the burden of showing the existence of genuine issues of fact, and the silence of the record on this point, therefore, cannot be held against it. In the end, the Court is persuaded that the better course is to proceed with caution. As the First Circuit has noted: The summary judgment rule, *F.R. Civ. P. 56*, can be a valuable tool for saving judicial time. However, by use in inappropriate situations, or misuses, it can also waste time. In view of the possible terminal result, it is essential that i's be dotted and t's crossed.

*Mack v. Cape [*31] Elizabeth School Board*, 553 F. 2d 720, 722 (1st Cir. 1977).

This is not to say that a trial will be necessary on the question of the possible anticompetitive effect of the provider agreements. Further submissions made pursuant to a renewed motion for summary judgment by the defendant may show that no genuine issue of fact exists on the pivotal question of restriction of output. If this is the case, a grant of summary judgment in favor of defendant on this question will be warranted.

IV. Horizontal Price-Fixing Agreements Between Insurance Companies

Although plaintiff does not emphasize this aspect of its case in its Memorandum of Law in opposition to the defendant's motion for summary judgment, the complaint in this action also alleges that the defendant has combined and conspired with other insurance companies to fix the price paid to automobile repair shops for their services. Second Amended Complaint P6. Such an agreement between buyers of services, if not immune from antitrust scrutiny under the McCarran-Ferguson Act, would be illegal per se. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *Williams v. St. Joseph Hospital*, 629 [*321] F. 2d 448, 453 (7th Cir. 1980). The Court finds, however, that Aetna has demonstrated that it has not engaged in any conspiracy with other automobile insurance companies to fix the price of automobile repairs, and that no genuine issue of fact exists on this question.

In sworn affidavits submitted by its present and former Providence Branch Claims Managers, Aetna has categorically denied consulting with any other insurance company in determining the competitive cost of repairs. Daffron Affidavit at 3; Mistretta Affidavit at 4. Following this sworn denial, "[i]t . . . became [plaintiff's] burden to present factual materials that might have been admissible at trial as evidence to support the complaint." *White v. The Hearst Corp.*, 669 F. 2d 14, 18 (1st Cir. 1982). This plaintiff clearly has failed to do.

Indeed, in deposition testimony Richard Ruggiero, the president of Custom Auto Body, admitted that he has no direct evidence that Aetna has agreed with other insurance companies to fix prices, and that plaintiff's allegations in this regard are largely conjectural. Ruggiero Deposition at 82-84. Nor has plaintiff produced any persuasive circumstantial evidence which tends [*33] to show the existence of such an agreement.¹⁵ Faced with this

¹⁴ Aetna comes very close to demonstrating that it does not attempt to restrict output by limiting the quality of repairs performed by its preferred shops. Aetna's affidavits state that it recommends shops based on their ability to perform quality repairs at a competitive price, and that it guarantees that workmanlike repairs can be performed for the amount of its estimate. Daffron Affidavit at 5; Mistretta Affidavit at 2. This is circumstantial evidence that Aetna has not conspired with preferred repair shops to restrict output by performing inferior repairs. Absent an explicit denial that such an agreement exists, however, the Court cannot say that this is sufficient to meet Aetna's burden of showing the absence of any genuine issue of material fact.

complete absence of evidence to contradict Aetna's sworn statement that it has not engaged in horizontal price fixing, the Court is required to grant summary judgment for Aetna on this claim.¹⁶

[*34] V. Agreements Between Aetna and Its Policyholders

The third focus of plaintiff's antitrust challenge is the relationship of the defendant with its policyholders. Plaintiff maintains that the defendant has acted in concert with its insureds to create a horizontal combination of automobile owners which uses its combined purchasing power to restrain trade in the automobile repair industry. The court believes, however, that any such combination is clearly exempt from antitrust scrutiny under the McCarran-Ferguson Act, and that defendant is entitled to summary judgment for this reason. I thus need not reach the question of whether the defendant would be entitled to summary judgment on the alternative ground that the alleged combination is completely legal under the Sherman Act.

To decide whether plaintiffs claim is barred by the McCarran-Ferguson Act, the court must first determine whether the challenged conduct constitutes "the business of insurance". Before reaching this question, however, it is necessary to understand precisely what conduct plaintiff is challenging. Read broadly, plaintiff's allegations appear to challenge the legality of the basic concept of automobile insurance. [*35] As was noted earlier, automobile insurance provides for the spreading of risk by obligating the insurance company to undertake the repair of automobile damage sustained by its policyholders. In fulfilling its obligations under the insurance contract, the insurance company will always be required to perform some purchasing functions on behalf of its insureds. Some combination of buying power thus seems virtually inherent in any automobile insurance policy. It seems unlikely, however, that plaintiff intends to argue from this that automobile insurance by its very nature is violative of the antitrust laws.¹⁷

A more reasonable interpretation of plaintiff's contention is that it challenges the provision in the insurance policy which limits the reimbursement of the policyholder to the reasonable or competitive cost of repairs. Absent such a restriction on the policy's coverage, an insured would have less incentive to accept his insurance company's recommendation of a repair shop, and the company would find it more difficult to aggregate the buying [*36] power of its insureds in dealing with repair shops. Even accepting this more reasonable interpretation of plaintiff's allegations, however, it is clear that plaintiff is challenging conduct which constitutes the business of insurance.

¹⁵ Plaintiff appears to rely on the theory of conscious parallelism to prove the existence of a horizontal conspiracy. It claims that the defendant and other insurance companies employ similar practices in settling claims, such as the use of the same independent publication to determine repair times and new part prices. Plaintiff suggests that the existence of these similar practices can only be explained as the result of a conspiracy between insurance companies. The Supreme Court has indicated that parallel behavior may be circumstantial evidence of the existence of an agreement or conspiracy. See [Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 \(1939\)](#). But it is also clear that mere proof of parallel behavior without more does not prove the existence of a contract, combination or conspiracy. [Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 \(1954\)](#); [Naumkeag Theatres Co. v. New England Theatres, Inc., 345 F.2d 910, 911-12 \(1st Cir., cert. denied, 382 U.S. 906 \(1965\)\)](#).

In this case, plaintiff has failed to show that the similar practices employed by automobile insurance companies are anything more than the result of the companies' independent pursuit of their economic self-interest. Absent such a showing, the doctrine of conscious parallelism in no way supports an inference of conspiracy. See [Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F.2d 1195, 1200-01 \(7th Cir. 1981\)](#), cert. denied, [102 S. Ct. 1717 \(1982\)](#); [Workman v. State Farm Mutual Automobile Insurance Co., 520 F. Supp. 610, 621 \(N.D. Cal. 1981\)](#); [Sausalito Pharmacy, Inc. v. Blue Shield of California, 1981-1 TRADE CASES P63,885 at 75,612 \(N.D. Cal. 1981\)](#); [Chick's Auto Body v. State Farm Mutual Automobile Insurance Co., 168 N.J. Super. 68, 401 A.2d 722, 730-31 \(1979\)](#), aff'd per curiam, [176 N.J. Super. 320, 423 A.2d 311 \(1980\)](#).

¹⁶ The Court therefore need not decide whether an agreement between insurance companies to fix the price of automobile repairs would be immune under the McCarran-Ferguson Act.

¹⁷ Such a claim would clearly be a challenge to "the business of insurance" within the meaning of the McCarran-Ferguson exemption.

As the Supreme Court noted in Royal Drug:

Another commonly understood aspect of the business of insurance relates to the contract between the insurer and the insured. In enacting the McCarran-Ferguson Act Congress was concerned with: "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement -- these were the core of the "business of insurance."

[Royal Drug at 215-16](#) (quoting [SEC v. National Securities, Inc., 393 U.S. 453 460 \(1969\)](#).

The conduct challenged here, involving as it does the provisions of the insurance policy itself, falls within the core of "the business of insurance" as the Supreme Court has defined that term.¹⁸

[*37] The challenged conduct must also be regulated by state law before the McCarran-Ferguson exemption will apply.¹⁹ In accordance with the intent of Congress expressed in the McCarran-Ferguson Act, Rhode Island has established a comprehensive program of regulation for the business of insurance. See R.I.G.L. § 27-29.1. Rhode Island law prohibits any person from engaging in "an unfair method of competition or an unfair deceptive act or practice in the business of insurance." [R.I.G.L. § 27-29-3](#). The Insurance Commissioner is authorized to make determinations as to what constitutes unfair competition, and to seek injunctions in superior court enjoining any violation he determines is taking place. [R.I.G.L. § 27-29-8](#).

In addition to this general regulation, Rhode Island law [*38] specifically regulates claims adjustment procedures. The Insurance Commissioner is authorized to order the discontinuance of any claims adjustment practice which he finds to be unfair, with Rhode Island statutes. [R.I.G.L. § 27-10-10](#). The Commissioner's authority also extends specifically to motor vehicle damage appraisers, and he is authorized to "prescribe reasonable regulations concerning . . . the methods with which [such appraisers] conduct their business." [R.I.G.L. § 27-10.1-1](#) (1981 supp.).

Pursuant to his statutory authority, the Insurance Commissioner has promulgated Regulation XXVIII, Fair Insurance Claim Settlement Practices. Section 9 of this regulation establishes "Standard For Prompt, Fair and Equitable Settlements Applicable to Automobile Insurance." The regulation provides that:

A viewing of a damaged automobile for the purposes of preparing an estimate for the cost of repair shall be made within seven (7) working days of notification to the insurer of the claim. Such estimate shall be in an amount for which it may be reasonably expected the damage can be satisfactorily repaired.

Regulation XXVIII § 9(d).

It thus appears that Rhode Island has specifically [*39] authorized the activities challenged by the plaintiff by passing a regulation that permits an insurance company to pay only the reasonable cost of repairs. Such specific authorization more than satisfies the requirement that the business of insurance be regulated by state law before the McCarran-Ferguson exemption will be available.²⁰ See [Dexter v. Equitable Life Assurance Society of the](#)

¹⁸ Plaintiff appears to argue that even if the agreements between Aetna and its insureds are themselves immune under the McCarran-Ferguson Act, the anticompetitive effects of such agreements are not. Objection and Opposition at 11-12. This argument is completely without merit. As the Justice Department points out, "An antitrust exemption would be meaningless, however, if it were forfeited to the extent that the exempted conduct produced anticompetitive effects." Memorandum of the United States at 14. See [Royal Drug at 249](#) (Brennan, J. dissenting). If the agreements satisfy the requirements of the McCarran-Ferguson Act, they are exempt from the antitrust laws without regard to their possible anticompetitive effects.

¹⁹ In addition, under the McCarran-Ferguson Act the antitrust laws remain applicable to acts of boycott, coercion and intimidation in the business of insurance. [15 U.S.C. § 1013\(b\)](#). The Court concludes for the reasons set forth in a subsequent section of this opinion that the actions of defendant and its insureds cannot be said to constitute an act of boycott or coercion. See pp. 30-34 infra.

[United States, 527 F. 2d 233, 236 \(2d Cir. 1975\)](#); [Crawford v. American Title Insurance Co., 518 F. 2d 217, 219 \(5th Cir. 1975\)](#) (2-1 decision); [Commander Leasing Co. v. Transamerica Title Insurance Co., 477 F. 2d 77, 83 \(10th Cir. 1973\)](#); [Miley v. John Hancock Mutual Life Insurance Co., 148 F. Supp. 299, 302](#) (D. Mass.), aff'd per curiam, [242 F. 2d 758](#) (1st Cir.), cert. denied, 355 U.S. 8288 (1975).

[*40] Accordingly, I find that the combination between Aetna and its insureds which is challenged by the plaintiff constitutes the business of insurance which is regulated by state law. As such, the combination is immune from antitrust attack under the McCarran-Ferguson Act.²¹ The defendant's motion for summary judgment on this claim will therefore be granted.

VI. Agreements Between Aetna "Preferred" Repair Shops, Damage Appraisers and Policyholders [*41] to Boycott Plaintiff's Repair Shop

Plaintiff's final antitrust claim is that Aetna has conspired with its insureds, certain automobile repair shops, and certain automobile damage appraisers to boycott plaintiff's repair shop. Plaintiff contends that a boycott occurs when the defendant informs its policyholders that it will pay only the amount which it determines to be the reasonable cost of repair work. This amount is sometimes less than the amount that plaintiff charges for its services. Insureds who wish to deal with plaintiff's shop may thus be forced to choose between paying the additional amount charged by plaintiff out of their own pockets, or having the repair work performed at a "preferred" shop which will do the work for the amount estimated by Aetna. In many such instances, insureds choose to take their business elsewhere, and this refusal to deal constitutes the alleged boycott of which plaintiff complains.

In response the defendant has offered sworn affidavits which state that Aetna imposes no restrictions on its insureds' freedom to deal with any repair shop they choose. The only limitation imposed by Aetna is that it will pay no more than the competitive cost [*42] of repairs. Daffron Affidavit at 4-5; Mistretta Affidavit at 7. It is also important to note that plaintiff does not contend that it is being boycotted despite its willingness to offer price quotes and other terms that are comparable to those offered by preferred shops. Plaintiff apparently concedes that the alleged boycott has occurred only because of its refusal to offer prices and terms in line with those offered by other shops.

A group boycott has been described generally as "concerted refusal by traders to deal with other traders." [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 \(1959\)](#). But obviously not every refusal to deal constitutes an illegal boycott. A purchaser's refusal to deal with a seller because his price is too high, for example, is clearly not an illegal boycott under the Sherman Act. Rather, this is simply the result of the proper functioning of the marketplace wherein purchasers decide whether or not to buy based on the price and quality of goods. See [American Tel. & Tel. Co. v. Delta Communications Corp., 408 F. Supp. 1075, 1101 \(S.D. Miss. 1976\)](#), aff'd per curiam, [579 F. 2d](#)

²⁰ To trigger McCarran-Ferguson exemption, the system of state regulation need not completely duplicate the provisions of the federal antitrust laws. The Court agrees with the Second Circuit's observations that:

"The McCarran-Ferguson Act clearly contemplates that where a state undertakes to regulate the business of insurance, it has the power to permit practices which would otherwise violate federal antitrust laws; if the exemption is only to apply when state law squarely prohibits all acts which would, absent the exemption, violate the antitrust laws, the state regulation which the McCarran-Ferguson Act aims to foster, [15 U.S.C. §§ 1011, 1012\(a\)](#), would be a nullity."

[Dexter v. Equitable Life Assurance Soc'y of the United States, 527 F. 2d 233, 236 \(2d Cir. 1975\)](#); accord [Travelers Ins. Co. v. Blue Cross of Western Pa., 481 F. 2d 80, 83 n. 10](#) (3rd Cir.); cert. denied, [414 U.S. 1093 \(1973\)](#); [Ohio AFL-CIO v. Insurance Rating Bd., 451 F. 2d 1178, 1181 \(6th Cir. 1971\)](#), cert. denied, [409 U. S. 917 \(1972\)](#).

²¹ The Justice Department takes the position that a combination between insurers and insureds which aggregates buying power would not violate the antitrust laws in any case, absent some showing that insureds had agreed to pool their purchasing power and restrict demand so as to lower the price of automobile repairs below the competitive level. Memorandum of the United States at 16. It seems at least unlikely that plaintiff could make such a showing at trial. Because defendant is entitled to summary judgment on McCarran-Ferguson grounds, however, the Court need not decide if defendant has met its burden of showing that no genuine issue of fact exists as to this possible anticompetitive effect of the insurer-insured combination.

[972](#) (5th cir. 1978), modified on other grounds, [590 F. 2d 100](#) [*43] (5th cir. 1979) ("[a] refusal to buy a product for more than it is worth simply cannot be a violation of the antitrust laws.")

Purchases in the insurance context, however, are somewhat different from the typical purchase of goods and services in that both the insurer and the insured perform certain purchasing functions. The insured usually performs the task of selecting a provider of services while the insurer pays for the purchase subject to the coverage limitations of the insurance policy. Because two separate entities perform purchasing functions, plaintiff claims that there is concerted action when an insured automobile owner declines to use plaintiff's shop because the owner's insurance company will not reimburse the full cost of repairs. Plaintiff appears to conclude from this that the conduct of the defendant and its insureds involves both concerted action and a refusal to deal, and that therefore such conduct constitutes a concerted refusal to deal which by definition is an illegal boycott.

But this is a concerted refusal to deal only as a matter of semantics. Verbal formulas cannot be used to obscure the fact that the defendant and its insureds have simply acted [*44] as rational consumers in declining to patronize high-priced repair shops. Plaintiff at all times has been free to compete for the business of the defendant and its insureds by offering lower prices or higher quality services. From time to time plaintiff has failed in this endeavor because Aetna deemed the plaintiff's charges unreasonable and individual car owners did not believe that the quality of plaintiff's services justified paying an additional amount out of their own pockets. Far from being an illegal boycott, such activities merely constitute the normal functioning of a free-market economy. As the Seventh Circuit recently observed in a similar case: Although some repair shops which charge more than the so-called prevailing competitive rate may suffer some economic losses, these losses appear basically to be the result of the shops' inability or unwillingness to meet competition. The Darwinian working of competition (which the antitrust laws are presumably designed to foster) mean that high-cost, high-price shops tend to lose business and might even go out of business if they cannot become more competitive. Presumably, this process is in the consumer's best interest (although [*45] it may have social costs we think inappropriate to address here). Whatever sympathy one may feel for the body shops in these circumstances, the antitrust laws were not intended to provide redress for losses resulting from noncompetitive prices.

[Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1206 \(7th Cir. 1981\)](#), cert. denied, 102 S. Ct. 1717 (1982).

Moreover, the harm to competition that usually results from a group boycott is conspicuously absent here. The Supreme Court has noted that the principal evil of group boycotts is their tendency to "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 \(1959\)](#) (quoting [Kiefer-Stewart Co. v. Joseph R. Seagram & Sons 1950-1951 TRADE CASES P62,737, 340 U.S. 211, 213 \(1951\)](#)). The Court noted that a group boycott curtails the freedom of both the participants in the boycott and the boycott's target to deal with each other on the same terms that they deal with others. [Id. at 213](#). Here plaintiff remains free to compete with all other body shops on the same basis in attracting the business of Aetna [*46] and its insureds. Individual insureds likewise remain free to deal with plaintiff's shop by personally paying the additional amount charged by plaintiff. The restrictions on freedom to trade usually associated with group boycotts are thus wholly absent in this case.

I note that courts faced with allegations of an illegal boycott based on similar facts have uniformly found such allegations to be without merit. Quality Auto Body, [Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1206 \(7th Cir. 1981\)](#), cert. denied, 102 S. Ct. 1717 (1982); [Bartholomew v. Virginia Chiropractors Ass'n, Inc., 612 F. 2d 812, 817-18 \(4th Cir. 1979\)](#) (2-1 decision), cert. denied, 446 U.S. 938 (1980); [Proctor v. State Farm Mutual Automobile Insurance Co., 561 F. 2d 262, 275 \(D.C. Cir. 1977\)](#), vacated and remanded on other grounds, 440 U.S. 942 (1979); [Workman v. State Farm Mutual Automobile Insurance Co., 520 F. Supp. 610, 622-24 \(N.D. Cal. 1981\)](#); [Nationwide Mutual Insurance Co. v. Automotive Service Councils of Delaware, Inc., 1981-1 TRADE CASES P63,958 at 75,963 \(D. Del. 1981\)](#); [Chicks' Auto Body v. State Farm Mutual Automobile Insurance Co., 168 N.J. Super. 68, 401 A. 2d 722, 730 \(1979\)](#), aff'd per curiam, [*47] [176 N.J. Super. 320, 423 A. 2d 311 \(1980\)](#). The only case that is arguably to the contrary is [General Glass Co. v. Globe Glass & Trim Co., 1980-2 TRADE CASES P63,531 at 76,843 \(N.D. Ill. 1980\)](#). There the court held that plaintiff's allegations that they had been boycotted by an insurance company, the

company's policyholders, and certain preferred glass repair shops were sufficiently supported by the evidence so as to require a trial on the merits. Id. at 76,853-54. This case, however, is distinguishable. Evidence in General Glass Co. indicated that individual insureds were told that they had to replace their broken glass at a "preferred" repair shop, and that they could not use a non-preferred shop. Id. at 76,853. No such restriction on an insured's freedom of choice has been shown to have taken place in this case.

For the foregoing reasons the Court believes that defendant has shown that there exists no genuine issue of fact on the boycott claim, and that the conduct challenged here does not constitute an illegal boycott. The defendant is thus entitled to summary judgment on this claim.

VII. Slander Claim

The Second Amended Complaint alleges that one Walter Fortin, [*48] acting as the agent of the defendant, stated to one of plaintiff's customers, "What makes you think this repair work is so good; in my opinion, this work stinks." The plaintiff further alleges that Fortin made this statement with respect to work that had been performed by the plaintiff that said statement was false, and that Fortin acted maliciously in making it. Plaintiff now seeks to recover nominal actual and punitive damages on a state law claim based on slander.

The defendant has moved for summary judgment on a number of grounds. First, it argues that the Court should exercise its discretion under [United Mine Workers v. Gibbs, 383 U.S. 715, 726 \(1966\)](#), to dismiss the pendent state claim. In the Court's opinion, Gibbs is inapplicable to the present controversy. This is because a reading of the complaint discloses an independent basis for federal jurisdiction over the state law claim. Specifically, Paragraph 2 of the Second Amended complaint alleges that plaintiff is a Rhode Island corporation with its principal place of business in Rhode Island. Paragraph 3 alleges that the defendant is a Delaware corporation with its principal place of business in Hartford, Connecticut. [*49] Paragraph 1 states that the amount in controversy exceeds the sum of \$10,000 exclusive of interest and costs. The complaint thus alleges all the facts necessary to show the existence of diversity jurisdiction. [28 U.S.C. §§ 1332\(a\)](#) and [\(c\)](#). The Court, therefore, has independent subject matter jurisdiction over Count II and lacks any discretion to dismiss the claim under the doctrine announced in Gibbs. It is true that the complaint does not specifically refer to [28 U.S.C. § 1332](#), and that the plaintiff has unnecessarily sought to invoke the Court's pendent and ancillary jurisdiction. It is well settled, however, that a failure to cite the proper jurisdictional provision is not fatal if the complaint sets forth sufficient facts to show that the court has jurisdiction. *Continental Casualty Co. v. Canadian Universal Insurance Co.*, 605 F. 2d 1340, 1343 55th Cir. 1979), cert. denied, 445 U.S. 929 (1980); *Lytle v. Freedom International Carriers, S.A.*, 519 F. 2d 129 132-33 (6th Cir. 1975); [Williams v. United States, 405 F. 2d 951, 954 \(9th Cir. 1969\)](#).

The defendant's second argument is that the statement allegedly made by Fortin was a statement of opinion which is not actionable [*50] because it was not defamatory. The defendant relies on [§ 566 of the Restatement \(Second\) of Torts](#) which states, "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." The Court is uncertain whether Rhode Island courts would follow the rule set forth in the Restatement. Two somewhat dated cases indicate that a false statement that the goods and services supplied by a tradesman are of inferior quality is actionable regardless of whether it is a statement of opinion or an assertion of fact. [Barr v. Providence Telegram Publishing Co., 27 R.I. 101, 103, 60 A. 835 \(1905\)](#); [Morrison-Jewell Filtration Co. v. Lingane, 19 R.I. 316, 317, 33 A. 452 \(1895\)](#). But I need not decide this question because I am convinced that the alleged statement was defamatory even under the Restatement approach.

The Restatement provides that an opinion is defamatory if it implies the allegation of undisclosed defamatory facts. Fortin's statement of opinion may be fairly interpreted to imply either that the work performed suffered from hidden [*51] defects or that such work was generally inferior when compared to the work performed by other automobile repair shops with which Fortin was familiar. Either implication could well constitute the allegation of undisclosed defamatory facts, and the statement of opinion would thus be defamatory even under the Restatement approach. I conclude that the defendant's argument on this point is without merit.

The defendant's final argument is that it is entitled to summary judgment because the statement made by Fortin was privileged under Rhode Island law. The Rhode Island Supreme Court has recognized the existence of a qualified privilege for communications between parties who share a "common interest" in the subject matter of the communication. *Ventetuolo v. Burke*, 470 F. Supp. 887, 897 (D.R.I. 1978), aff'd 596 F. 2d 476, 485 (1st Cir. 1979); *Powers v. Carvalho*, 117 R.I. 519, 368 A. 2d 1242, 1249 (1977); *Ponticelli v. Mine Safety Appliance Co.*, 104 R.I. 549, 247 A. 2d 303, 306 (1968). The communication alleged in the complaint would seem to fall within the scope of this privilege, since Aetna's agent and the policyholder to whom he spoke had an important common interest in a full and [*52] open discussion of the quality of repairs obtained by the insured and paid for by Aetna.

This qualified privilege may be lost, however, if plaintiff can show that the defendant acted with malice in making the false statement. *Swanson v. Speidel Corp.*, 110 R.I. 335, 293 A. 2d 307, 310 (1972); *Ponticelli v. Mine Safety Appliance Co.*, 104 R.I. 549, 247 A. 2d 303, 308 (1968). Malice in this context may be present when the defendant acts with ill will, spite, or malevolence, *Swanson v. Speidel Corp.*, 110 R.I. 335, 293 A. 2d 307, 310 (1972), or when the defendant's "statement was made with the knowledge that it was false or with a reckless disregard of whether it was false or not." *Powers v. Carvalho*, 117 R.I. 519, 368 A. 2d 1242, 1250 (1977). Plaintiff in its complaint has alleged that the defendant acted with malice and defendant has failed to show that there is no genuine issue on this question.²² Defendant's motion for summary judgment on the basis of privilege must therefore be denied.

[*53] VIII. Conclusion

The Court finds that defendant is not entitled to summary judgment on plaintiff's claim that its provider agreements with "preferred" automobile repair shops violate the rule of reason under the Sherman Act. The defendant's motion for summary judgment on all other antitrust claims is granted. The defendant's motion for summary judgment on plaintiff's slander claim is denied.

An order will be prepared in keeping with this Opinion.

End of Document

²² Defendant in its Memorandum of Law cites the deposition of Richard Ruggiero, the plaintiff's president, in support of its position that Fortin's statement was made without malice. The Court has read the cited portion of the deposition and finds therein no discussion whatsoever of the question of malice.



Trident Neuro-Imaging Laboratory v. Blue Cross & Blue Shield, Inc.

United States District Court for the District of South Carolina, Charleston Division

August 5, 1983

Civil Action No. 81-1639-1

Reporter

568 F. Supp. 1474 *; 1983 U.S. Dist. LEXIS 14876 **; 1983-2 Trade Cas. (CCH) P65,559

TRIDENT NEURO-IMAGING LABORATORY, ALBERT F. AIKEN, M.D., O. RHETT TALBERT, M.D., THOMAS H. DUKES, M.D., CT SCANLAB, JAMES HARRELL, and JOHN MIZZELL, Plaintiffs, v. BLUE CROSS AND BLUE SHIELD OF SOUTH CAROLINA, INC., Defendant

Core Terms

boycott, reimburse, scanners, insurance business, scans, antitrust, insurers, conspiracy, exemption, physician-owned, policyholder, summary judgment, summary judgment motion, underwriting, plaintiffs', spreading, McCarran-Ferguson Act, coverage, Sherman Act, restraint of trade, district court, psychologists, chiropractic, purposes, alleged conspiracy, acquisition, concerted, Pharmacy, provider, motives

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

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

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

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

HN1[] Entitlement as Matter of Law, Appropriateness

Summary judgment may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

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

HN2[] Summary Judgment, Burdens of Proof

The antitrust plaintiff, when faced with a summary judgment motion, must merely offer significant probative evidence to support its case.

568 F. Supp. 1474, *1474 1983 U.S. Dist. LEXIS 14876, **14876

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN3 **Summary Judgment, Burdens of Proof**

If reasonable inferences drawn from all of the evidence -- which must be viewed in the light most favorable to the plaintiff -- indicate the existence of a conspiracy, the plaintiff has introduced a sufficient basis for proceeding to trial. The ultimate inference that a conspiracy existed need not be more probable than the inference that the refusal to deal resulted from independent business judgment.

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

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

HN4 **Monopolies & Monopolization, Conspiracy to Monopolize**

When viewing a conspiracy, the conspiracy must be judged, not by looking at its various distinct parts, but only by looking at it as a whole. Conspiracies may be implied from a course of dealing and other circumstances. Moreover, questions concerning the moving defendants' intentions and motives are questions that should seldom be disposed of by summary procedure.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN5 **Scope, Exemptions**

The McCarran-Ferguson Act, [15 U.S.C.S. § 1011 et seq.](#), exempts from the antitrust laws, including the Sherman Act, the business of insurance, which is regulated by the state and which does not constitute an act of boycott, coercion, or intimidation.

Antitrust & Trade Law > Sherman Act > General Overview

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

An unreasonable restraint on the freedom to buy and sell on the open market -- not necessarily total exclusion -- is essential to the Sherman Act concept of boycott.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN7 Exemptions & Immunities, McCarran-Ferguson Act Exemption

There are three criteria relevant in determining whether a particular practice is part of "the business of insurance" exempted from the antitrust laws by § 2(b): first, whether the practice has the effect of transferring or spreading of a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in and of itself.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

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

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN8 Regulated Practices, Price Fixing & Restraints of Trade

The Unfair Trade Practices Act, [S.C. Code Ann. § 39-5-40\(a\)](#) (1976) does not apply to transactions permitted under laws administered by any regulatory body.

Counsel: **[**1]** Wade H. Logan, III, Charleston, South Carolina, J. Marbury Rainer and John H. Parker, Jr., Atlanta, Georgia, for Plaintiffs.

Charles W. Knowlton and Manton M. Grier, Columbia, South Carolina, for Defendant.

Opinion by: HAWKINS

Opinion

[*1476] ORDER

This matter is before the court on defendant Blue Cross and Blue Shield of South Carolina, Inc.'s motion for summary judgment. The plaintiff instituted this action in July 1981, seeking damages and injunctive relief. Plaintiff Trident Neuro-Imaging Laboratory (Trident) is a South Carolina general partnership; the plaintiffs Albert F. Aiken, M.D., O. Rhett Talbert, M.D. and Thomas H. Dukes, M.D. are its partners. CT Scanlab is a North Carolina limited partnership, and James Harrell and John Mizzell are patients of one of the two scanlabs who have contracts of insurance with Blue Cross and Blue Shield of South Carolina, Inc. (Blue Cross). Both partnership plaintiffs consist of physician partners and are physician-directed "private" clinics which own, operate and use devices known as CAT scanners in rendering CAT scans and interpretations thereof to patients who have health and medical insurance with Blue Cross. Trident is located in **[**2]** North Charleston, South Carolina, and CT Scanlab is located in Charlotte, North Carolina.

The defendant Blue Cross is a private insurance corporation which contracts with policyholders and others to provide third party payment directly to health care providers for various health and medical services rendered by doctors, hospitals, clinics and other health care providers. If direct reimbursement is not paid to the provider, then Blue Cross may reimburse the policyholder directly for health care provided.

[*1477] The former defendant Palmetto Lowcountry Health Systems Agency (PLHSA) is a nonprofit regional Health Systems Agency (HSA) established pursuant to the National Health Planning and Resources Development Act of 1974 (NPRDA) (Public Law 93-641), [42 U.S.C. § 300k, et seq.](#), and state enabling legislation. PLHSA was designated as an HSA on April 29, 1976. By order dated November 2, 1982, this court granted summary judgment to defendant PLHSA.

The plaintiffs' complaint seeks damages and injunctive relief. Count I of the complaint alleges violations of §§ 4 and 16 of the Clayton Act ([15 U.S.C. § 15](#)) and [§ 1](#) of the Sherman Act ([15 U.S.C. § 1](#)) by Blue Cross, alleging [*3] a conspiracy by Blue Cross and other unnamed co-conspirators in restraint of trade. Count II of the plaintiffs' complaint alleges violations of the South Carolina statutes regarding trusts, monopolies and restraints of trade, specifically [S.C. CODE §§ 39-3-10, 39-3-120, 39-3-130, 39-3-140](#), and the South Carolina Unfair Trade Practices Act ([S.C. CODE § 39-5-20](#)). Count III of the complaint alleges a breach of contract by Blue Cross.

The case at bar involves Computerized Axial Tomography scanners (CAT scanners). Computerized axial tomography, labeled the first revolutionary innovation in radiology, is a procedure whereby a machine known as a scanner obtains x-ray images of cross sections of the head or body (tomography). These images are reconstructed from numerous angles (axial) mathematically into three dimensions (by computer). Reconstructions can be displayed on a television screen from which photographic prints may be made for medical records or presented in digital form. Plaintiffs' contention is that Blue Cross conspired with others to restrain trade by preventing or impairing the ability of physicians with CAT scanners to compete with hospitals in providing CAT scanning [*4] services.

Blue Cross has moved for summary judgment on the federal antitrust claim on two distinct grounds: (1) that there is no evidence creating an issue of antitrust conspiracy; and (2) that Blue Cross is exempt from antitrust liability under the McCarran-Ferguson Act ([15 U.S.C. § 1011, et seq.](#)). [HN1](#) [↑] Summary judgment may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [Kendall Elevator Co., Inc. v. LBC & W Assoc. of S.C., Inc.](#), 350 F. Supp. 75 (D.S.C. 1972).

I. EVIDENCE OF ANTITRUST CONSPIRACY

Plaintiffs' position is that the evidence shows that Blue Cross conspired with PLHSA and other health planning agencies, the Health Care Financing Administration (HCFA) of the Department of Health and Human Services, hospitals with CAT scanners, hospital-based physicians (most notably radiologists), and Blue Cross and Blue Shield Association (BCA) to restrain trade in the market of CAT scanning, and attempted to prevent the acquisition of CAT scanners by private physicians.

Citing to numerous depositions and documents, the plaintiffs have substantiated, for the purposes of this summary judgment motion, [*5] their theory of conspiracy. This court has studied the evidence at length and concludes that there is sufficient evidence from which to draw reasonable inferences of the existence of a conspiracy as outlined by the plaintiffs.

To illustrate, BCA paid for the CAT scan study conducted by the Institute of Medicine, which discouraged the acquisition of CAT scanners by physicians and recommended that insurers not reimburse for scans performed on physician-owned machines. This report was relied on by PLHSA in adopting its recommendation that insurers not reimburse for CAT scans done on physician-owned scanners. Judge Simons has ruled in *Starnes v. Harris*, No. 79-2311-6 (D.S.C. Mar. 6, 1980), that Blue Cross acted in concert with HCFA and others to formulate a ceiling for Medicare reimbursement for CAT scans performed on physician-owned machines when no such limitation on reimbursement was placed on CAT scans on hospital-owned scanners. The existence, make-up, and discussions of [*1478] the "CAT discussion group" called by the South Carolina Department of Health and Environmental Control (DHEC) give rise to inferences of a joint effort to prevent physician-owned scanners. There [*6] is evidence from which to infer that Blue Cross worked with hospitals and hospital administrators to prevent the acquisition of CAT scanners by physicians (see affidavit of Michael L. Hodge). Further, the evidence as submitted indicates that Blue Cross never imposed any limit on the level of hospital reimbursement for CAT scans. As stated by the plaintiffs, each of the alleged conspirators had an economic or other express interest in preventing physician-

owned CAT scanners. Whether these persons or organizations joined in a conspiracy to carry out the mutual interest of the group is a question of fact that will have to be decided at trial.

In a memorandum supporting the motion for summary judgment and at oral argument, Blue Cross has attempted to narrow the scope of alleged conspiracy to the activities of the "CAT discussion group," as those participants in the DHEC meeting are known. Plaintiffs' position is that the meeting was only one act in furtherance of the overall conspiracy, and plaintiffs have supported their position for the purposes of this motion.

HN2[] The antitrust plaintiff, when faced with a summary judgment motion, must merely offer significant probative evidence to [****7**] support its case.

HN3[] If reasonable inferences drawn from all of the evidence -- which must be viewed in the light most favorable to the plaintiff -- indicate the existence of a conspiracy, the plaintiff has introduced a sufficient basis for proceeding to trial. See [*Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 \(1962\)*](#). The ultimate inference that a conspiracy existed need not be more probable than the inference that the refusal to deal resulted from independent business judgment.

[*Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485, 495 \(5th Cir. 1982\)*](#). **HN4**[] When viewing a conspiracy such as is involved in this case, the conspiracy must be judged, not by looking at its various distinct parts, but only by looking at it as a whole.

Conspiracies may be implied from a course of dealing and other circumstances [citation omitted]. Moreover, this case involves elusive questions concerning the moving defendants' intentions and motives, which are questions that should seldom be disposed of by summary procedure.

Ohio ex rel. Brown v. Mahoning County Medical Society, 1980-1 Trade Cases P 63-100, p. 77,505 [****8**] (N.D. Ohio 1979).

The facts and evidence in this case permit the inference that Blue Cross conspired with numerous parties to boycott and prevent the acquisition of CAT scanners by private physicians and to otherwise restrain trade in the CAT scanning market. Regardless of Blue Cross' denial that a conspiracy existed, the evidence before this court of the close contacts and contractual relations between Blue Cross and the alleged co-conspirators, the actions of those parties, and the motives of the alleged co-conspirators to boycott physician-owned scanners give rise to an inference that all embraced the conspiracy. See [*Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 548-49 \(5th Cir. 1978\)*](#); [*Ballard v. Blue Shield of Southern West Virginia, 529 F. Supp. 71 \(S.D. W. Va. 1981\)*](#).¹

[**9] Given the general principle that summary disposition of antitrust conspiracy cases is not favored, especially when there are competing inferences which may be [***1479**] drawn from the evidence and questions exist concerning the defendant's motives and intent, this is simply not a case which is appropriate for summary disposition. As the Supreme Court stated in the landmark case [*Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 \(1962\)*](#):

We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

¹ Blue Cross relies on two cases from the Second Circuit Court of Appeals to support its position that it is entitled to a summary judgment on the conspiracy issue. Neither case is applicable since both determined that no conspiracy existed after a full review of the evidence presented at trial and the peculiar circumstances of the industries and relationships involved. In [*Oreck Corp. v. Whirlpool Corp. 639 F.2d 75 \(2d Cir. 1980\)*](#), cert. denied, 454 U.S. 1083, 102 S. Ct. 639, 70 L. Ed. 2d 618 (1982), the court affirmed a directed verdict, and in [*Venture Technology, Inc. v. National Fuel Gas Co., 685 F.2d 41 \(2d Cir. 1982\)*](#), the court reversed a jury verdict.

Id. at 473.

II. McCARRAN-FERGUSON ACT

Blue Cross also argues that, as a matter of law, summary judgment should be granted as Blue Cross is protected by [HN5](#) the McCarran-Ferguson Act, [15 U.S.C. § 1011, et seq.](#), which exempts from the antitrust laws, including the Sherman Act, the business of insurance, which is regulated by the state and which does not constitute an act of boycott, coercion, or intimidation.

The plaintiffs concede that Blue Cross [\[**10\]](#) is regulated by the state, but argue that the act complained of is not the "business of insurance." In addition, plaintiffs argue that their claim is within the "boycott" exception of Section 3(b) of the Act, which provides that the Sherman Act shall remain applicable "to any agreement to boycott, coerce or intimidate, or act of boycott, coercion or intimidation." [15 U.S.C. § 1013\(b\)](#). The issue is whether the plaintiffs have provided sufficient evidence of conduct amounting to a boycott to withstand a summary judgment motion.

A. Conduct Amounting to Boycott

In [St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 57 L. Ed. 2d 932, 98 S. Ct. 2923 \(1978\)](#), the Supreme Court construed the language of § 3(b) as adopting the traditional concept of a boycott: namely, a target of the boycott and a concerted refusal to deal with the target. Blue Cross would argue that there must be a refusal to deal *on any terms* by members of the boycott, thus, there is no boycott in the instant case because, on some Blue Cross policies, the plaintiffs are reimbursed. Further, Blue Cross points out, other private insurers and Medicare provide the coverage for CAT scans performed in physicians' [\[**11\]](#) offices. Blue Cross also points out that it does not compete in the relevant market, a requirement it says is necessary for a relevant boycott.

The generic concept of boycott is a "method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." [Barry, 438 U.S. at 542](#). In the present case, under the facts alleged, Blue Cross' partial refusal to deal with plaintiffs, for whom reimbursement is important in providing health care services, "accords with the common understanding of boycott." [Barry, 438 U.S. at 552](#). As a means of ensuring plaintiffs' submission to their attempt to prevent them from operating a physician-owned CAT scanner, the alleged conspirators convinced Blue Cross to refuse to reimburse plaintiffs. A valuable service germane to plaintiffs' business and important to their effective competition with others was withheld from it by collective action.

Further, as the *Hibbett* court ruled, [HN6](#) an unreasonable restraint on the freedom to buy and sell on the open market -- not necessarily total exclusion -- is essential to the Sherman Act concept of boycott. [Nurse Midwifery Associates](#) [\[**12\]](#) *v. Hibbett, 549 F. Supp. 1185, 1191-92 (M.D. Tenn. 1982)*.

The plaintiffs rely on *Ballard v. Blue Shield of West Virginia*, a Fourth Circuit case which involved the refusal of the Blue Shield plan to reimburse for chiropractic services. The Fourth Circuit held that the allegation that Blue Shield's policy restrained trade by making chiropractic services unattractive was sufficient to come within the scope of [15 U.S.C. § 1013\(b\)](#) for purposes of withstanding a motion to dismiss. [Ballard v. Blue Shield of West Virginia, 543 F.2d 1075 \(4th Cir. 1976\)](#). On remand, on motion for summary judgment, the district court refused to hold that a boycott within the meaning of the Act [\[*1480\]](#) could not be proved and denied summary judgement.

This court is of the opinion that whether or not a boycott has existed or exists presently is a question of fact going directly to the merits of the plaintiffs' case. Quite simply, if a boycott exists or has existed in the past, the plaintiffs may prevail before a jury and recover damages accordingly. Conversely, if there is or has been no boycott the plaintiffs will have failed to prove their case and the defendants will prevail without [\[**13\]](#) need for invoking the McCarran-Ferguson exemption. In short, by alleging a boycott, plaintiffs have precluded further inquiry regarding this exemption and must now be put to their proof.

The existence or non-existence of a boycott remains a genuine issue of material fact to be resolved herein and summary judgment is manifestly inappropriate.

Over a six-year period, the court file in this action has become voluminous, and this court is unable to say that a jury might not draw differing inferences regarding the existence of a boycott. Indeed, documents submitted by

the plaintiffs tend to indicate an anti-chiropractic bias on the part of the leadership of the American Medical Association. The factual materials in the record do not necessarily preclude plaintiffs' establishing at trial some nexus between the A.M.A. and one or more of the named defendants with regard to this anti-chiropractic attitude. Should such a nexus be established, a jury could find that there was concerted action among one or more defendants and the A.M.A. to boycott the chiropractic profession.

The casebooks are replete with admonitions against the granting of summary judgment in complex antitrust cases involving **[**14]** intent and motive. (See 10 Wright and Miller, Federal Practice and Procedure § 2730).

....

The case at bar seems to be a classic example of a situation in which there may be little dispute as to the facts, but great disagreement as to the inferences which might conceivably be drawn therefrom. The record before the court abounds with documents, depositions and interrogatories which, taken together, constitute a set of facts about which there is little dispute. Summary judgment, under these circumstances, will nevertheless be improper because it appears that these undisputed facts might yield conflicting inferences.

[Ballard v. Blue Shield of Southern West Virginia, 529 F. Supp. 71, 74-75 \(S.D. W. Va. 1981\)](#).

Because the § 3(b) exception to possible McCarran-Ferguson Act exemption is applicable in this case for the purpose of this motion, this court could deny Blue Cross' summary judgment motion on this ground without considering whether the challenged activity constitutes the "business of insurance" for purposes of exemption under § 2(b). Application of the § 3(b) boycott exception, however, warrants denial of Blue Cross' motion only as to the Sherman **[**15]** Act claims of boycott or concerted refusal to deal. To the extent that the complaint states any antitrust claims that do not invoke a boycott within the meaning of the Sherman Act, Blue Cross could still argue that the § 2(b) "business of insurance" exception applies to it.

B. The Business of Insurance

The issue becomes whether or not the decision by Blue Cross not to reimburse policyholders for CAT scans performed outside hospitals is the business of insurance.²

The Supreme Court in *[Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 \(1982\)](#)*, re-examined the three basic elements used to determine what is the "business of insurance" that were first set forth in *[Group Life and Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 59 L. Ed. 2d 261, 99 S. Ct. 1067 \(1979\)](#)*.

[*1481] [16]** In sum, *Royal Drug* identified [HN7](#) three criteria relevant in determining whether a particular practice is part of "the business of insurance" exempted from the antitrust laws by § 2(b): *first*, whether the practice has the effect of transferring or spreading of a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in and of itself

[Pireno, 458 U.S. at 129, 102 S. Ct. at 3009](#). These will be discussed separately.

(1) Whether the practice has the effect of transferring or spreading of a policyholder's risk.

"It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." G. Couch, Encyclopedia of Insurance Law, § 1:3 (2d Ed. 1959). Blue Cross classifies the underwriting decision made as the decision, in part, to exclude the "risk of CAT scans **[**17]** performed on a hospital scanner" is transferred to Blue Cross and spread over all its subscribers.

² It should be noted that it is plaintiffs' contention that Blue Cross' decision not to reimburse for physician-owned CAT scans was only one aspect of the overall illegal conduct.

Plaintiffs, on the other hand, contend that the underwriting decision made by Blue Cross was to reimburse for all medically necessary CAT scans, since any policyholder in need of a scan could obtain reimbursement for a CAT scan by going to a hospital with a scanner. Thus, the decision NOT to reimburse physician-owned scanners was made to discourage the acquisition of CAT scanners and was not an underwriting decision.

A study of relevant case law is revealing. In *Royal Drug*, the Texas Blue Shield Plan offered policies which entitled insureds to purchase prescription drugs for two dollars from pharmacies participating in "Pharmacy Agreements" with Blue Shield. Non-participating pharmacies alleged pricefixing and a boycott. The Supreme Court ruled that Blue Shield was not protected from liability by the McCarran-Ferguson Act. The Court found no "underwriting of risk" involved in the decision to offer the "Pharmacy Agreement" involved in the decision to offer the "Pharmacy Agreement" benefit to insureds because Blue Shield had already accepted the risk of paying for an insured's [**18] prescription. The Supreme Court in *Pireno* reviewed the use of a chiropractic peer review committee by insurance companies to determine whether chiropractic charges were reasonable. The Supreme Court found the arrangement in question did not involve the spreading of risk. As explained by the Second Circuit, whose opinion was affirmed by the Supreme Court, peer review merely *measures the extent* to which a policyholder has failed to effect such a transfer of risk (i.e., the cost of chiropractic service). *Pireno v. New York State Chiropractic Ass'n*, 650 F.2d 387, 393 (1981). The *Pireno* Supreme Court found the use of the peer review committee to be a form of cost reduction and *not* the spreading of risk. *Pireno*, U.S. , 102 S. Ct. at 3009.

A Tennessee district court refused to dismiss an action brought by midwives against a medical insurance company for refusing to provide malpractice coverage. Using the *Pireno* analysis, the court in *Nurse Midwifery Associates v. Hibbett*, 549 F. Supp. 1185 (M.D. Tenn. 1982), undertook an analysis of the insurance company's decision to refuse to cover midwives in order to determine if it were made a part [**19] of the "business of insurance." There, the judge felt that the denial of coverage was related to the underwriting or spreading of "risk," saying that if transferring risk is the "business of insurance," then the converse process, a refusal to transfer a risk, would also be a part of insurance. *Id. at 1194*. Compare *Pireno*, where the Second Circuit said "an activity or procedure that does not either transfer risk for insurer or spread the risk among insureds is *not* the business of insurance." *Pireno*, 650 F.2d at 393. However, the court in *Hibbett* applied the other two criteria of the "business of insurance" to the facts and found this refusal to insure *not* to be covered by the McCarran-Ferguson Act for the purpose of the dismissal motion.

[*1482] In *Hahn v. Oregon Physicians' Service*, 508 F. Supp. 970 (D. Org. 1981), the district court granted summary judgment for the defendant health insurers in an antitrust action where plaintiffs alleged that the insurers had conspired to boycott podiatrists' services in favor of licensed physicians by not providing insurance coverage. The district court in examining the "risk-spreading" criteria found that: [**20]

In my view, the qualifications of physicians, podiatrists, and other members of the healing arts, and the nature and extent of the services such persons may perform, are essential elements in the risk which health care insurance companies may legally define. Therefore, the defendants were privileged to determine that the care provided by podiatrists increased the risk over that of an M.D., for the same type of service. This is particularly true in Oregon, where there is no equality statute.

I therefore hold that the decision of the defendants to limit their risk by imposing restrictions on podiatric care insurance qualifies as the "business of insurance" for purposes of the McCarran-Ferguson Act.

Id. at 975.

On appeal, the Ninth Circuit held that the record did not support the district court's decision and therefore reversed the district court in *Hahn v. Oregon Physicians' Service*, 689 F.2d 840 (9th Cir. 1982). While the opinion primarily focused on the third criteria set forth in *Royal Drug* and *Pireno*, the court stated: ". . . the defendants have introduced no evidence tending to establish there were bona fide risk-related reasons to distinguish between [**21] the services of M.D.'s and podiatrists . . ." *Id. at 843.*

Finally, the Fourth Circuit, in *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), cert. denied, 450 U.S. 916, 67 L. Ed. 2d 342, 101 S. Ct. 1360 (1981), decided a Sherman Act case

brought by psychologists against Blue Shield for its refusal to reimburse insureds for services rendered by clinical psychologists unless the services were billed through a physician. The court held that the defendants' activities were not the "business of insurance." *Id. at 483-84*. The court recognized that the insurers had already made the underwriting decision to cover these mental and nervous disorders in their policies. "Their decision regarding psychologists was not whether to underwrite the risk of those disorders or even the need for psychotherapy; rather it was a question of *who* [sic] they would pay for such services." *Id. at 484*. The court therefore decided that the defendants' actions did not fall within the traditional meaning of the "business of insurance" but rather related to the cost of carrying out their contractual obligation.

Thus, cases since *Royal Drug* seem to hold that only the core activities of a traditional insurance company, *viz.*, the underwriting and risk spreading functions, fall within the McCarran-Ferguson Act exemption for the business of insurance.

Applying that approach to the facts at hand, this court concludes that Blue Cross' decision not to reimburse for physician-owned scanners is not an underwriting decision but rather a cost reduction decision as explained by the plaintiffs. Thus, Blue Cross fails to qualify for the first criteria of the "business of insurance."

(2) *Whether the practice is an integral part of the policy relationship.*

Although Blue Cross' reimbursement policy with regard to CAT scans was adopted on January 23, 1977, and applied to all claims received thereafter, the policy was not incorporated into many contracts even as late as April 26, 1979. Further, in *Virginia Academy*, although the payment policy was clearly included in the contracts, the Fourth Circuit concluded:

The essence of the business of insurance is the relationship between the insurance company and its policyholder. [Citations omitted]. We are persuaded that the defendants' policy regarding payment of clinical psychologists is only tangential to that relationship in that it does not affect the benefit conferred upon the subscriber.

Id. at 483. The Virginia Blue Shield policy would not reimburse a policyholder who went directly to a psychologist. In order to [*1483] obtain reimbursement, a policyholder would have to go to a physician who would then presumably refer the patient, then handle the billing for the treatment rendered by the psychologist. The Fourth Circuit did not feel this policy affected the benefit conferred on the subscriber. It seems certain that the Fourth Circuit would feel the same way about Blue Cross' policy not to reimburse for CAT scans taken on physician-owned instruments.

(3) *Whether the practice is limited to entities within the insurance industry.*

It is clear that Blue Cross' refusal to reimburse for physician-owned scanners inevitably involves third parties wholly outside the insurance industry -- namely neurologists. As noted in *Royal Drug* (and quoted in *Pireno*), § 2(b) was intended primarily to protect "intra-industry cooperation in the underwriting of risks." *440 U.S. at 221*. The plaintiffs claim is that Blue Cross' **24 practices restrain competition in a provider market -- the market for neurological reading of CT scans -- rather than the insurance market. *Royal Drug*, *Pireno*, and *Hahn*, all support this analysis. Further, the plaintiffs have alleged that hospital physicians and others influenced Blue Cross' decision not to reimburse. To that extent, third parties outside the insurance industry were involved in the decision-making process. Blue Cross cites *Anglin v. Blue Shield of Virginia*, 693 F.2d 315 (4th Cir. 1982), for support in saying that Blue Cross meets this third criteria; however, *Anglin* dealt with the refusal of Blue Shield to offer the plaintiff a policy which would cover his child but would not require coverage for his wife. That refusal was certainly an insurance decision. The plaintiffs were policyholders whose alleged injury concerned only Blue Shield's relations with its policyholders and had no direct effect on a specific health care provider. It is evident under the facts of the case at bar that Blue Cross does not meet the third criteria.

To summarize, Blue Cross' decision not to reimburse for physician-owned scanners does not constitute the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act. As the district court said in *Hibbett*,

This Court cannot conclude, for purposes of these motions to dismiss, that the process by which SVMIC, allegedly in concert with the physicians, decided not to continue its policy relationship with Dr. Martin is so plainly the "business of insurance" as to require Section 2(b) exemption. To hold otherwise would mean that the challenged denial of coverage should be exempted from antitrust scrutiny as part of the business of insurance even if, as plaintiffs allege, it was made solely to apply pressure upon the customer in order to secure his compliance with anticompetitive behavior in a noninsurance market. It is not the business of insurance to use coverage "as a coercive lever . . . in order to compel certain dealings in a non-insurance product or service." (citation omitted)

Hibbett, 549 F. Supp. at 1194. Summary judgment is denied as a matter of law on the ground that Blue Cross is exempt from liability by the McCarran-Ferguson Act. Plaintiffs' injuries did not result from the "business of insurance," therefore, Blue Cross is not entitled to the protection **[**26]** afforded by the Act.

III. BLUE CROSS' MOTION FOR SUMMARY JUDGMENT ON THE STATE LAW CAUSES OF ACTION

As to the allegations of state antitrust violations, this court has previously held that under Count II there is no private right of action under the state antitrust statutes. Blue Cross is also exempt from liability under the Unfair Trade Practices Act, which has been allegedly violated by Blue Cross. The activities of Blue Cross are regulated by the Insurance Commission under Title 38 of the South Carolina Code. HN8[↑] The Unfair Trade Practices Act does not apply to "transactions permitted under laws administered by any regulatory body . . ." S.C. CODE ANN. § 39-5-40(a)(1976), see State ex rel. McLeod v. Rhoades, 275 S.C. 104, 267 S.E.2d 539 (1980). As the South Carolina Commission on Insurance approved Blue Cross' exclusion of coverage on physician-owned CAT scans, § 39-5-40(g) acts to exempt Blue Cross from Unfair Trade Practice claims.

[*1484] Count III alleges contract claims by the individual plaintiffs, subscribers to Blue Cross policies. As summary judgment has been denied on the federal claims, this court will continue its pendent jurisdiction over these common **[**27]** law claims.

Based on the above, it is, therefore,

ORDERED, that the defendant Blue Cross' motion for summary judgment be, and the same is hereby, granted only as to the state antitrust and Unfair Trade Practice causes of action (designated as Count II in the complaint), and that its motion for summary judgment as to the federal antitrust cause of action and the contract cause of action (designated as Counts I and III in the complaint) be, and the same is hereby, denied.

AND IT IS SO ORDERED.

Fairdale Farms, Inc. v. Yankee Milk, Inc.

United States Court of Appeals for the Second Circuit

January 24, 1983, Argued ; August 8, 1983, Decided

No. 82-7698, Cal. No. 813 -- August Term, 1982

Reporter

715 F.2d 30 *; 1983 U.S. App. LEXIS 25085 **; 1983-2 Trade Cas. (CCH) P65,545

FAIRDALE FARMS, INC., Plaintiff-Appellant, v. YANKEE MILK, INC. and REGIONAL COOPERATIVE MARKETING AGENCY, INC., Defendants-Appellees

Subsequent History: [\[**1\]](#) Cert. Denied, January 9, 1984.

Prior History: Appeal from a summary judgment of the United States District Court for the District of Vermont, Coffrin, J., dismissing appellant's antitrust complaint.

Disposition: The judgment of the district court is affirmed.

Core Terms

milk, cooperative, premium, prices, predatory, district court, marketing area, agricultural, purchaser, monopolization, over-order, premium charge, producers

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Law > Cooperatives > General Overview

[HN1](#) Collectives & Cooperatives, Capper-Volstead Act

The Secretary of Agriculture is authorized to issue a cease and desist order against any monopolization by a cooperative which has unduly enhanced the price of any agricultural product. The Capper-Volstead Act, [7 U.S.C.S. § 292](#).

Antitrust & Trade Law > Sherman Act > General Overview

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

[HN2](#) Antitrust & Trade Law, Sherman Act

The reasonableness of prices has no constancy.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[HN3](#) Exemptions & Immunities, Collectives & Cooperatives

Predatory practices are not aimed at consumers, but at an identifiable competitor or potential competitor or an identifiable group of them. Although, in some instances, the charging of unremunerative prices may damage or destroy competition, excessively high pricing hardly is likely to accomplish the same result.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

[HN4](#) Exemptions & Immunities, Collectives & Cooperatives

The Secretary of Agriculture sets minimum milk prices for each federal marketing area which are not nationally uniform, nor, indeed, necessarily uniform within the marketing area itself, financial allowances being permitted for those producers in an area who provide an economic service or benefit to the handler. However, producers are permitted to bargain with handlers for higher prices, or over-order premium charges.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Law > Cooperatives > General Overview

[HN5](#) Exemptions & Immunities, Collectives & Cooperatives

The basic requirement for successful cooperative marketing is the control or handling of a substantial part of a commodity in the market involved.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

[HN6](#) Exemptions & Immunities, Collectives & Cooperatives

Governmentally defined marketing areas for fluid milk create natural boundaries for price differentials.

Antitrust & Trade Law > Sherman Act > General Overview

[HN7](#) Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. § 2 \(1976\)](#), does not give purchasers the exclusive right to dictate the terms upon which they will deal.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[HN8](#) [d] Actual Monopolization, Anticompetitive & Predatory Practices

There is nothing predatory in terminating deliveries to a purchaser who refuses full payment therefor, particularly where other purchasers are required to and do pay the full price.

Counsel: Susan F. Eaton, Middlebury, Vermont, (Langrock Sperry Parker & Wool, Middlebury, Vermont, Chapman & Clearwaters, Washington, District of Columbia, Fred I. Parker, Keith I. Clearwaters), for Plaintiff-Appellant Fairdale Farms, Inc.

John M. Freyer, Syracuse, New York, (Bond, Schoeneck & King, Ronald C. Berger, Ronald G. Hull, Syracuse, NY), for Defendant-Appellee Regional Cooperative Marketing Agency, Inc.

Frederick U. Conard, Jr., Hartford, Connecticut, (Shipman & Goodwin, Theodore M. Space, Hartford, Connecticut), for Defendant-Appellee Yankee Milk, Inc.

Judges: Lumbard, Van Graafeiland and Pierce, Circuit Judges.

Opinion by: VAN GRAAFEILAND

Opinion

[*31] VAN GRAAFEILAND, Circuit Judge:

Fairdale Farms, Inc. appeals from a summary judgment of the United States District Court for the District of Vermont (Albert W. Coffrin, J.) dismissing its antitrust complaint against appellees, Yankee Milk, Inc. and Regional Cooperative Marketing [*2] Agency, Inc. We affirm.

Appellant is a dairy products producer and processor located in Bennington, Vermont, which purchases raw milk from other producers in Bennington County, Berkshire County, Massachusetts, and Rensselaer County, New York. Appellee, Yankee Milk, is a dairy farmer cooperative with members in New England and eastern New York. Yankee and six other cooperatives in the New England-New York area are associated in the Regional Cooperative Marketing Agency, Inc. (RCMA). Since 1973, RCMA has acted as a common marketing agency for its members.

In 1975, Fairdale began this action against Yankee, alleging that Yankee and RCMA had conspired to fix the price of raw milk and had monopolized and attempted to monopolize the raw milk trade in the three county area in which Fairdale procures its milk, all in violation of [sections 1](#) and [2](#) of the Sherman Act, [15 U.S.C. §§ 1, 2 \(1976\)](#). Yankee joined RCMA as a necessary party. In 1979, the district court granted defendants' motions for summary judgment on the [section 1](#) price-fixing claim but denied their motions on the [section 2](#) monopolization claim. The court certified the case for interlocutory appeal. [28 U.S.C. § 1292](#) [*3] (b). This Court affirmed the district court's dismissal of the price-fixing claim, but vacated and remanded on the monopolization claim. [Fairdale Farms, Inc. v. Yankee Milk, Inc.](#), [635 F.2d 1037 \(2d Cir. 1980\)](#), cert. denied, [454 U.S. 818](#), [70 L. Ed. 2d 88](#), [102 S. Ct. 98](#) (1981).

The district court had ruled that the latter claim was to be tested by the usual monopolization standards of [United States v. Grinnell Corp.](#), [384 U.S. 563](#), [16 L. Ed. 2d 778](#), [86 S. Ct. 1698](#) (1966). That case held that a claim under [section 2](#) was made out if the plaintiff established "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a

consequence of a superior product, business acumen, or historical accident." *Id. at 570-71*. We held that the effect of the Capper-Volstead Act, [7 U.S.C. §§ 291-92](#), "is to prevent the full application of the second element of this test to agricultural cooperatives," so that the acquisition, maintenance, or exercise of monopoly power by "predatory means" only was proscribed. [\[**4\] 635 F.2d at 1045](#). Because we could not determine "whether the district court denied defendants' motion for summary judgment dismissing the [section 2](#) count on the premise that the mere accretion of power from formation of a cooperative is sufficient to violate that section or on the ground that predatory acts had been sufficiently shown," *id.*, the order of denial was vacated and remanded for reconsideration. Upon remand and defendants' renewal of their motions for summary judgment, the district court dismissed the complaint, holding that plaintiff had raised no material questions of fact as to whether defendants had engaged in predatory conduct.

RCMA Pricing Policies

Appellant contends that RCMA set its over-order premium so high as to constitute a predatory policy. The over-order premium was the amount by which RCMA prices exceeded the market order minimum prices [\[*32\]](#) set by the United States Department of Agriculture and State regulatory agencies. Relying in part upon our decision in [Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 \(2d Cir. 1979\)](#), cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980), [\[**5\]](#) the district court properly rejected that argument. As we stated in *Berkey*, "there is probably no better way for [a monopolist] to guarantee that its dominance will be challenged than by greedily extracting the highest price it can." *Id.* It may be, as appellant contends, that market forces will not correct over-pricing in the cooperative milk trade as rapidly as they might in others. Congress wisely has protected against this possibility, however, by authorizing [HN1](#) the Secretary of Agriculture to issue a cease and desist order against any monopolization by a cooperative which has "unduly enhanced" the price of any agricultural product. [7 U.S.C. § 292](#).

In enacting the Sherman Act, Congress recognized that [HN2](#) the "reasonableness of prices has no constancy." [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221, 84 L. Ed. 1129, 60 S. Ct. 811 \(1940\)](#). "The reasonable price fixed today may through economic and business changes become the unreasonable price [\[*6\]](#) of tomorrow," [United States v. Trenton Potteries Co., 273 U.S. 392, 397, 71 L. Ed. 700, 47 S. Ct. 377 \(1927\)](#), and courts are poorly equipped to undertake the "heavy, continuous, and unguided burden" of determining reasonableness, III Areeda and Turner, [Antitrust Law](#) para. 710, at 149 (1978); see Sullivan, *Handbook of the Law of Antitrust* 117-18 (1977). It is not surprising, therefore, that Congress did not ask the courts to determine "whether or not particular price-fixing schemes are wise or unwise, healthy or destructive." [Socony-Vacuum Oil Co., supra, 310 U.S. at 221](#). Instead, the Sherman Act makes every combination formed for the purpose of raising the price of a commodity illegal per se. [Id. at 223](#).

The Capper-Volstead Act was enacted to provide an exception from this rule for agricultural cooperatives. [Fairdale I, supra, 635 F.2d at 1039](#). Had Congress intended that the federal courts were to act as regulatory bodies in setting upper monetary limits for this exception, it easily could have said so. It did not. Although the Capper-Volstead Act has not relieved us of our duty to outlaw "competition-stifling [\[*7\]](#) practices", [Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 463, 4 L. Ed. 2d 880, 80 S. Ct. 847 \(1960\)](#), we fail to see how an increase in prices by an agricultural cooperative stifles competition by other cooperatives or individual farmers. Appellant's contention that appellees' imposition of over-order premiums constitutes a "predatory practice" against the consumer misinterprets the meaning of that phrase as it is used in [Fairdale I, supra, 635 F.2d at 1044](#), and [United States v. Dairymen, Inc., 660 F.2d 192, 194 \(6th Cir. 1981\)](#). [HN3](#) "Predatory practices", as discussed in those and similar cases, are not aimed at consumers, but at "an identifiable competitor or potential competitor or an identifiable group of them." Sullivan, *supra*, at 112. Although, in some instances, the charging of unremunerative prices may damage or destroy competition, [Northeastern Tel. Co. v. American Tel. and Tel. Co., 651 F.2d 76, 86 \(2d Cir. 1981\)](#), cert. denied, 455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982), [\[*8\]](#) excessively high pricing hardly is likely to accomplish the same result.

We likewise find no merit in appellant's argument that appellees violated [section 2](#) because they charged different premiums in the several milk-marketing areas which they served. [HN4](#)¹⁵ The Secretary of Agriculture sets minimum milk prices for each federal marketing area which are not nationally uniform, nor, indeed, necessarily uniform within the marketing area itself, financial allowances being permitted for those producers in an area who provide an economic service or benefit to the handler. [Schepps Dairy, Inc. v. Bergland, 202 U.S. App. D.C. 11, 628 F.2d 11, 15 \(D.C. Cir. 1979\)](#). However, producers are permitted to bargain with handlers for higher prices, or over-order premium charges. *Id.* A similar situation exists in State-regulated areas, one of which includes Berkshire County, Massachusetts.

[HN5](#)¹⁶ The basic requirement for successful cooperative marketing is the control or handling [*33] of a substantial [**9] part of a commodity in the market involved. [Fairdale I, supra, 635 F.2d at 1041-43](#). It would be self-defeating for a cooperative to raise its prices when its share of the market is so small as to leave it without bargaining power. It is undisputed that appellees did not have the bargaining power in the large New York-New Jersey marketing area to enable them successfully to impose over-order premium charges. See [Zuber v. Allen, 396 U.S. 168, 173 n.4, 24 L. Ed. 2d 345, 90 S. Ct. 314 \(1969\)](#). Appellant contends, nonetheless, that appellees' failure to impose over-order premium charges in New York precluded them from imposing such charges in the New England marketing area. We disagree.

[HN6](#)¹⁷ Governmentally defined marketing areas for fluid milk create natural boundaries for price differentials. Fairdale has made no showing that appellees' pricing in the New York-New Jersey market was below their cost or was designed in some manner to eliminate competition by predatory means. See Areeda and Turner, *supra*, para. 720, at 187. Absent any showing that appellees [**10] were moving milk from the New York marketing area into the New England marketing area to compete with Fairdale and given appellees' lack of bargaining power in the New York area, there was nothing predatory in the premium charges which appellees imposed uniformly in the Berkshire County area where appellant purchased milk. To hold otherwise would be to defeat the very purpose of the Capper-Volstead Act. See [Kinnett Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608, 633-34 \(M.D. Ga. 1981\); GVF Cannery, Inc. v. California Tomato Growers Ass'n, 511 F. Supp. 711, 715-16 \(N.D. Cal. 1981\)](#).

Refusal to Deal

Yankee first began charging that RCMA premium to Fairdale in the second half of 1973. The premium was imposed at all relevant times only with respect to milk produced by Yankee members in Berkshire County. In the Spring of 1974, a New York handler, Normanskill Dairy, began preparations to enter the Berkshire market. By purchasing in New York, where the Government minimum price was lower than in Berkshire County and where RCMA could not impose its premium because of competition, Normanskill would be able to offer prices to potential Berkshire customers [**11] that were lower than those charged by Fairdale. Seeking to forestall this competition by lowering its own prices, Fairdale asked Yankee for an exemption from the RCMA premium. Yankee granted an exemption to Fairdale, but for one month only. When the premium was reimposed, Fairdale refused to pay it. Although Yankee warned Fairdale that it would cease to deliver any more milk unless the Berkshire premiums were paid, milk deliveries continued while the matter was being negotiated.

In December, 1974, Fairdale learned from two Yankee members that Yankee's management had ordered them to withhold milk deliveries to Fairdale. Upon inquiry, Fairdale learned that the order had been given in error and already had been rescinded. At the next negotiating session, Fairdale demanded that Yankee promise to give Fairdale forty-five days prior notice of any termination of its milk supply. Upon Yankee's refusal to give such assurance, Fairdale, professing its inability to live with resultant supply uncertainties, discontinued its relations with Yankee as of December 31, 1974.

Fairdale says Yankee's threat to sell it no more milk was a predatory practice. Because the dispute concerned only Yankee [**12] milk produced in Berkshire County, Fairdale contends Yankee had no reason to refuse to sell it milk purchased in Vermont and New York, about which there was no price dispute. Since only 40% of Fairdale's milk purchases were from Yankee, no reasonable contention can be made that Yankee was cutting Fairdale off from all

sources of supply. Moreover, although Vermont producers were getting the Vermont Milk Control Board price, which included the equivalent of an RCMA premium, no such premium was charged in eastern New York, only a short distance from Bennington. [*34] See *Kinnett Dairies, Inc. v. Dairymen, Inc., supra, 512 F. Supp. at 624-25*. **HN7**[[↑]] Section 2 of the Sherman Act does not give purchasers the exclusive right to dictate the terms upon which they will deal. Yankee, which did not have a monopoly covering both the New York and New England areas, lawfully might refuse to sell to a purchaser which would not meet its terms of sale and which had other sources of supply available. *Kinnett Dairies, Inc. v. Dairymen, Inc., supra, 512 F. Supp. at 632*; *GVF Cannery, Inc. v. California Tomato Growers Ass'n, supra, 511 F. Supp. at 716*. [**13] Such conduct cannot be considered an unlawful use of lawfully acquired monopoly power. See *Fairdale I, supra, 635 F.2d at 1044*. If anything, Yankee's action in terminating all business relationships with Fairdale necessarily created an added market for its competitors. *House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 871 (2d Cir. 1962)*.

Fairdale's argument that a processor who refuses to pay overdue premium charges nonetheless is entitled to forty-five days' notice before future deliveries can be cancelled, is specious. **HN8**[[↑]] There is nothing predatory in terminating deliveries to a purchaser who refuses full payment therefor, particularly where other purchasers are required to and do pay the full price. As a matter of fact, it was not Yankee, but Fairdale, which terminated their business relationship, and it did so on one week's notice.

The judgment of the district court is affirmed.

End of Document



First American Title Co. v. South Dakota Land Title Asso.

United States Court of Appeals for the Eighth Circuit

March 16, 1983, Submitted ; August 11, 1983

No. 82-1753

Reporter

714 F.2d 1439 *; 1983 U.S. App. LEXIS 24992 **; 1983-2 Trade Cas. (CCH) P65,539

First American Title Company of South Dakota and First American Title Insurance Company of South Dakota, Appellants, v. South Dakota Land Title Association, South Dakota Abstracter's Board of Examiners, Black Hills Land and Abstract Company, Dennis O. Murray, Security Land and Abstract Company, Glen M. Rhodes, Fall River County Abstract Company, Charles E. Clay, Custer Title Company, Betty J. Gould, Haakon County Abstract Company, Keith Emerson, Wayne Roe, and Charles Nass, Appellees

Subsequent History: [**1] *Certiorari Denied, 464 U.S. 1042 (1984)*.

Prior History: Appeal from the United States District Court for the District of South Dakota.

Disposition: The judgement of the district court is affirmed.

Core Terms

abstracter, regulation, Sherman Act, countersignature, plant, anticompetitive, licensed, title insurance policy, title insurance company, district court, state action doctrine, antitrust, countersigning, lobbying, sham, title insurance, conspiracy, preemption, regulatory scheme, anti trust law, domestic, cases, state statute, title company, state action, insured, sovereign capacity, per se violation, fee schedule, price-fixing

LexisNexis® Headnotes

Real Property Law > Title Quality > Marketable Title > Abstracts

HN1 [down arrow] **Marketable Title, Abstracts**

See [S.D. Codified Laws § 58-25-16](#).

Real Property Law > Title Quality > Marketable Title > Abstracts

HN2 [down arrow] **Marketable Title, Abstracts**

In part, S.D. Admin. R. § 20:36:04:01, requires that the plant contain a complete index showing every instrument recorded in the register of deeds' office in the county wherein the abstracter proposes to operate, properly listed against the specific property which it affects, and also a separate index showing all recorded instruments which do

not affect specific property. This index must be made from an actual check of each page of each book of recorded instruments in said office, and in no case will a copy or film of the numerical index in the register's office be accepted.

Insurance Law > Types of Insurance > Property Insurance > Title Insurance

Real Property Law > Title Quality > Marketable Title > Abstracts

HN3 **Property Insurance, Title Insurance**

The amended, [S.D. Codified Laws § 58-25-16](#), which became effective July 1, 1979, states: No insurance company shall issue any policy of title insurance or certificate of title or other guarantee of title, covering any property located within the state of South Dakota, unless the same is countersigned by a person, partnership or corporation, who has met the requirements of §§ 36-13-8 and 36-13-10 in the county in which the real property is located, or maintains an abstract plant in the county where the real property is located and meets the requirements of chapter 36-13. A violation of this section is a Class 2 misdemeanor.

Insurance Law > Types of Insurance > Property Insurance > Title Insurance

Real Property Law > Title Quality > Marketable Title > Abstracts

HN4 **Property Insurance, Title Insurance**

The legislature enacted, [S.D. Codified Laws § 36-13-26.1](#), which states, an abstractor's countersignature on a title insurance policy is verification that the abstracter has furnished the insurer a report based on the examination of record title and any other title information and services required by the insurer and [§ 36-13-25](#).

Insurance Law > Types of Insurance > Property Insurance > Title Insurance

Real Property Law > Title Quality > Marketable Title > Abstracts

HN5 **Property Insurance, Title Insurance**

The legislature also amended, [S.D. Codified Laws § 36-13-25](#), to state in pertinent part that, the Board of Examiners shall also establish a schedule of fees and the requirements for an abstracter's services for countersigning title insurance policies pursuant to [§ 58-25-16](#).

Antitrust & Trade Law > Sherman Act > Claims

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

HN6 **Sherman Act, Claims**

714 F.2d 1439, *1439LÁ1983 U.S. App. LEXIS 24992, **1

It is well-established that price-fixing is a per se violation of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

[HN7](#) Antitrust & Trade Law, Sherman Act

The Noerr-Pennington doctrine generally holds that the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), does not apply to joint efforts by groups seeking to exercise their, [U.S. Const. amend. I](#), right to petition the government, whether it be a petition to the legislature, an administrative agency, or the courts. Furthermore, such joint efforts do not violate the antitrust laws even though intended to eliminate competition. But an exception to the doctrine does hold that the Sherman Act applies if the joint action is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

[HN8](#) Exemptions & Immunities, Noerr-Pennington Doctrine

The Sherman Act, [15 U.S.C.S. § 1 et seq.](#), 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. Such associations bear very little if any resemblance 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.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

[HN9](#) Exemptions & Immunities, Noerr-Pennington Doctrine

It is established that the right of access to the courts is indeed but one aspect of the right of petition; accordingly, groups do not violate the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), by using the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN10 [blue icon] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The sham exception to the Noerr-Pennington doctrine holds that litigation of baseless claims which may be characterized as a sham cover for what is really just an attempt to directly interfere with the business relations of a competitor, is subject to scrutiny under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#)

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > State & Territorial Governments > Legislatures

Transportation Law > Commercial Vehicles > Traffic Regulation

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN11 [blue icon] **Antitrust & Trade Law, Exemptions & Immunities**

When a state legislature enacts an otherwise unlawful anticompetitive system of regulation, such regulation is outside the reach of the antitrust laws under the state action exemption provided that the regulations reflect a state policy clearly articulated and affirmatively expressed, designed to displace unfettered business freedom with regulation.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN12 [blue icon] **Exemptions & Immunities, Parker State Action Doctrine**

State agencies or subdivisions of a state simply by reason of their status as such, apparently do not qualify as the state acting in its sovereign capacity. Actions by such bodies, however, may reflect a state policy to displace competition with regulation. Such actions will not be subject to scrutiny under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), provided that an adequate state mandate for anticompetitive activities exists. This mandate exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN13 [blue icon] **Exemptions & Immunities, Parker State Action Doctrine**

Conduct by a private party may be cloaked with state action immunity provided that the conduct was pursuant to a clearly articulated and affirmatively expressed state policy and that the conduct was actively supervised by the state itself.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN14 [blue icon] **Exemptions & Immunities, Parker State Action Doctrine**

The Sherman Act, [15 U.S.C.S. § 1 et seq.](#), will preempt a state statute if there exists an irreconcilable conflict between the federal and state regulatory schemes. It is then self-evident that application of state action principles follows the antitrust court's initial determination that there is truly a conflict between the Sherman Act and the challenged regulatory scheme.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

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 > Nonprice Restraints

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

[HN15](#) [] Exemptions & Immunities, Parker State Action Doctrine

A state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under the Sherman Act, [15 U.S.C.S. § 1](#), when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

[HN16](#) [] Exemptions & Immunities, Parker State Action Doctrine

The [Due Process Clause, U.S. Const. amends. V](#) and [XIV](#), does not empower the judiciary to sit as a super-legislature to weigh the wisdom of legislation. Rather the judiciary fulfills its role by determining whether the state as a sovereign, in the broad exercise of its police powers, has chosen to displace competition with regulation.

Counsel: Lynn, Jackson, Schultz & Lebrun, P.C., Donald R. Shultz, Gene N. Lebrun, Rapid City, SD, Bruns & Figa, P.C., Hugh A. Burns, Phillip S. Figa, Denver, Colorado, for Plaintiff-Appellants.

Schmidt, Schroyer, Colwill & Zinter, P.C., Gary F. Colwill, Ronald G. Schmidt, Pierre, S.D. , for Defendant-Appellees South Dakota Land Title Association, Fall River Abstract Company, Charles E. Clay, Custer Title Company, Betty J. Gould, Haakon County Abstract Company, Keith Emerson, Wayne Roe and Charles Nass.

Lynn, Jackson, Schultz & Lebrun, P.C., Donald R. Schultz, Gene N. Lebrun, Rapid City, South Dakota, Burns & Figa, P.C., Hugh A. Burns, Phillip S. Figa, Denver, Colorado, for Appellants.

Mark V. Meierhenry, Attorney General, Jeffrey P. Hallem, Assistant Attorney General, Pierre, South Dakota, for State Appellees.

Judges: Heaney and Fagg, Circuit Judges, and William C. Hanson, * Senior District Judge. [**2]

Opinion by: HANSON

Opinion

[*1441] HANSON, Senior District Judge.

This antitrust case concerns alleged anticompetitive private and regulatory restraints on the South Dakota abstracting and title insurance businesses. Plaintiffs/appellants, First American Title Company of South Dakota and First American Title Insurance Company of South Dakota, contend that they were the victims of a price-fixing conspiracy, frivolous and sham litigation, and a conspiracy to devise and [*1442] enforce statutes and regulations which served to restrain trade in the abstracting and title insurance businesses, all in violation of [sections 1](#) and [2](#) of the Sherman Act.¹ [15 U.S.C. §§ 1](#) and [2](#). Defendants/appellees are the South Dakota Land Title Association (the Association), a professional association of South Dakota abstracters; the South Dakota Abstracters' Board of Examiners (the Board of Examiners), the state board which regulates the business of abstracting; and various individual South Dakota abstracters and title companies. The district court also permitted the joinder of the State of South Dakota as a defendant pursuant to a motion by the Board of Examiners.

[**3] Following a bifurcated bench trial on the issue of liability, the district court entered judgment for defendants. The court found that there was insufficient evidence to support a conclusion that a private price-fixing conspiracy existed among defendant abstracters and their title companies. The court further concluded that plaintiffs' remaining antitrust claims were barred by the McCarran-Ferguson Act, the *Noerr-Pennington* doctrine, and the state action doctrine. The First American companies appeal these holdings and we affirm.

I.

A.

South Dakota pervasively regulates the business of abstracting and insuring land titles. See SDCL chs. 36-13 (Abstracters of Title) and 58-25 (Title Insurance Rates and Policies). Until July 1, 1979, South Dakota required that no foreign insurance company could issue a title insurance policy on property in South Dakota unless the policy

* The Honorable William C. Hanson, Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

¹ The district court's memorandum opinion sets out plaintiffs' basic allegations as follows:

Plaintiffs allege that the Defendants conspired to: (a) fix the price to Plaintiffs of abstractor countersignatures on title insurance policies; (b) engage in frivolous and sham litigation by appealing the decision of the South Dakota Director of Insurance to grant a certificate of authority to Plaintiff First American Title Insurance Company to do business in South Dakota; (c) engage in frivolous and sham litigation by participating in the case of *Fall River County Abstract Company v. Knutson*, (6th Judicial Circuit Court, Hughes County, S.D., Nov. 6, 1979, Judge Robert A. Miller, presiding); (d) engage in efforts to influence the enactment of S.L. 1979, ch. 345, amending [SDCL 58-25-16](#), which had the effect of requiring all title insurance policies issued in the state to contain the countersignature of an abstractor; (e) enforce and attempt to enforce [SDCL 58-25-16](#); (f) attempt to establish a fee schedule for countersignatures to be provided by abstractors on title insurance policies; (g) enforce and attempt to enforce ARSD § 20:36:04:01; (h) engage in a publicity campaign directed against the Plaintiffs, ostensibly directed toward influencing government action, which campaign was a sham to cover an attempt to interfere with the business relationships of Plaintiffs.

was countersigned by a licensed abstracter who was doing business in the county where the property was located. [SDCL § 58-25-16](#).²

[**4] In order to do business in a particular county in South Dakota, an abstracter, among other requirements, must have an approved abstract plant showing "in a sufficiently comprehensive form, all instruments affecting the title to real estate which are of record or on file in the office of the register of deeds. . ." [SDCL § 36-13-10](#). The Board of Examiners, whose duty it is to "carry out the purposes and enforce the provisions of" the statutes governing abstracting and to "make such rules and regulations as may be necessary to carry out the purposes of those statutes," [SDCL § 36-13-6](#), defines by regulation what constitutes "sufficiently comprehensive form" for an abstract plant's records. [*1443] [HN2](#)[↑] In part, this long-standing regulation requires that the plant contain

a complete index showing every instrument recorded in the register of deeds' office in the county wherein [the abstracter] proposes to operate, properly listed against the specific property which it affects, and also a separate index showing all recorded instruments which do not affect specific property. This [**5] index . . . must be made from an actual check of each page of each book of recorded instruments in said office, and in no case will a copy or film of the numerical index in the register's office be accepted.

ARSD § 20:36:04:01.

One of the First American companies' contentions is that the requirement that an abstracter's index be "made from an actual check of each page of each book of recorded instruments" imposes a financially-prohibitive burden upon anyone who wishes to open a competing abstract plant in a given county. See Part IV *infra*. The regulation's anticompetitive effect, according to appellants, is reflected by the current situation in South Dakota in which most counties have only one licensed abstracter, except for the more populated counties, which have two.

B.

Walter J. Linderman became a licensed abstracter in Pennington County, South Dakota in 1973 and formed First American Title Company of South Dakota in 1974. Linderman's title company served as a local agent for a foreign title insurance company, First American Title Insurance Company of California. In his dual capacity as abstracter and title insurance agent, Linderman was qualified to countersign [**6] title insurance policies on property located in Pennington County; but in insuring title on property outside Pennington County, Linderman was required to obtain the countersignature of that county's licensed abstracter and pay the resulting fee.

The anomaly in [SDCL § 58-25-16](#) which required only foreign insurance companies to obtain countersignatures from abstracters on title insurance policies led Linderman to form a domestic title insurance company in December 1978 -- First American Title Insurance Company of South Dakota. This would have enabled Linderman to issue title insurance policies on property in any South Dakota county without obtaining a countersignature from that county's licensed abstracter.

This was not to be, however, because in the ensuing legislative session, the South Dakota legislature amended [SDCL § 58-25-16](#) by deleting the word "foreign," thus extending the countersignature requirement to all title insurance policies, whether they be issued by a foreign or domestic insurance company.³

² [HN1](#)[↑] [Section 58-25-16 of the South Dakota Codified Laws](#) provided:

No foreign insurance company shall issue any policy of title insurance or certificate of title or other guarantee of title, covering any property located within the state of South Dakota, unless the same is countersigned by a person, partnership or corporation, who has met the requirements of §§ 36-13-8 and 36-13-10. Violation of this section is a Class 2 misdemeanor.

This statute was amended by the South Dakota legislature in 1979. See Part I B *infra*.

³ [HN3](#)[↑] The amended [§ 58-25-16](#) which became effective July 1, 1979, states:

[**7] Defendants' opposition to Linderman's formation of a domestic title insurance company and their support for the amendments to [§ 58-25-16](#) form bases for two of the First American companies' antitrust claims. It is claimed that defendants engaged in frivolous and sham litigation in violation of the Sherman Act by appealing to state court the administrative decision by the Division of Insurance to grant a certificate of authority to First American Title Insurance Company of South Dakota. It is further claimed that defendants engaged in unlawful anticompetitive conduct by lobbying in support of the amendments to [§ 58-25-16](#), which included the deletion of the word "foreign" from the statute.

[*1444] Following the amendment to the countersignature statute, the alleged anticompetitive conspiracy continued in 1979 in the context of a controversy over whether the Division of Insurance or the Board of Examiners had the authority to set countersignature fees. The Board of Examiners already had at that time clear authority to "establish a schedule of fees for doing business" under chapter 36-13 relating to abstracters' services. [SDCL § 36-13-25](#). The countersignature requirement, however, [**8] is in chapter 58-25, which regulates title insurance, a business overseen by the Division of Insurance and its director. [SDCL § 58-2-21](#). The First American companies claim that defendants wanted the Board of Examiners to control countersignature fees to insure that they would be sufficiently high to stem the proliferation of title insurance in South Dakota. Presumably, the Board of Examiners' interest in setting high fees would be greater because three of its four members are required to be abstracters. [SDCL § 36-13-1](#).

Following an opinion by the South Dakota Attorney General that the Division of Insurance had authority to set countersignature fees, the Association brought an ultimately unsuccessful state court action attacking the jurisdictional basis for this authority. *Fall River County Abstract Company v. Knutson*, (6th Judicial Circuit Court, Hughes County, S.D., November 6, 1979, Judge Robert A. Miller). A basis for the state court ruling was the conclusion that the countersigning of a title insurance policy was purely a ministerial act because South Dakota law did not require any affirmative act by the abstracter before signing. During the 1979 South Dakota legislative [**9] session, defendants successfully lobbied the state legislature to pass laws which ensured that the countersigning of a title insurance policy was to be more than a ministerial act and which specifically gave the Board of Examiners the authority to set countersignature fees.⁴ The litigation and lobbying by defendants on the countersignature fee issue are alleged to be further unlawful anticompetitive acts.

No insurance company shall issue any policy of title insurance or certificate of title or other guarantee of title, covering any property located within the state of South Dakota, unless the same is countersigned by a person, partnership or corporation, who has met the requirements of §§ 36-13-8 and 36-13-10 *in the county in which the real property is located, or maintains an abstract plant in the county where the real property is located and meets the requirements of chapter 36-13*. A violation of this section is a Class 2 misdemeanor.

The emphasized portion indicates language which was added by amendment in 1979.

⁴ [HN4](#) [↑] The legislature enacted [SDCL § 36-13-26.1](#), which states, "An abstractor's countersignature on a title insurance policy is verification that the abstracter has furnished the insurer a report based on the examination of record title and any other title information and services required by the insurer and [§ 36-13-25](#)."

[HN5](#) [↑] The legislature also amended [SDCL § 36-13-25](#) to state in pertinent part that, "[The Board of Examiners] shall also establish a schedule of fees and the requirements for an abstracter's services for countersigning title insurance policies pursuant to [§ 58-25-16](#)."

The Board of Examiners subsequently promulgated regulations implementing these statutory changes. A title search -- meaning a search of both the abstracter's plant and the official county records -- is required before countersigning a title insurance policy. ARSD § 20:36:07:01. Additionally, the search is to be "made under the direction of an abstracter licensed in the county in which the property is located." ARSD § 20:36:07:02. This regulation also requires the abstracter's full cooperation with the title insurer by forbidding any unnecessary delays in performing the search and countersigning the policy: "Delays in the search or reporting shall be cause for complaint and disciplinary proceedings by the abstracters' board of examiners." *Id.*

[**10] Although the Board of Examiners did in 1980 obtain authority to establish countersignature fees, no fee schedule ever regulated countersignature fees during the life of the First American Title Insurance Company of South Dakota. It is claimed that Linderman, as the agent for this company, was the victim of a private price-fixing conspiracy by the individually-named defendant abstracters and title companies in 1979 and 1980. Allegedly, these defendants conspired to fix countersignature fees at a level of 50% of the title insurance policy's premium. It is claimed that this private price-fixing conspiracy, coupled with the statutory changes, forced Linderman to dissolve First American Title Insurance Company of South Dakota in May 1980.

II.

First American's ⁵ initial claim on appeal -- that the district court erred in finding insufficient evidence of a private [*1445] conspiracy to fix prices for countersignature fees -- need not long detain us. [HN6](#)[↑] It is, of course, well-established that price-fixing is a *per se* violation of [§ 1](#) of the Sherman Act. [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 84 L. Ed. 1129, 60 S. Ct. 811 \(1940\)](#). [**11] In this case the district court concluded that evidence of a conspiracy to fix countersignature fees at 50% of the title insurance policy premium was "equivocal" and "not sufficient." First American failed to prove the presence of a conspiracy among the individual abstracters and title companies named as defendants, and further failed to prove that the countersignature fees charged by these defendants were fixed at a level of 50% of the policy premium. It would serve no purpose for this court to reiterate the district court's discussion which reflects careful consideration of the evidence. See [First American Title Co. v. South Dakota Land Title Association, 541 F. Supp. 1147, 1154-56 \(D.S.D. 1982\)](#). We hold that substantial evidence in the record supports the district court's findings; nowhere are we left with the "definite and firm conviction that a mistake has been committed" with regard to these findings. [United States v. United States Gypsum Co., 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 \(1948\)](#).

[**12] III.

First American next contends that the district court erred in holding that the *Noerr-Pennington* doctrine insulates defendants from antitrust liability for their lobbying and litigation activities. [HN7](#)[↑] The *Noerr-Pennington* doctrine generally holds that the Sherman Act does not apply to joint efforts by groups seeking to exercise their [first amendment](#) right to petition the government, whether it be a petition to the legislature, an administrative agency, or the courts. [California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#); [United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#); [Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#). Furthermore, such joint efforts "do not violate the antitrust laws even though intended to eliminate competition." [Pennington, supra, 381 U.S. at 670](#). But an exception to the doctrine does hold that the Sherman Act applies if the joint action "is [**13] a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." [Noerr Motor Freight, supra, 365 U.S. at 144](#).

A.

First American initially attacks the district court's holding that lobbying by defendants in favor of the amendment to [SDCL § 58-25-16](#) which resulted in deletion of the word "foreign" from the statute was activity which fell "squarely within the confines of the Noerr-Pennington Doctrine." [First American Title Co., supra, 541 F. Supp. at 1157](#). We do not understand First American to argue the sham exception in attacking this holding. Indeed, such a claim would not prevail. As the district court concluded, "This is a classic case of a group of persons petitioning their government for relief and receiving the relief they request." *Id. Cf. Alexander v. National Farmers Organization, 687 F.2d 1173, 1195 (8th Cir. 1982)*, cert. denied, 461 U.S. 937, 103 S. Ct. 2108, 77 L. Ed. 2d 313, 51 U.S.L.W. 3826 (1983) ("The sham exception generally involves governmental contacts which are not a genuine attempt to influence official decision [**14] making, but instead are merely an attempt to interfere directly with the business relationships of a competitor.").

⁵ We shall refer to appellants collectively as "First American" throughout the remainder of this opinion.

Rather First American claims that the *Noerr-Pennington* doctrine does not apply because a state agency -- the Board of Examiners -- was an alleged conspirator along with the private party defendants in seeking amendment to the countersignature statute. First American relies on [*Duke & Co. v. Foerster, 521 F.2d 1277, 1281-82 \(3d Cir. 1975\)*](#), in arguing for application of this coconspirator exception to the *Noerr-Pennington* doctrine. In *Duke & Co.*, plaintiff alleged that municipal corporations which [*1446] owned the Pittsburgh Civic Arena, Three Rivers Stadium, and the Pittsburgh International Airport conspired with private corporations which operated these facilities to boycott malt beverages manufactured by plaintiff. The court of appeals reversed the district court's dismissal of the complaint, holding in part that the *Noerr-Pennington* doctrine did not shield defendants from antitrust liability.

Both *Noerr* and *Pennington* involved suits against *private parties* who had allegedly conspired to influence governmental [**15] action. In neither case was it alleged that the governmental entity had collaborated to promote the conspiracy. Where the complaint goes beyond mere allegations of official persuasion by anticompetitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the *Noerr-Pennington* doctrine is inapplicable.

[*Duke & Co., supra, 521 F.2d at 1282*](#) (emphasis in original).

We do not quarrel with the court's conclusion in *Duke & Co.* that the *Noerr-Pennington* doctrine did not apply. In our view, however, *Noerr-Pennington* was inapplicable because of the nature of the conduct alleged in the complaint, not because of the nature of the parties involved.⁶ The anticompetitive conduct alleged in the complaint in *Duke & Co.* was a boycott of plaintiff's product; clearly an alleged anticompetitive boycott is not [*first amendment*](#) conduct which the *Noerr-Pennington* doctrine was formulated to protect. The Court made this distinction in *Noerr Motor Freight*.

We think it equally clear that [**HN8**](#) the Sherman Act does [**16] 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. . . . Such associations . . . bear very little if any resemblance 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.

[*Id., 365 U.S. at 136*](#). Thus the Court made clear that "the proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." [*Id., 365 U.S. at 141*](#). *Duke & Co.* and the instant case are embodiments of the Court's distinction. Whereas *Duke & Co.* involved allegations of anticompetitive government activity in the business world, the instant case concerns government activity in the political [**17] arena. We therefore hold that *Duke & Co.* is distinguishable on its facts.

First American further contends that defendants' lobbying campaign should not be protected by *Noerr-Pennington* because it involved "a misuse of the lobbying process" through false statements and inaccuracies that were made [**18] by defendants to the state legislature. The focus of this complaint appears to be a letter that the Board of Examiners sent to members of the South Dakota legislature explaining the Board's understanding of the then-current requirements for becoming a licensed abstracter and stating the Board's fear that failure to amend the countersignature statute could conceivable result in a domestic title insurance company issuing policies without performing a title search. The district court made no specific findings in this regard, but [*1447] to characterize these statements as "misrepresentations" and to withhold *Noerr-Pennington* protection on account of this would

⁶This circuit recently refused to rely on the *Duke & Co.* coconspirator exception, noting that it has been subject to criticism. [*Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733, 746 \(8th Cir. 1982\)*](#), cert. denied, [*461 U.S. 945, 103 S. Ct. 2122, 77 L. Ed. 2d 1303, 51 U.S.L.W. 3841 \(1983\)*](#); see [*Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 229-30 \(7th Cir. 1975\)*](#); Fischel, *Anti-trust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U.Chi.L.Rev. 80, 115 (1977) ("in most cases the co-conspirator exception is unworkable and should not be recognized").

result in undermining the doctrine itself. This letter, which contained at most mild political hyperbole, was well within the bounds of traditional political activity which *Noerr-Pennington* was established to protect. Cf. *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 746 (8th Cir. 1982), cert. denied, 461 U.S. 945, 103 S. Ct. 2122, 77 L. Ed. 2d 1303, 51 U.S.L.W. 3841 (1983) (holding that illegal or fraudulent actions employed in conjunction with legitimate lobbying [**19] went beyond traditional political activity protected by *Noerr-Pennington*).

Even assuming that misrepresentations may have appeared in the Board's letter, this would not preclude application of the *Noerr-Pennington* doctrine -- at least in the context of legislative lobbying. The Supreme Court in *California Motor Transport* made the following comments regarding the bounds of constitutionally-protected conduct in the political arena:

The political campaign operated by the railroads in *Noerr* to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics. We said:

"Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." *365 U.S., at 141.*

Id. 404 U.S. at 512.

Finally, [**20] we note that First American had equal access to the legislature to lobby against the amendment and to correct any "misrepresentations" which may have been made by defendants. Accordingly, we hold that the district court properly applied the *Noerr-Pennington* doctrine to defendants' activities in lobbying the South Dakota legislature to amend the countersignature statute.

B.

First American also attacks the district court's application of the *Noerr-Pennington* doctrine to the state court litigation which arose during the period when Linderman formed and operated his domestic title insurance company. First American claims that certain defendants in two instances engaged in baseless and sham litigation intended to harass and interfere with First American's business relations. The Association opposed the granting of a certificate of authority by the Division of Insurance to First American Title Insurance Company of South Dakota and appealed the subsequent grant of the certificate to state court. This appeal resulted in affirmance of the Division of Insurance's decision to grant the certificate. Also, in *Fall River County Abstract Co. v. Knutson*, *supra*, the Association and the [**21] Fall River County Abstract Company sought a writ of prohibition in state court to prohibit the director of the Division of Insurance from establishing a fee schedule for the countersigning of title insurance policies. First American Title Insurance Company of South Dakota intervened in this litigation as a defendant. The district court held that the *Noerr-Pennington* doctrine protected the Association and the Fall River County Abstract Company from antitrust liability for their participation in these actions.

HN9 It is established that "the right of access to the courts is indeed but one aspect of the right of petition"; accordingly, groups do not violate the Sherman Act by "us [ing] the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." *California Motor Transport, supra, 404 U.S. at 510-11.* **HN10** The sham exception to this doctrine [**22] holds that litigation of baseless claims which "may be characterized as a [*1448] sham cover for what is really just an attempt to directly interfere with the business relations of a competitor," is subject to scrutiny under the Sherman Act. *Alexander v. National Farmers Organization, supra, 687 F.2d at 1200;* see *California Motor Transport, supra, 404 U.S. at 513.*

In *Alexander v. National Farmers Organization, supra*, the parties initiated reciprocal antitrust actions arising out of competition in the milk industry between the NFO and certain large midwest dairy cooperatives. The court held that certain lawsuits initiated by the other dairy cooperatives against NFO were not actionable under the antitrust laws

by application of the *Noerr-Pennington* doctrine, even though "the litigation directly against NFO was intended in part to hamper NFO's ability to compete." *Id.*, [687 F.2d at 1200](#). The court concluded that "(there were genuine disputes regarding NFO's solicitation methods," *id.*, thus the sham exception did not apply.

Similarly in this case we do not doubt that the litigation was intended in part [\[**23\]](#) to hamper First American's ability to carry on the title insurance business with a domestically-formed company. But both causes of action also involved genuine disputes. The controversy over who was the proper party to establish a countersignature fee schedule was certainly genuine. When the Association lost in the judicial forum, it continued to assert its position before the South Dakota legislature and ultimately achieved the result it sought -- the Board of Examiners was vested with authority to establish the fee schedule.

Likewise, the Association's effort to prevent Linderman's domestic title insurance company from receiving a certificate of authority to operate in South Dakota was not a baseless claim or sham cover for an attempt to interfere with First American's business.⁷ The Association had a genuine interest in preventing a domestic title insurance company from operating in South Dakota -- at least while South Dakota law had the effect of permitting a domestic insurance company to issue title insurance policies without securing a title search from an abstracter who was licensed in the county where the property to be insured was located.⁸ Clearly the Association [\[**24\]](#) had a [first amendment](#) right of access both to the administrative and the judicial forums to press its opposition. We discern no abuse of these processes which was intended to produce an illegal result. Cf. [California Motor Transport, supra](#) (in which the Court held that the sham litigation exception applied to allegations that defendants abused administrative and judicial processes to produce the illegal result of barring plaintiffs from access to the agencies and courts). We thus affirm the district court's application of the *Noerr-Pennington* doctrine to these litigation episodes.

[\[**25\]](#) IV.

First American also challenges the district court's application of the state action doctrine of [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#). First American's rather unclear claims in its complaint state that defendants violated the Sherman Act by "enforc[ing] and attempt[ing] [\[*1449\]](#) to enforce" the countersignature statute ([SDCL § 58-25-16](#)) and the regulation setting out the requirements for an abstract plant (ARSD § 20:36:04:01), as well as that defendants violated the Sherman Act by attempting to establish a fee schedule for countersignatures pursuant to [SDCL § 36-13-25](#). The district court held that these particular claims were barred from federal antitrust scrutiny on account of the state action doctrine under which federal law impliedly defers to "state action" when the state program at issue satisfies certain requirements. P. Areeda & D. Turner, [Antitrust Law](#) para. 207 at 58 (1978).

It appears, however, that First American shifted its focus somewhat during the course of the district court proceedings by dropping its challenge to defendants' authority to establish a countersignature fee schedule and arguing that [\[**26\]](#) the Sherman Act preempts the countersignature statute and certain regulations. See Clerk's Record (C.R.) at 74-75. The district court did not address this particular argument. The challenged regulations are those setting out the abstract plant requirements (ARSD § 20:36:04:01), requiring the abstracter to search both the

⁷ [SDCL § 58-6-8](#) requires the director of the Division of Insurance to hold a hearing in order to determine whether authority to engage in the INSURANCE BUSINESS SHOULD BE GRANTED. PART OF THIS INQUIRY IS A determination whether the grant of such authority would be in the public interest. *Id.*

⁸ Apparently, the Association's asserted public interest concern (see note 7, *supra*) was that untrained individuals could issue title insurance policies without the necessity of being supervised or trained by abstracters licensed by the State of South Dakota. Brief of the Association at 6-7. This situation prevailed as long as [SDCL § 58-25-16](#) required only foreign insurance companies to obtain the countersignature of a licensed abstracter before issuing a policy of title insurance. The Association asserted its position without success before the Division of Insurance and before a state court. It appealed the state court's decision to the South Dakota Supreme Court, but abandoned this appeal following the amendment of [SDCL § 58-25-16](#) which deleted the word "foreign" from the statute, thus extending the statute's requirements to domestic title insurance companies.

official records and the abstracter's title plant before countersigning a title insurance policy (ARSD § 20:36:07:01), and requiring that the search on behalf of a title insurer be made under the direction of the licensed abstracter (ARSD § 20:36:07:02).

First American claimed before the district court that the challenged statute and regulations produce the following anticompetitive effect. The challenged provisions impose a rigorous abstract plant requirement which must be satisfied in each county in which an abstracter seeks to be licensed to do business. ARSD § 20:36:04:01. Coupled with this is the countersignature requirement, which states that a title insurance policy must be countersigned by an abstracter who is licensed in the county where the property to be insured is located. [SDCL § 58-25-16](#). Because First American has satisfied the state's abstract [**27] plant requirements only in Pennington County, the anticompetitive effect is to prevent First American from performing title searches on a statewide basis, which in turn prevents First American from countersigning title insurance policies on a statewide basis.

First American reiterates this argument on appeal and adds that a further anticompetitive result of the regulatory scheme is to create a horizontal division of territories under which each abstracter is assured of a monopoly of the abstracting business in the county where the abstracter is licensed to operate. See [United States v. Topco Associates, Inc., 405 U.S. 596, 608, 31 L. Ed. 2d 515, 92 S. Ct. 1126 \(1972\)](#) ("One of the classic examples of a *per se* violation of [§ 1](#) is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.") We take this latter argument to be directed mainly at the abstract plant requirement which states that the plant must contain an index and that the index "must be made from an actual check of each page of each book of recorded instruments in [the register of deeds'] office, and in no case will a copy [**28] or film of the numerical index in the register's office be accepted." ARSD § 20:36:04:01. ⁹ According to First American, these anticompetitive effects require preemption of the challenged statute and regulations under the Sherman Act.

In arguing for preemption, First American claims neither to seek "any sweeping repudiation of state statutory and regulatory provisions," nor to "seek a finding of unconstitutionality of any state statutes." Brief of First American at 43. On [*1450] the contrary, the result of a successful preemption [**29] attack upon a state statute is that the statute is stricken down as unconstitutional under the [Supremacy Clause](#). See, e.g., [Seagram & Sons v. Hostetter, 384 U.S. 35, 45, 16 L. Ed. 2d 336, 86 S. Ct. 1254 \(1966\)](#). Accordingly, it is clear that First American is making a facial challenge to the above-indicated statute and regulations which are said to conflict with the Sherman Act. We also clarify that although First American's preemption argument appears to be directed against all defendants without differentiation, the only defendants against whom the argument necessarily can be directed are the State of South Dakota and the Board of Examiners. The state (in the form of its legislature) and the Board promulgated and enforce ¹⁰ the challenged statute and regulations; consequently, it is they who would be enjoined from enforcing the challenged aspects of the regulatory scheme if First American were to prevail. We trouble to clarify these points because they are important to our ensuing discussion of the preemption/state action issues.

[**30] A.

A due regard for federalism led the Supreme Court to create what is referred to as the state action doctrine in [Parker v. Brown, supra](#). A raisin producer attempted to use the Sherman Act in *Parker* to strike down a marketing program enacted by the California legislature to create price supports for raisins. The Court assumed that the

⁹ See Brief of First American at 41 (where First American claims that the abstract plant requirement makes it "prohibitively expensive" to construct an abstract plant and that the effect of the regulation is to give "existing abstracters monopoly power over title services within their respective counties"). Apparently there was never any evidence offered at trial indicating exactly how costly it would be to assemble an abstract plant in accordance with ARSD § 20:36:04:01.

¹⁰ The unauthorized conduct of the business of abstracting in South Dakota is a petty offense. [SDCL § 36-13-9](#). The Board of Examiners is empowered to commence actions for injunctions against such unauthorized business as an alternative to the state's initiation of criminal proceedings. [SDCL § 36-13-9.1](#). In addition, [SDCL § 58-25-16](#) states that violation of its countersignature requirement "is a Class 2 misdemeanor."

program would have violated the Sherman Act if it had been devised and carried out by private individuals or corporations. But because the marketing program "derived its authority . . . from the legislative command of the state," *id.*, [317 U.S. at 350](#), the program was not prohibited by the Sherman Act. The Court found no intent in the Sherman Act to occupy a field so broad that it precluded the states, acting in their sovereign capacities, from exercising their broad police powers to effect economic regulations.¹¹ "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." *Id. 317 U.S. at 351*. [**31]

Of late, the state action doctrine has become a road well-traveled by the Court.¹² Its signposts, however, remain less than clear. We know, for example, that [HN11](#) when a state legislature enacts an otherwise unlawful anticompetitive system of regulation, such regulation is "outside the reach of the antitrust laws under the 'state action' exemption" provided that the regulations reflect a state policy "clearly articulated and affirmatively expressed, designed to displace unfettered business freedom" with regulation. [New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 109, 58 L. Ed. 2d 361, 99 S. Ct. 403 \[*1451\] \(1978\)](#). [**32] This state policy must be articulated by the state acting in its sovereign capacity; this much is clear from *Parker* itself. Naturally the question arises -- what constitutes an articulation of the state in its sovereign capacity? Certainly enactments of a state legislature qualify as the state acting in its sovereign capacity. [Orrin W. Fox, supra](#); [Parker, supra](#). Also, the state supreme court acting in its supervisory capacity over the practice of law qualifies as the state acting in its sovereign capacity. [Bates v. State Bar of Arizona , 433 U.S. 350, 359-60, 53 L. Ed. 2d 810, 97 S. Ct. 2691 \(1977\)](#); [Goldfarb v. Virginia State Bar, 421 U.S. 773, 789-90, 44 L. Ed. 2d 572, 95 S. Ct. 2004 \(1975\)](#).

[**33] On the other hand, [HN12](#) "state agencies or subdivisions of a State . . . simply by reason of their status as such," apparently do not qualify as the state acting in its sovereign capacity. [City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 408, 55 L. Ed. 2d 364, 98 S. Ct. 1123 \(1978\)](#). Actions by such bodies, however, may reflect a state policy to displace competition with regulation. Such actions will not be subject to scrutiny under the Sherman Act provided that "an adequate state mandate for anticompetitive activities exists." *Id. 435 U.S. at 415*. This mandate exists "when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" *Id.*

Finally, we observe that [HN13](#) conduct by a private party may be cloaked with state action immunity provided that the conduct was pursuant to a "clearly articulated and affirmatively expressed" state policy and that [**34] the conduct was "actively supervised"¹³ by the state itself. [California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)](#).

¹¹ Of course the state's exercise of its police powers in effecting economic regulations may impermissibly impinge on other federal interests which does not concern us in the instant case -- notably the interest in preventing significant burdens on interstate commerce which is protected by the [Commerce Clause](#). See P. Areeda & D. Turner, [Antitrust Law](#) paras. 219-20 (1978).

¹² See [Community Communications Co. v. City of Boulder, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835 \(1982\)](#); [California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)](#); [New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 58 L. Ed. 2d 361, 99 S. Ct. 403 \(1978\)](#); [City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 \(1978\)](#); [Bates v. State Bar of Arizona, 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 \(1977\)](#); [Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 \(1976\)](#); [Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 \(1975\)](#).

¹³ Uncertainty exists regarding whether the second *Midcal* criterion -- the requirement of active state supervision -- applies to conduct by municipalities and other state subdivisions as well as to conduct by private parties. The Court expressly declined to address this issue in [Community Communications Co. v. City of Boulder, 455 U.S. 40, 51 n.14, 70 L. Ed. 2d 810, 102 S. Ct. 835 \(1982\)](#) ("Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question whether that ordinance must or could satisfy the 'active state supervision' test focused upon in *Midcal*.")

[**35] B.

We therefore see the state action doctrine to be a construct developed by the Court and based upon principles of federalism which permits the coexistence of the Sherman Act and apparently conflicting state economic regulation. Absent the state action doctrine, the Sherman Act preempts the conflicting state regulation. *Rice v. Norman Williams Co.*, 458 U.S. 654, 73 L. Ed. 2d 1042, 1049, 102 S. Ct. 3294 (1982) HN14¹⁴ (The Sherman Act will preempt a state statute if "there exists an irreconcilable conflict between the federal and state regulatory schemes."). It is then self-evident that application of state action principles [*1452] follows the antitrust court's initial determination that there is truly a conflict between the Sherman Act and the challenged regulatory scheme. See, e.g., *Midcal, supra*, 445 U.S. at 102 ("The threshold question is whether California's plan for wine pricing violates the Sherman Act."); *Parker, supra*, 317 U.S. at 350 ("We may assume for present purposes that the California prorate program would violate the [*36] Sherman Act. . . .").

In *Rice, supra*, the Court set out how the antitrust court is to analyze whether a state regulatory scheme conflicts with the Sherman Act when aspects of the state scheme are challenged in the abstract.

HN15¹⁵ [A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute [**37] is facially inconsistent with federal antitrust laws.

Id., 73 L. Ed. 2d at 1051. The challenged statute in *Rice* empowered liquor distillers to designate which California wholesalers may import the distiller's product into the state. The Court characterized the conduct allowed by the statute as a vertical nonprice restraint; such restraints have been held not to be *per se* violations of the Sherman Act. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). Accordingly, the Court held that there was no irreconcilable conflict between the state statute and the Sherman Act; hence, there was no preemption by the Act.¹⁴ The Court noted that "Because of our resolution of the preemption issue, it is not necessary for us to consider whether the statute may be saved from invalidation under the doctrine of *Parker v. Brown*. . . ." *Rice, supra*, 73 L. Ed. 2d at 1052 n.9.

[**38] C.

This circuit has answered this question in the negative in the context of municipal conduct. *Gold Cross Ambulance & Trans. v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983) ("The state supervision requirement is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake."). The court's reasoning in *Gold Cross* was fourfold: municipal officials are generally politically accountable to their citizens, which keeps those officials in check; requiring state authorization for local government conduct is analogous to requiring active supervision of private conduct; it would make little sense to require the state to supervise and enforce municipal ordinances; and state supervision could lead to duplicative, wasteful regulation as well as the erosion of local autonomy. *Id.*, 705 F.2d at 1014-15. But see *Ronwin v. State Bar of Arizona*, 686 F.2d 692, 696 (9th Cir. 1981), cert. granted, 461 U.S. 926, 103 S. Ct. 2084, 77 L. Ed. 2d 296, 51 U.S.L.W. 3825 (1983) (No. 82-1474) (The court held in the context of challenged action by the state supreme court-appointed committee which grades the Arizona bar examination that the acts of this governmental body had to be "actively supervised by the state itself" in order to be immune from Sherman Act scrutiny.).

¹⁴ The Court indicated that the conduct of a particular distiller under the statute would not necessarily be insulated from scrutiny under the Sherman Act, even though there was no basis "for condemning the statute itself by force of the Sherman Act." *Rice v. Norman Williams Co.*, 458 U.S. 654, 73 L. Ed. 2d 1042, 1052, 102 S. Ct. 3294 (1983).

Applying the above principles to the instant case, we arrive at the following conclusions. Initially, the district court, in analyzing First American's Sherman Act challenges to aspects of South Dakota's regulation of the business of abstracting, applied the two *Midcal* criteria and concluded that the state action doctrine immunized the regulatory scheme from Sherman Act scrutiny. As we have stated, however, the *Midcal* criteria apply only in the context of whether a private party's conduct is immunized from Sherman Act scrutiny by the state action doctrine. See [Gold Cross Ambulance & Trans. v. City of Kansas City, 705 F.2d 1005, 1014 \(8th Cir. 1983\)](#).

More fundamentally, we do not perceive that the aspects of South Dakota's regulatory scheme which are challenged by First American "irreconcilably conflict" with the Sherman Act under the principles of [Rice, supra](#). We are told by First American that an irreconcilable conflict does exist because the rigorous abstract plant requirement of ARSD § 20:36:04:01 effectively forecloses competition in the abstracting business within a county and creates a horizontal division of territories, which **[**39]** is a *per se* violation of [§ 1](#) of the Sherman Act. See note 9 *supra* and accompanying text. But *Rice* states that for an irreconcilable **[**1453]** conflict to arise, the challenged regulatory provision must contemplate conduct that "is in all cases a *per se* violation." [Id., 73 L. Ed. 2d at 1051](#). Regardless of whether the challenged regulation tends to have the anti-competitive effect claimed by First American, it cannot be said that the regulation mandates or authorizes conduct that in all cases constitutes a [§ 1](#) violation. First American and its principal, Linderman, exemplify this. In 1973, Linderman became a licensed abstracter in Pennington County which indicates that Linderman was able to fulfill the abstract plant requirement and thus compete on an equal footing with the other licensed abstracter in Pennington County at that time, Theresa Burke. Accordingly, we hold that because no irreconcilable conflict exists between the Sherman Act and the abstract plant requirement, the Sherman Act does not preempt the requirement.

Furthermore, even if we assumed that the challenged aspects of the regulatory scheme conflicted with the Sherman Act sufficiently **[**40]** to require preemption, we would hold that the scheme reflects a clearly articulated and affirmatively expressed state policy to replace unfettered business freedom with regulation. See [Orrin W. Fox, supra, 439 U.S. at 109](#). Thus the state action doctrine would apply to preclude preemption. The state as sovereign enacted the challenged countersignature statute, [SDCL § 58-25-16](#), and although it is within the code chapter regulating the business of title insurance, it undoubtedly regulates the business of abstracting as well. In fact, First American's complaint about the statute relates to its anticompetitive effect on the business of abstracting.

The statutory requirement that a title insurance policy be signed by a licensed abstracter who, by regulation, has searched both his own title plant and the official county records (ARSD § 20:36:07:01) before countersigning ensures that someone whom the State of South Dakota deems qualified has performed a professional title search before title to property is transferred. Indeed, First American at oral argument appeared to have no quarrel with this policy, stating that it did not really object to the countersignature requirement, **[**41]** but only objected to the regulations which precluded Linderman, a licensed abstracter, from searching official county records outside of Pennington County and countersigning title insurance policies based on his search of those records. According to First American, the state's requirement that an abstracter have an abstract plant in each county in which the abstracter wishes to do business serves only anticompetitive ends. The State of South Dakota at trial justified its abstract plant requirement by introducing evidence which indicated the poor -- in some cases illegible -- condition of many counties' official records. Thus the state requires an actual check, in lieu of copies, of each page of the official county records in constructing an index for the abstract plant.

We do not fulfill our role as the antitrust court by determining whether the manner in which the State of South Dakota regulates the business of abstracting is wise or appropriate. This type of judicial inquiry by the federal courts has long been repudiated in the context of due process. See [Ferguson v. Skrupa, 372 U.S. 726, 731, 10 L. Ed. 2d 93, 83 S. Ct. 1028 \(1963\)](#) (**[**42]** [HN16](#) The Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation'"). Rather we fulfill our role by determining whether the state as a sovereign, in the broad exercise of its police powers, has chosen "to displace competition with regulation. . ." [City of Lafayette, supra, 435 U.S. at 413](#).

Certainly regulation of the business of title insurance falls within the state's broad police powers. As the South Dakota Supreme Court observed in response to a due process challenge to the fee schedule for abstractors' services, which at the time was established by state statute:

Because the abstractors' product is an indispensable part of real property transfers and due to the reliance which must [*1454] necessarily be placed upon it by the vendor and vendee alike, the legislature has properly exercised its police power by the enactment of Ch. 36-13 [Abstractors of Title]. It is evident that there does exist a real and substantial relation between the regulatory means adopted in regard to price regulation and the actual or manifest evil possible [**43] due to the monopolistic nature of the business.

Siefkes v. Clark Title Co., 88 S.D. 81, 215 N.W.2d 648, 652 (1974).¹⁵ The pervasiveness of South Dakota's regulation -- to the point of mandating the fixing of prices for abstractors' services, SDCL § 36-13-25 -- indicates that the state has indeed chosen to displace competition with regulation in the business of abstracting.

First American argues that even if the statutes which regulate the abstracting business are protected by the state action doctrine, the regulations promulgated by the Board of Examiners are not because they [**44] do not qualify as enactments of the state as sovereign. We hold that the abstract plant regulation (ARSD § 20:36:04:01), the regulation requiring the abstractor to search both his own abstract plant and the official county records before countersigning (ARSD § 20:36:07:01), and the regulation requiring the search pursuant to the countersignature requirement to be under the supervision of a licensed abstractor (ARSD § 20:36:07:02) all to be actions clearly within the contemplation of the legislature in granting authority to the Board to regulate. See City of Lafayette, supra, 435 U.S. at 415.

South Dakota by statute requires that an abstractor maintain an abstract plant "showing in a sufficiently comprehensive form, all instruments affecting the title to real estate which are of record or on file in the office of the register of deeds. . ." SDCL § 36-13-10. The Board of Examiners in turn sets out by regulation precisely what constitutes "sufficiently comprehensive form" for an abstract plant in ARSD § 20:36:04:01. South Dakota also requires by statute that an abstractor maintain a set of records for "each county wherein said person seeks to engage in compiling [**45] abstracts of land titles. . ." SDCL § 36-13-10. In addition, SDCL § 36-13-26.1 requires the abstractor to examine record title and furnish a report to the title insurer before countersigning the title insurance policy. The Board of Examiners in turn sets out that the "examination of record title" required by SDCL § 36-13-26.1 must include an examination of both the abstractor's abstract plant and the official county records. ARSD § 20:36:07:01. The Board also requires that the search pursuant to the countersignature requirement be made "under the direction of an abstractor licensed in the county in which the property is located," ARSD § 20:36:07:02, to ensure that the search is not improperly delegated to one who has not met the requirements for becoming a licensed abstractor. Clearly the statutory provisions which govern the business of abstracting indicate that the challenged regulations of the Board of Examiners are the kind of action contemplated by the South Dakota legislature. Cf. Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435, 445 n.49 (1981) ("Immunity [under the state action doctrine] for decisions of subordinate [**46] agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the legislature."). To the extent that the challenged regulatory provisions impose an anticompetitive restraint upon First American, such restraint "is a necessary or reasonable consequence of engaging in the authorized activity." Gold Cross, supra, 705 F.2d at 1013.

First American relies on cases from the Ninth and Fifth Circuits in arguing that [*1455] the challenged regulations were not compelled by the South Dakota legislature, thus they are not entitled to state action immunity. Ronwin v. State Bar of Arizona, 686 F.2d 692 (9th Cir. 1981), cert. granted, 461 U.S. 926, 103 S. Ct. 2084, 77 L. Ed. 2d 296,

¹⁵ See also 1 Am.Jur.2d Abstracts of Title § 4 at 230 (1962) ("The inherent police power of the states permits reasonable regulation of businesses or professions when such regulation appears necessary for the general welfare of the people, and in the exercise of this power, a state may impose reasonable regulations upon those who seek to engage in the business of abstracting titles to real estate.")

51 U.S.L.W. 3825 (1983); [United States v. Texas State Board of Accountancy](#), 464 F. Supp. 400 (W.D.Tex. 1978), modified, [592 F.2d 919](#) (5th Cir.), cert. denied, 444 U.S. 925, 100 S. Ct. 262, 62 L. Ed. 2d 180 (1979). Our above discussion should indicate, however, that we are in fundamental **[**47]** disagreement with our brethren in these circuits regarding application of the state action doctrine to state agencies or subdivisions. In both these cases, the courts cast the inquiry in mandatory terms -- whether the challenged action by the state agency was compelled by the state legislature. In both cases there were vigorous dissents putting forth the view adhered to by this circuit: "that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" [City of Lafayette](#), 435 U.S. at 415.

Accordingly, we conclude that the Sherman Act does not irreconcilably conflict with the challenged statute and regulations, and that, even if it did, the state action doctrine would operate to shield the regulatory provisions from anti-trust scrutiny. ¹⁶

[48]** V.

In conclusion we observe that the regulations challenged here by First American undoubtedly restrained it from carrying on its business in the manner it desired. That the regulations, in this sense, have an anti-competitive effect does not invalidate them under the Sherman Act, "for if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." [Exxon Corp. v. Governor of Maryland](#), 437 U.S. 117, 133, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978).

For the foregoing reasons, the judgement of the district court is affirmed.

End of Document

¹⁶ It is thus unnecessary to consider the district court's alternative holding that the countersignature statute is exempt from antitrust scrutiny under the McCarran-Ferguson Act, [15 U.S.C. §§ 1011-15](#), because the statute constitutes state regulation of the "business of insurance." See [Union Labor Life Ins. Co. v. Pireno](#), 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982).

Additionally, we reject First American's contention that the district court failed to consider its claims under [§ 2](#) of the Sherman Act. [15 U.S.C. § 2](#). If the alleged private price-fixing conspiracy was supposed to be evidence of monopolization, the claim failed for lack of proof. If the lobbying and litigation activity which has been held immune from anti-trust scrutiny under *Noerr-Pennington* is alleged to be evidence of an attempt or a conspiracy to monopolize, then *Noerr-Pennington* applies to immunize defendants from these claims as well.

Shafer v. Bulk Petroleum Corp.

United States District Court for the Eastern District of Wisconsin

August 15, 1983

Civil Action No. 79-C-153

Reporter

569 F. Supp. 621 *; 1983 U.S. Dist. LEXIS 14634 **; 1983-2 Trade Cas. (CCH) P65,586

DWIGHT W. SHAFER, JOHN L. BALTZ, GARY BEITZEL, DAVID BORK, JERRY DYBUL, BOBBY G. DYSON, WILLIAM C. EBERT, NANCY B. FINCH, PATRICK GEDIG, MICHAEL GREEN, JAMES W. HAMMILL, DAVID HASA, DARWIN E. HUETTL, RICHARD A. KLEMM, SR., DONALD L. LARSON, WILLIAM D. LARSON, DANIEL D. LAWREY, FRANK J. LYSS, MARK A. MacDONALD, PATRICIA A. MALEK, BYRON McCRARY, JAMES SABEL, KAY E. SAUGSTAD, JEROME SCHMECHEL, ESTATE OF JOHN STERNEMANN, by DOROTHY STERNEMANN, its Personal Representative, RALPH C. UZZLE, RICHARD P. WARNA, PAULL WEISS, RICHARD F. WILCOXON, DAVID WILLIAMS, ROBERT WITTHUHN, and JAMES G. ZORN, Plaintiffs, v. BULK PETROLEUM CORPORATION, a Delaware corporation, and GULF OIL CORPORATION, a Pennsylvania corporation, Defendants

Core Terms

gasoline, summary judgment, releases, vertical, antitrust, horizontal, rule of reason, defendants', resale price, products, lease, factors, prices, cases, maximum, anti trust law, economic power, federal law, state law, contracts, Volume, tie, summary judgment motion, material fact, common law, plaintiffs', conspiracy, customers, stations, judging

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

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

HN1[] Entitlement as Matter of Law, Appropriateness

Summary judgment is, of course, proper in antitrust cases if no material facts are in dispute.

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

HN2[] Price Fixing & Restraints of Trade, Tying Arrangements

569 F. Supp. 621, *621L983 U.S. Dist. LEXIS 14634, **14634

The factors which may indicate requisite economic power to impose an illegal tie are: the seller occupies a dominant position in the tying market; the seller's product is sufficiently unique that it provides him with an advantage not shared by the competitors; or a substantial number of customers have accepted the tie and there are no explanations other than the seller's economic power for their willingness to do so.

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

[HN3](#) [↓] Price Fixing & Restraints of Trade, Tying Arrangements

The requirement that a "not insubstantial" amount of commerce be affected by the tie is not necessarily dependent on market shares. Normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be de minimis, is foreclosed to competitors by the tie.

Antitrust & Trade Law > Sherman Act > General Overview

[HN4](#) [↓] Antitrust & Trade Law, Sherman Act

An illegal combination is found if a 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.

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

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

[HN5](#) [↓] Monopolies & Monopolization, Conspiracy to Monopolize

The factors involved in the intra-enterprise conspiracy analysis include: the extent of integration and ownership; whether the two corporations have separate managerial staffs; whether efficiencies would be notably sacrificed if they acted as two firms, whether the firms functioned separately before being partially integrated; the extent to which they can wield market power-- that they would not have as separate corporations -- when they act as one corporation. The factors are not canonical.

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

[HN6](#) [↓] Monopolies & Monopolization, Conspiracy to Monopolize

See [Wis. Stat. § 133.14.](#)

Governments > Legislation > Statutory Remedies & Rights

[HN7](#) [↓] Legislation, Statutory Remedies & Rights

Penalty provisions may be unconstitutional if in actual operation they work an arbitrary, unequal and oppressive result that shocks the sense of fairness that [U.S. Const. amend. XIV](#) was intended to satisfy.

Counsel: ^[**1] James A. Hauer, Elm Grove, Wisconsin, Susan Steingass, Stafford, Rosenbaum, Rieser & Hansen, Madison, Wisconsin, for Plaintiffs.

Robert DuPuy, Foley & Lardner, Milwaukee, Wisconsin, for Defendants.

Judges: Terrence T. Evans, J.

Opinion by: EVANS

Opinion

[*622] DECISION and ORDER

This is an antitrust action brought by 32 individual plaintiffs against Gulf Oil Corporation and its wholly owned subsidiary, Bulk Petroleum Corporation. Plaintiffs allege that the defendants engaged in maximum resale price maintenance; illegally tied the sales of gasoline, milk, cigarettes, and related products to gasoline station leases; required plaintiffs to deal exclusively in Bulk's gasoline, milk, cigarettes, and other products; and conspired to fix the wholesale price of gasoline sold by Bulk to the plaintiffs. The allegations are made under both state and federal antitrust laws; on the federal claims, plaintiffs seek damages of \$9 to \$12 million trebled; on a state claim, plaintiffs seek more than \$100 million. Defendants have moved for summary judgment dismissing all claims.

The 32 plaintiffs are independent businessmen selling gasoline in the Milwaukee and Fox River Valley areas of Wisconsin. ^[**2] Each plaintiff operated under a lease agreement with Bulk, which in turn delivered gasoline to them through its "Transport" Division. In the early 1970's, the agreements between the plaintiffs and Bulk were ^[*623] oral. However, all of the agreements have subsequently been reduced to writing.

The agreements in question consist of several documents: a basic lease; an automotive gasoline agreement; a security deposit agreement; and a credit card agreement. The gasoline stations which the plaintiffs operated were discount, cut-rate, non-major/unbranded gasoline retail outlets. The emphasis was on pumping gas, and with minor exceptions, the stations did not provide repair facilities or other service to customers. Plaintiffs emphasize that their arrangement with Bulk did not require them to invest significant capital as a condition to entry into the business; in addition, because their main business was to pump gas, there was no substantial inventory to purchase in order to start the business.

Gulf Oil Corporation is a large refiner and supplier of petroleum products in the United States. The company does business in all sections of the country. At one time, Gulf sold gasoline ^[**3] in Wisconsin under the brand name "Gulf". It has not done so for over ten years.

Bulk is a wholly owned subsidiary of Gulf. It does business in Wisconsin through its "Transport" Division, which primarily is in the business of the purchase and resale of gasoline to cut-rate, non-major/unbranded outlets.

The defendants have moved for summary judgment. Their argument in support of their motion is contained in three volumes of briefs, and in numerous documents attached thereto. The three volumes of briefs are spread over a total of 165 pages. The plaintiffs' brief in opposition to the motion is 116 pages long. It is met by the defendants' 61 page reply brief. Despite their length, the briefs submitted by counsel for each side are excellent.¹

^[**4] To summarize, the defendants argue that the rule of reason, rather than the per se standard, should be applied to all of the antitrust claims at issue here, including the resale price maintenance claim. Defendants argue

¹ The briefs in this case, though of excellent quality, are a bit long, totaling 342 pages. Counsel for both sides, who are frequent litigators in this court, should be aware of the passage of new local rules by the judges of this district on May 24, 1983. One of the new rules, number 6.01, provides that except with permission of the court, principal briefs on motions may not exceed 30 pages in length. Reply briefs are limited to 15 pages. The new rules will become effective on September 1, 1983.

that the tying claims are without merit because the items involved constituted a package, rather than separate products capable of being tied; because Bulk lacks sufficient economic power in the lease market to impose an unlawful tie; because competition has not been appreciably restrained in the markets for the tied products; and because various dealers have acknowledged that they were not coerced into purchasing the tied products. Furthermore, defendants argue that plaintiffs' exclusive dealing claims are without merit. These arguments are addressed in Volume I of the defendants' brief. Volume II sets forth defendants' arguments that the intra-enterprise conspiracy claim should be dismissed because the relationship between Bulk and Gulf establishes that the two are not separate actors capable of conspiring. Defendants propose that should the claim survive the motion, it should be tested under the rule of reason. Volume III sets forth the argument that the dealers [**5] who have released their claims must be dismissed from the case. Defendants argue that the state antitrust claims must be dismissed, in that Wisconsin antitrust law does not apply to transactions involving interstate commerce. Finally, the argument is made that § 133.14, Wis. Stats., is unconstitutional.

In their response, plaintiffs concede defendants' arguments as to two claims: they concede that the tying claims brought under § 3 of the Clayton Act should be dismissed, but they argue that dismissal of the Sherman Act tying claims would not be appropriate; plaintiffs concede that the exclusive dealing claims must be dismissed.

Rule of Reason or Per Se Standard

Defendants seek a ruling that the rule of reason, rather than the per se standard, [**624] should be applied to the resale price maintenance claims and the tying claims. Defendants state:

"Current judicial analysis of tying claims and resale price maintenance is generally conducted under the per se standard. However, defendants believe that the law has evolved to the point that this court should recognize that the rule of reason is appropriate for judging plaintiffs' antitrust claims in this case." Vol. [**6] 1, p. 8.

The evolution of the "law" which leads them to this conclusion is (1) their reading of Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977), in which the court concluded that economic considerations should control in cases of vertical territorial and customer restraints; (2) the position announced by William F. Baxter, Assistant Attorney General and Chief of the Antitrust Division of the Department of Justice ² in which he concluded that resale price maintenance and tying should be subject to the rule of reason; and (3) various academic articles, most notably those authored by Judge (then Professor) Richard Posner.³

[**7] It goes without saying that while there may be some merit to the opinions of Assistant Attorneys General, their opinions are not law. The same is true of analyses performed by academics. As to the effect of Sylvania, supra, sitting as a district judge, I would be reluctant to extend that case to vertical price restraints or to tying claims. The court states, at n. 18, p. 51:

. . . We are concerned here only with non-price vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. . . . Furthermore, Congress recently has expressed its approval of a per se analysis of vertical price restrictions. . . .

Recently, in Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982), the court held that horizontally imposed maximum fee agreements were unlawful per se. In that case, the district court, in reliance on Sylvania, had noted a "recent antitrust trend . . . emerging where the Rule of Reason is the

² For an interesting, and critical, review of Mr. Baxter's position, see the article written by David D. Stewart, an attorney in the Washington, D.C. firm of Miller, Cassidy, Larroca & Lewin. Mr. Stewart's article appears in the July 18, 1983 issue of the National Law Journal.

³ The articles were written by Judge Posner when he was a professor of law at the University of Chicago Law School. Ironically, Mr. Baxter was also a professor of law (at Stanford) before he joined the Department of Justice in 1981.

preferred method of determining whether a particular practice is in violation of the **antitrust law**." [**8] The Supreme Court, however, reversed and adhered to the per se rule, stating:

"We have not wavered in our enforcement of the per se rule against price fixing." At 2475.

Defendants attempt to distinguish *Maricopa County* because horizontal restraints were involved there and vertical restraints are attacked here. They quote the following passage:

"Our decisions foreclose the argument that the agreements at issue escape per se condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal -- even if not economic -- footing as agreements to fix minimum or uniform prices."

Defendants also quote the footnote which accompanies this passage:

"It is true that in *Kiefer-Stewart*, as in *Albrecht*, the agreement involved a vertical arrangement in which maximum resale prices were fixed. But the case also involved an agreement among competitors to impose the resale price restraint. In any event, horizontal restraints are generally less defensible than vertical restraints." At 2475.

[*625] From these passages, defendants argue that [**9] the court is using *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951) and *Albrecht v. Herald Co.*, 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968), as a basis for holding horizontal maximum price fixing per se illegal, but at the same time stating that vertical restraints may be judged by a rule of reason.

Clever. *Kiefer-Stewart* and *Albrecht* involved vertical restraints on maximum prices. In *Maricopa County*, the court extended those cases to horizontal restraints and said in fact that horizontal restraints are less defensible than vertical restraints. The most obvious way to read *Maricopa County* is as follows: vertical restraints are per se illegal; horizontal restraints are less defensible than vertical restraints; horizontal restraints are therefore also per se illegal. Defendants, however, have their own reading: vertical restraints -- though previously held to be per se illegal -- are not as bad as horizontal restraints, so therefore they must be subject to the rule of reason. I disagree.

As to tying claims, the court in footnote 15 on page 2473 in *Maricopa County* stated:

"Among the practices which [**10] the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements."

Defendants' request to apply the rule of reason to these claims is denied. My role is to apply the law as it seems to be, not as commentators think it should be. Judge Eschbach of this circuit has recently made an eloquent statement regarding the roles of the lower courts in relation to pronouncements from the Supreme Court. In *Vail v. Board of Education*, 706 F.2d 1435 (7th Cir. 1983), Judge Eschbach was writing to respond to what he called a "strongly worded dissenting opinion", ironically written by Judge Posner, whose views, while a professor of law, I am aggressively urged to adopt here.⁴ Writing in regard to property [*626] interests in employment, Judge Eschbach stated that a certain case was correctly decided. He explained:

⁴ It is certainly possible that someday in the future the defendants here will be in Chicago renewing their argument on this point before a panel of the Court of Appeals for the Seventh Circuit. It is also possible that Judge Posner could be one of the members of the panel. If he is, one could hardly blame the defendants if they smile.

Judge Posner has been a member of the Court of Appeals since December of 1981. While I have found his judicial writings to be interesting and informative -- he is obviously very intelligent and his style is to be admired -- he has been criticized, most notably by a former brother from academia (Professor James F. Ponsoldt, University of Georgia Law School), for not remembering that he is no longer speaking as a law professor from the University of Chicago. The criticism, written as a letter to the editor and published in the February 7, 1983 edition of the National Law Journal stated:

"Since President Reagan has demonstrated no reluctance to appoint law professors to the federal judiciary, it may be appropriate to take another look at the proper role of the Senate in reviewing and approving these most important

"When I say 'correctly' decided, I mean that it was decided in accordance with the authoritative pronouncements of the United States Supreme Court and remains good law in light of subsequent precedent. Whether it was correctly decided in some sort of ultimate jurisprudential or philosophical [**11] sense is not within my domain as an intermediate appellate court judge once I have decided that it was properly decided in the former sense. My brother Posner calls this approach to deciding cases 'putting the blame on the [Supreme] Court.' . . . I call it adherence to *stare decisis* and to a superior authority."

[**12] It would be inappropriate for me to adopt what is essentially a new standard for judging price fixing and tying claims. In their motion, however, defendants request that I go even further than that and grant summary judgment.

HN1 Summary judgment is, of course, proper in antitrust cases if no material facts are in dispute. See *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163 (7th Cir. 1978), cert. den. 440 U.S. 982, 60 L. Ed. 2d 242, 99 S. Ct. 1791 (1979). Although it is true that no greater caution is required in judging a summary judgment motion in antitrust litigation than in any other litigation (see *Weit v. Continental Ill. Nat. Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), cert. den. 455 U.S. 988, 102 S. Ct. 1610, 71 L. Ed. 2d 847 (1982)), that is not to say that caution should be thrown to the wind.

Tying

Defendants argue alternatively that even if the per se rule is applied, summary judgment should be granted dismissing the tying claims. Defendants claim that what is involved here were packaged distribution systems, rather than separate products capable of being tied. In addition, they argue that Bulk lacked sufficient economic power in the lease [**13] market to impose an unlawful tie; that competition has not been appreciably restrained; and that certain plaintiffs have admitted that they were not coerced into purchasing the tied products.

I am unpersuaded that summary judgment is appropriate on the tying claim under § 1 of the Sherman Act (the Clayton Act claim is dismissed per plaintiffs concession that it ought to be). At this point I am unconvinced by the

presidential appointments. In particular, the question arises: to what extent should a person's public expression of and commitment toward an ideology hostile to prevailing law and public policy effectively preclude him from serving as a judge?

"Part of the job of a law professor is to criticize and seek change. In fact, law professors often achieve prominence through their association with innovative reform and more radical schools of thought. Yet the role of a federal judge is institutionally different, if for no other reason than to engender respect for the rule of law -- distinguishing our governmental system from others -- among the public.

"Perhaps most startling among this group of professor-judges is Richard A. Posner, formerly a prolific University of Chicago law professor. As one example, Judge Posner's recent opinion for the 7th U.S. Circuit Court of Appeals in *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083, reported in your Dec. 13 issue, may demonstrate the continuing need for the Senate to insist upon closer substantive scrutiny of judicial appointees' intentions.

"Judge Posner's writing and consulting had long been known for its revisionist, anti-populist critique of the existing body of antitrust legislation and Supreme Court caselaw. Judge Posner's antitrust casebook had set forth and criticized 50 years of Supreme Court antitrust boycott law as being too restrictive to business integration and not promoting economic efficiency.

"Perhaps, therefore, it should have come as no surprise that Judge Posner's opinion in *Marrese* relied on his own views and ignored at least six relevant landmark Supreme Court decisions, constituting the 50-year development of the law through the present day. What is surprising, as evidenced by retired Justice Potter Stewart's outraged dissent in *Marrese* (Justice Stewart was sitting on the panel by designation), is that Judge Posner purported to revise the law and legislative history in a private antitrust case in which the merits of the antitrust claim had never been submitted to trial or even to pretrial discovery. The case was an interlocutory appeal in which the appellate court admittedly lacked jurisdiction to reach the merits of the antitrust claim and in which Judge Posner did not even participate in oral argument. "The Posner opinion in *Marrese* represents the imperial judiciary in its extreme. The possibility of similar judicial nullification, based upon any ideology, should be addressed specifically by the Senate in its confirmation hearings, at least where the nominee is so publicly associated with an extralegal view of public policy."

contention that the dealerships involved in this action constitute packaged distribution systems. Since May, 1980, defendants have leased stations to certain of the plaintiffs on terms that did not require them to buy gasoline or any other products from the defendants. That action by the defendants raises a significant issue of fact as to whether what is involved here is a package.

Additionally, defendants attempt to slide this case into the category of franchise cases. A genuine issue of material fact exists as to whether that is the proper category. What is involved here is a lease of a gasoline station for unbranded discount gasoline. No business distribution system has been established, nor is any business reputation at issue.

Similar issues of fact preclude findings [**14] regarding defendants' economic power to impose an illegal tie. In *Fortner I* and *Fortner II*,⁵ the Supreme Court analyzed [*627] [HN2](#)[] the factors which may indicate requisite economic power: (1) the seller occupies a dominant position in the tying market; (2) the seller's product is sufficiently unique that it provides him with an advantage not shared by the competitors; or (3) a substantial number of customers have accepted the tie and there are no explanations other than the seller's economic power for their willingness to do so. In the case before me, plaintiffs agreed to purchase all their gasoline from Bulk for the duration of the leases. They continued to buy from Bulk even when Bulk admittedly charged excessive prices. A genuine issue of material fact exists as to whether an explanation exists for this behavior, other than defendants' economic power.

[**15] Defendants also argue that no tying claim can be established because competition has not been appreciably restrained, in that Bulk's shares in the relevant market are slight. Summary judgment on this issue is also inappropriate. [HN3](#)[] The requirement that a "not insubstantial" amount of commerce be affected by the tie is not necessarily dependent on market shares:

"An analysis of market shares might become relevant if it were alleged that an apparently small dollar-volume of business actually represented a substantial part of the sales for which competitors were bidding. But normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be *de minimis*, is foreclosed to competitors by the tie. . ." [Fortner I, 394 U.S. 495, 501, 22 L. Ed. 2d 495, 89 S. Ct. 1252](#).

Additionally, plaintiffs have raised an issue of fact on this point.

Finally, defendants argue that the tying claims must be dismissed because of a lack of coercion in the arrangement between them and certain of the plaintiffs. This argument must also be rejected. Even if the facts show that a few plaintiffs did not feel [**16] direct coercion, the claim need not necessarily fail. See [Tire Sales Corp. v. Cities Service Oil Co., 637 F.2d 467 \(7th Cir. 1980\)](#), cert. denied 451 U.S. 920, 68 L. Ed. 2d 312, 101 S. Ct. 1999 (1981). In summary, issues of material fact preclude summary judgment on the tying claims.

Resale Price Maintenance

Defendants argue that summary judgment must be granted as to the resale price maintenance claims because defendants' actions regarding prices is condoned in [United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 \(1919\)](#). This argument also must be rejected.

As interpreted by later decisions, *Colgate* held that a seller's advance announcement that it will not sell to price cutters and its termination of customers who cut prices, without more, is not a Sherman Act violation. However, [HN4](#)[] an illegal combination is found if

⁵ [Fortner Enterprises v. U.S. Steel, 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 \(1969\); U.S. Steel Corp. v. Fortner Enterprises, 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 \(1977\)](#).

569 F. Supp. 621, *627L 1983 U.S. Dist. LEXIS 14634, **16

". . . 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. 29, 43, 4 L. Ed. 2d 505, 80 S. Ct. 503 \(1960\)](#).

Plaintiffs have raised issues of fact regarding [**17] whether defendants here have used such means to secure adherence to their pricing policies.

Intraenterprise Conspiracy

Defendants claim that the intraenterprise conspiracy claim should be dismissed because plaintiffs cannot establish a separateness of identity between Gulf and Bulk, an element necessary to allow them to conspire.

The intraenterprise conspiracy doctrine has been roundly criticized by commentators (see [Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 317 n. 3 \(7th Cir. 1982\)](#)). Be that as it may, the Supreme Court has made sweeping pronouncements supporting the theory, and those pronouncements cannot be disregarded:

[*628] "For a federal judge at the trial or appellate level, the salient factor is that the Supreme Court's decisions, while they need not be read with complete literalism, of course they cannot be ignored." [Independence Tube, at 317.](#)

In [Timken Co. v. United States, 341 U.S. 593, 598, 95 L. Ed. 1199, 71 S. Ct. 971 \(1951\)](#), for example, the court stated:

"The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."

[**18] In [Perma Mufflers v. Int'l Parts Corp., 392 U.S. 134, 141-2, 20 L. Ed. 2d 982, 88 S. Ct. 1981 \(1968\)](#), the court stated:

". . . Since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."

In deciding this issue, the Court of Appeals for this circuit has focused "on the practical relationship between the parent and the subsidiary, using a variety of factors to decide when there is enough separation between the two entities to make treating them as two independent actors sensible." The focus essentially is on the question as to "when the distinction between affiliation and integration is trivial and when it is significant." [Independence Tube, at 318.](#)

HN5 [↑] The factors involved in the analysis were first articulated in [Photovest Corp. v. Fotomat Corp., 606 F.2d 704 \(7th Cir. 1979\)](#), cert. denied 445 U.S. 917, 63 L. Ed. 2d 601, 100 S. Ct. 1278 (1980), and include the following: the extent of integration and ownership, whether the two corporations have separate managerial staffs, [**19] whether efficiencies would be notably sacrificed if they acted as two firms, whether the firms functioned separately before being partially integrated, the extent to which they can wield market power when they act as one corporation -- power they would not have as separate corporations. The analysis is in a formative stage; the factors are not "canonical". [Independence Tube, at 318.](#)

What they are, however, is highly dependent on the facts of a particular case, making, at this stage in the development of the law, a grant of summary judgment on this issue rather risky. In the case before me defendants list numerous factors which they consider relevant to the issue, and which in their view establish that plaintiffs will not be able to show two entities capable of conspiring. Plaintiffs, quite expectedly, counter with factors of their own which present issues of material fact. To make a judgment on this issue requires a weighing of facts and evidence, an undertaking that cannot be correctly negotiated on a motion for summary judgment.

Releases

Defendants argue that summary judgment should be granted against the eight dealers who have signed releases of claims and causes [**20] of action. Defendants contend that federal law, rather than Wisconsin law, governs the interpretation of the releases. According to the defendants, under federal law, the claims of these plaintiffs would be barred. Alternatively, defendants argue that even under Wisconsin law, the claims are barred.

Plaintiffs argue that Wisconsin law governs the interpretation of the releases, which are in fact contracts; that under Wisconsin law, the claims would not be barred by the releases; and that even if federal law is applied, factual disputes preclude summary judgment. Finally, plaintiffs argue that the releases are with Bulk and that, therefore, the claims against Gulf can proceed.

Although *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), stated that there was "no federal general common law", a body of federal common law has grown over the years in limited areas where a federal voice is necessary. The areas are "few and restricted" (*Wheeldin v. Wheeler*, 373 U.S. 647, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963)), and are limited to situations in which federal law is necessary [*629] to protect a federal interest or in which Congress has given [**21] the court the power to develop substantive law. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 68 L. Ed. 2d 500, 101 S. Ct. 2061 (1981).

The most comprehensive discussion to which I have been referred on this issue is *Three Rivers Motors Company v. Ford Motor Company*, 522 F.2d 885 (3d Cir. 1975), cited by both sides as support for their respective positions. As defendants point out, the court indicated that it was competent to interpret releases without reference to state law. However, as plaintiffs emphasize, the court then went on to state that it was "also free to apply a state rule of law." It stated that it had to determine whether the policies embodied in the antitrust laws would be better served by the absorption of state laws regarding releases or by the formulation of a federal rule. Factors relevant to a decision were (1) the need for a federal rule, (2) the extent to which the transaction in question first falls within the normal course of activities regularly governed by state law, and (3) the possibility of a state rule frustrating the federal statutory scheme. The court concluded that state law was appropriate to the interpretation of leases.

[**22] I agree. The action before me was brought under the federal antitrust laws. The releases, which are contracts between the dealers and Bulk, are defenses to the antitrust action. There would be nothing particularly unusual for federal law to be applied to one issue and state law to the other. In fact, the parties in entering into the releases -- if they gave it any thought whatsoever -- would probably have assumed that Wisconsin law would govern them.

More important here, the application of Wisconsin law in this case will not frustrate the federal statutory scheme. That scheme would be frustrated if a state had a rule on releases which would preclude a plaintiff from pursuing a federal claim in a situation in which federal common law would allow him to proceed. That is not the case here. According to both sides in this litigation, the releases will receive very vigorous scrutiny under Wisconsin law. In fact, it is possible that if federal law were applied in this case, the plaintiffs might be precluded from bringing their antitrust actions in federal court but be allowed to proceed on a claim in state court.

Additionally, it is somewhat unclear what "federal common law" exists [**23] in this circuit on the interpretation of releases. Two cases are cited: *Fabert Motors, Inc. v. Ford Motor Company*, 355 F.2d 888 (7th Cir. 1966), cert. den. 384 U.S. 939, 16 L. Ed. 2d 539, 86 S. Ct. 1462(1966) and *Richard's Lumber & Supply v. U.S. Gypsum Co.*, 545 F.2d 18 (7th Cir. 1976), cert. den. 430 U.S. 915, 51 L. Ed. 2d 593, 97 S. Ct. 1326 (1977). It may be that federal common law is being applied in those cases although there is no explicit discussion of the appropriate rule of law. Neither decision attempts to set forth a comprehensive federal rule regarding releases. And in fact, *Richard's Lumber* cites *Three Rivers, supra*, in which state law was applied.

Under Wisconsin law, the validity of a release is a question of fact. Also under Wisconsin law on this record, summary judgment is inappropriate.

State Law Claims

Defendants argue that this court lacks jurisdiction over the plaintiffs claims brought under the state antitrust statutes. The argument is without merit. The motion for summary judgment on this issue is denied.

Finally, defendants argue that any recovery pursuant to a claim based on [§ 133.14, Wis. Stats.](#), must be reduced to reflect [**24] the benefits plaintiffs have received under the allegedly illegal contracts. If no set off is made, defendants argue, the statute is unconstitutional.

[Section 133.14](#) provides:

HN6[] "All contracts or agreements made by any person while a member of any combination or conspiracy prohibited by section 133.03, and which contract or agreement is founded upon, is the result of, grows [*630] out of or is connected with any violation of such section, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom may be had by or for such person. Any payment made upon, under or pursuant to such contract or agreement to or for the benefit of any person may be recovered from any person who received or benefitted from such payment in an action by the party making any such payment or the heirs, personal representative or assigns of the party."

The language of the statute shows that no set off is contemplated. In [Madison v. Hyland, Hall & Co., 73 Wis.2d 364, 243 N.W.2d 422 \(1976\)](#), the Wisconsin Supreme Court compared the statute to the setting aside of an illegal or fraudulent contract, in which case the defrauded party is entitled to recoupment [**25] of the full contract price without a requirement for set off.

Defendants argue that if no set off is made, the statute as applied in this action is unconstitutional. The recovery plaintiffs seek under the statute is \$100,000,000; whereas their actual damages are said to be \$4,000,000. Defendants claim that the difference between the two amounts is an unconstitutional taking in violation of the due process clause.

HN7[] Penalty provisions may be unconstitutional

". . . when in their actual operation in the cases before it, such statutes work an arbitrary, unequal and oppressive result. . . . which shocks the sense of fairness the [Fourteenth Amendment](#) was intended to satisfy in respect to state legislation. . . ." [Chicago & Northwestern Railway Co. v. Nye-Schneider-Fowler Co., 260 U.S. 35, 44-45, 67 L. Ed. 115, 43 S. Ct. 55 \(1922\)](#).

According to the defendants, in evaluating the constitutionality of penalty provisions, courts look to three factors: the size of the penalty; the proportion of the penalty to actual damages; and the relationship between the penalty, the violation, and the public interest sought to be protected.

To state the criteria reveals, I think, the [**26] premature nature of defendants' request for summary judgment on this issue. There has been no finding of actual damages. The nature of the violation has not been judged. While it is true that a claim for \$100,000,000 sounds a little ridiculous, dealing as we are here with a mine run antitrust claim affecting cut-rate gasoline operations and not the property damage claims that followed the eruption of Mt. St. Helens, it could become clear at trial that the size of the claim is due to the volume of business conducted under illegal contracts. If so, plaintiffs should not be thrown out of court because they were harmed excessively, rather than moderately. The motion in regard to [§ 133.14, Wis. Stats.](#), is denied at this time.

I am aware that other minor issues, such as the standing of plaintiff Zorn, have not been specifically addressed in this decision. Eleven lawyers were apparently involved in the preparation of the briefs and supporting materials for this motion. Their work as I have stated was well done. However, not every claimed deficiency in this case need be addressed at this time. If issues remain, they can be addressed at trial, for the motion for summary judgment, [**27] except as noted below, is denied.

569 F. Supp. 621, *630 (1983 U.S. Dist. LEXIS 14634, **27

IT IS THEREFORE ORDERED that defendants' motion for summary judgment is DENIED, with the exception that plaintiffs' tying claims under § 3 of the Clayton Act are DISMISSED and plaintiffs' exclusive dealing claims are DISMISSED.

End of Document



Stevens v. Zenith Distributing Corp.

United States District Court for the Western District of Missouri, Western Division

August 18, 1983

No. 78-0477-CV-W-6

Reporter

568 F. Supp. 1200 *; 1983 U.S. Dist. LEXIS 14505 **; 1983-2 Trade Cas. (CCH) P65,558

ROBERT A. STEVENS, d/b/a BOB STEVENS APPLIANCES, Plaintiff, v. ZENITH DISTRIBUTING CORPORATION OF KANSAS and ZENITH RADIO CORPORATION, Defendants

Core Terms

price discrimination, damages, Robinson-Patman Act, pricing policy, lost profits, products, sales, constructive termination, potential customer, anti trust law, future profits, make purchases, distributorship, hypothetical, transactions, defendants', distributor, automatic, purchases, holdings, remedied, trebling, elected, losses, novel

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN1 [down arrow] **Price Discrimination, Competitive Injuries**

A price discrimination complaint is directed toward actual sales transactions; it cannot be presented by a potential customer who fails to make purchases because he objects to a potential seller's pricing policies, or where the lack of consummated sales is otherwise simply "attributable" to the discriminatory practice.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN2 [down arrow] **Robinson-Patman Act, Remedies**

Only direct, proximate losses may be remedied under the antitrust laws.

Antitrust & Trade Law > Robinson-Patman Act > Claims

568 F. Supp. 1200, *1200L^A 1983 U.S. Dist. LEXIS 14505, **14505

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

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN3 [+] **Robinson-Patman Act, Claims**

The Robinson-Patman Act, [15 U.S.C.S. § 13a](#) is remedial legislation which should be construed liberally. Though widely criticized, it is enforced as protective legislation designed to help small businesses remain healthy and afloat. The Supreme Court does, however, elect against adopting a generous method of ascertaining damages. It accepts Judge Learned Hand's ruling against allowing "automatic damages" measured by the amount of the price differential.

Counsel: [**1] William J. Burrell, Duane J. Fox, Burrell, Seigfreid & Bingham, P.C., Kansas City, Missouri, for Plaintiff.

F. Philip Kirwan, Terry L. Tyrrell, Margolin And Kirwan, Kansas City, Missouri, for Defendant Zenith Distributing Corp. of Kansas.

Philip J. Curtis, Edward McCausland, Glenview, Illinois, for Defendant Zenith Radio Corporation.

Opinion by: SACHS

Opinion

[*1201] MEMORANDUM AND ORDER LIMITING PLAINTIFF'S PROOF OF ALLEGED DAMAGES

Defendants have filed a motion that would drastically limit plaintiff's proof in this Robinson-Patman case, scheduled for early trial. Plaintiff's major contention in this case is that, as a distributor of defendants' products, he suffered price discrimination for several years and then elected in February, 1977, to begin purchasing similar products from other suppliers. Price discrimination damages in the amount of \$38,048 (before trebling) are sought for the period in which plaintiff served as a distributor. Plaintiff also seeks \$1,448,542 (before trebling) in alleged lost profits for the period from 1977-1982, after he gave up the distributorship.

Defendants seek an *in limine* ruling that plaintiff could not recover for profits that he contends [**2] he would have made if he had continued to make purchases from defendants and the pricing policy had been modified in his favor. In the alternative, defendants ask the Court to limit the proof of lost profits to the period (some eighteen months) in which plaintiff continued to operate as an individual sole proprietor. The business was later incorporated, to ease the transition of the business in the event of plaintiff's retirement or death.

Plaintiff apparently seeks to prove damages as though he were complaining of the constructive termination of his distributorship. The gist of the complaint, however, is price discrimination, and plaintiff relies solely on alleged "violations of the Robinson-Patman Act, [15 U.S.C. § 13 et seq.](#)" Complaint, paragraph 11 (Count I), paragraph 6 (Count II).

HN1 [+] A price discrimination complaint is directed toward actual sales transactions; it cannot be presented by a potential customer who *fails* to make purchases because he objects to a potential seller's pricing policies, or where the lack of consummated sales is otherwise simply "attributable" to the "discriminatory practice." A contrary holding

by the Fifth Circuit ([American Can Co. v. Bruce's Juices, Inc.](#), [187 F.2d 919, 924 \(5th Cir. 1951\)](#), *reh'g. granted*, [190 F.2d 73 \(5th Cir. 1951\)](#), *cert. dis.*, [342 U.S. 875, 72 S. Ct. 165, 96 L. Ed. 657 \(1951\)](#)) is considered "an aberration," although arguably good public policy. See, e.g., [M.C. Mfg. Co. v. Texas Foundries, Inc.](#), [517 F.2d 1059, 1065 \(5th Cir. 1975\)](#), *cert. den.*, [424 U.S. 968, 47 L. Ed. 2d 736, 96 S. Ct. 1466 \(1976\)](#); [Republic Packaging Corp. v. Haveg Industries](#), [406 F. Supp. 379, 381 \(N.D.Ill. 1976\)](#); Hansen, "Robinson-Patman Law," [51 Fordham L.Rev. 1113, 1126 n. 79 \(1983\)](#).

If the claim for future profits were allowed in this context, it would apply not only to the plaintiff, who had several years' experience selling defendants' products, but would equally apply to a plaintiff who quits defendants after thirty days, in protest against their pricing policies. Even a potential customer (like the corporation formed by plaintiff in 1978) might similarly make a multi-million dollar claim. Whatever logical analogy may be made to a constructive termination case, under the antitrust laws or otherwise, the absence of any support for plaintiff generated during the nearly fifty years of experience with the [\[***4\]](#) Robinson-Patman Act convinces me that such generous remedies are not available under that legislation. If a theoretical label needs to be placed on the rejection of the novel claim, perhaps it should be categorized as too "indirect" or "remote" from the offending sales transactions. [HN2](#)[] Only direct, proximate losses may be remedied under the antitrust laws. [Associated General Contractors of California v. California State Council of Carpenters](#), [459 U.S. 519, 103 S. Ct. 897, 910-13, 74 L. Ed. 2d 723 \(1983\)](#).

Plaintiff's search for supporting authorities has produced essentially one offering: [Perkins v. Standard Oil Co. of California](#), [395 U.S. 642, 23 L. Ed. 2d 599, 89 S. Ct. 1871 \(1969\)](#). That case basically holds, however, that "fourth level" injuries are compensable under the Robinson-Patman Act. [\[*1202\]](#) It further permits recovery of individual losses of brokerage fees *during the period of price discrimination*, even though the individual plaintiff was not the direct victim of discrimination. Justice Marshall dissented from this last holding, saying "the law under the Robinson-Patman Act is convoluted enough without the addition of numerous explicit and implicit holdings [\[***5\]](#) which may come back to bedevil us in future years." I.c. 652. While there are references in that litigation to a claim for injury to the "going concern value" of Perkins' business ([Standard Oil Company of California v. Perkins](#), [396 F.2d 809, 815 \(9th Cir. 1968\)](#)) the reported decisions do not show the evidentiary basis for the claim. Nothing indicates use of data subsequent to the period of the sales giving rise to litigation. There is simply no price discrimination case law which is fairly usable in support of this plaintiff's claim for lost future profits. *

[\[***6\]](#) The trend of the law regarding Robinson-Patman damages is not encouraging to plaintiff's theory. [HN3](#)[] It is true that the Supreme Court very recently reaffirmed the view that the Robinson-Patman Act is remedial legislation which should be construed liberally. [Jefferson County Pharmaceutical Association v. Abbott Laboratories](#), [460 U.S. 150, 103 S. Ct. 1011, 1017, 74 L. Ed. 2d 882 \(1983\)](#). Though widely criticized, it is enforced as protective legislation designed to help small businesses remain healthy and afloat. I.c. 1023. The Supreme Court has, however, elected against adopting a generous method of ascertaining damages. [J. Truett Payne Co. v. Chrysler Motors Corp.](#), [451 U.S. 557, 68 L. Ed. 2d 442, 101 S. Ct. 1923 \(1981\)](#). It accepted Judge Learned Hand's ruling against allowing "automatic damages" measured by the amount of the price differential. [Enterprise Industries v. Texas Company](#), [240 F.2d 457 \(2d Cir. 1957\)](#). If "automatic damages" were deemed too generous as a matter of law, it would be surprising if the novel enlargement of damage potential suggested by this plaintiff were adopted.

* Additional difficulties may be mentioned for consideration if this ruling is reviewed on appeal. It may still be arguable in this Circuit that a future profit claim based on a plaintiff's continuing employment life expectancy should not be made even for a wrongful antitrust termination. Evidence of future profits is normally offered as one of the elements needed for capitalization into lost going concern value. [Albrecht v. Herald Company](#), [452 F.2d 124, 128-29 \(8th Cir. 1971\)](#). Unlike an employment termination case, a "life annuity" is not allowable as recovery for an antitrust violation, since "the injury is to the business and not to the person." 1.c. 131. The "life annuity" method of calculating damages seems to have been allowed, however, in such later cases as [Lehrman v. Gulf Oil Corp.](#), [500 F.2d 659, 663-64 \(5th Cir. 1974\)](#) and [Arnott v. American Oil Co.](#), [609 F.2d 873 \(8th Cir. 1979\)](#), *cert. den.* [446 U.S. 918, 64 L. Ed. 2d 272, 100 S. Ct. 1852 \(1980\)](#). Senior Judge Gibson's comment in *Albrecht* may, however, still have appeal to some members of the reviewing court. In the present case, moreover, plaintiff's business "lifetime" as a sole proprietor may be deemed to have ended when the corporation was formed. The absence of a corporate claim for its losses as a possible future customer might thus serve to limit any recovery.

568 F. Supp. 1200, *1202-983 U.S. Dist. LEXIS 14505, **6

It is therefore ORDERED that plaintiff's damage proof at trial as to price discrimination [**7] shall be limited to the period during which plaintiff was making purchases from defendants, and shall not include claims for hypothetical lost profits on hypothetical sales subsequent to February, 1977. * *

End of Document

* * Recognizing the monetary significance of this ruling, I note that it is necessarily interlocutory and that plaintiff will have a further opportunity, either orally or through further citations, to persuade me to change the views expressed above, which are, however, at this point firmly held. Perhaps plaintiff will give up hope at this level and will reserve his contention for settlement value or appeal.



Macmanus v. A. E. Realty Partners

Court of Appeal of California, Fourth Appellate District, Division Three

August 19, 1983

Civ. No. 30250

Reporter

146 Cal. App. 3d 275 *; 194 Cal. Rptr. 567 **; 1983 Cal. App. LEXIS 2072 ***; 1983-2 Trade Cas. (CCH) P65,660

FREDERICK O. MacMANUS et al., Plaintiff and Appellants, v. A. E. REALTY PARTNERS et al., Defendants and Respondents

Subsequent History: [***1] Appellants' petition for a hearing by the Supreme Court was denied October 26, 1983.

Prior History: Superior Court of Orange County, No. 338191, Edward J. Wallin, Judge.

Disposition: Judgment of dismissal is reversed, and the matter is ordered to proceed on the third amended complaint.

Core Terms

escrow, buyer, entity, conditioned, escrow instructions, tying arrangement, seller, damages, restraint of trade, cause of action, Plaintiffs', single family residence, economic power, tied product, Sherman Act, demurrer

LexisNexis® Headnotes

Real Property Law > Brokers > Brokerage Agreements

Real Property Law > Financing > Construction Loans

Real Property Law > Purchase & Sale > Contracts of Sale > Escrow

HN1[] Brokers, Brokerage Agreements

See [Cal. Civ. Code § 2995](#).

Governments > Legislation > Statute of Limitations > Time Limitations

HN2[] Statute of Limitations, Time Limitations

See [Cal. Code Civ. Proc. § 335](#).

Governments > Legislation > Statute of Limitations > Time Limitations

HN3 Statute of Limitations, Time Limitations

See [Cal. Code Civ. Proc. § 340\(1\)](#).

Governments > Legislation > Statute of Limitations > Time Limitations

HN4 Statute of Limitations, Time Limitations

See [Cal. Code Civ. Proc. § 338\(1\)](#).

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Conditions Precedent

Real Property Law > Financing > Construction Loans

Real Property Law > Brokers > Brokerage Agreements

Real Property Law > Purchase & Sale > Contracts of Sale > Escrow

HN5 Heightened Pleading Requirements, Conditions Precedent

The elements constituting a claim under [Cal. Civ. Code § 2995](#), appear on its face: (1) A real estate developer with a financial interest in a particular escrow entity, (2) who conditions the sale of a single family residence, (3) on the procurement of that escrow entity's services.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6 Public Enforcement, State Civil Actions

[Cal. Bus. & Prof. Code § 16720](#) prohibits the combination of resources of two or more persons to prevent market competition or to restrain trade as detailed in the section. Such combinations or trusts are unlawful, against public policy and void. [Cal. Bus. & Prof. Code § 16726](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7 Public Enforcement, State Civil Actions

See [Cal. Bus. & Prof. Code § 16720](#).

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

HN8 Price Fixing & Restraints of Trade, Tying Arrangements

Tying arrangements involve a seller's refusal to sell one product, the tying product, unless the buyer also purchases a second product, the tied product, from the seller.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Real Property Law > Mobilehomes & Mobilehome Parks > Purchase & Sale

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

HN9 [blue download icon] **Tying Arrangements, Per Se Rule**

To allege an illegal per se tying arrangement, the complaint must show: (1) a tying arrangement existed, i.e., the sale of a tying product was linked to the purchase of the tied product; (2) the seller had sufficient economic power in the tying market to coerce the sale of the tied product; (3) a substantial amount of commerce was effected by the tying arrangement; and (4) the buyer suffered damages proximately caused by the arrangement.

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

HN10 [blue download icon] **Price Fixing & Restraints of Trade, Tying Arrangements**

Sufficient economic power to compel the purchase of a tied product may be inferred if the seller occupies a dominant position in the relevant market. The power is sufficient even though it falls short of dominance and exists only with respect to some buyers. Finally, the requisite power can be inferred from the tying product's uniqueness or desirability to buyers.

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

HN11 [blue download icon] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The showing of a combination or conspiracy is a threshold requirement which must be met before the reasonableness of an alleged restraint of trade can be considered. This requirement precludes liability for coordinated activity among multiple corporations operating as a single entity.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN12 [blue download icon] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Jointly owned corporations that compete in the marketplace, hold themselves out to the public as competing corporations, or set policy independently, are capable of conspiring to restrain trade as distinct entities.

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

HN13 [blue download icon] **Price Fixing & Restraints of Trade, Tying Arrangements**

Where tying arrangements are alleged, there is ample authority the required combination can exist as between a defendant and the plaintiff/victim.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN14 [] Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. § 1](#), requires only a general intent on the part of a defendant to injure competition.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN15 [] Antitrust & Trade Law, Sherman Act

General intent is usually inferred from the particular circumstances. A plaintiff alleging an antitrust violation need only show that a defendant acted with the intention that his acts have their natural consequences and with knowledge at least one other person would act in conjunction with the defendant.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Two persons who purchased a home in a subdivision brought a class action against the real estate developer and an escrow company that the developer owned, alleging that they were required to use defendant escrow company's services and pay inflated closing costs as a condition of purchasing their home. Plaintiffs further alleged that such requirement violated [Civ. Code, § 2995](#), which prohibits a real estate developer from requiring the provision of escrow services by an entity in which the developer has a financial interest, and constituted an illegal per se tying arrangement under the Cartwright Act ([Bus. & Prof. Code, §§ 16720, 16726](#)). The trial court sustained defendant's demurrer to plaintiffs' third amended complaint without leave to amend and entered a judgment of dismissal. (Superior Court of Orange County, No. 338191, Edward J. Wallin, Judge.)

The Court of Appeal reversed and ordered the matter to proceed on the third amended complaint. The court first held that [Civ. Code, § 2995](#), was remedial in nature, not penal, and that the applicable limitations period was the three-year period provided by Civ. Code, § 338, subd. 1, and not the one-year period provided by Civ. Code, § 340, subd. 1. The court also held the cause of action alleging a violation of [§ 2995](#) accrued on the date escrow closed and the fees were paid, and not on the dates the purchase agreement or escrow instructions were signed. Accordingly, the court held the action was not time barred. The court further held that the complaint was sufficient to state a cause of action for violation of [§ 2995](#), and that whether a condition precedent to the purchase of homes existed as pleaded and whether the escrow instructions negated its existence were questions of fact to be resolved at trial. As to the Cartwright Act cause of action, the court held that the facts alleged were sufficient to allege a tying arrangement and to satisfy the requirement for sufficient economic power in the relevant market to coerce purchase of the tied product. The court also held that the complaint satisfied the threshold requirement for a showing of a combination between two distinct business entities and that the elements of intent to injure competition and resulting injury were sufficiently pleaded. (Opinion by Trotter, P. J., with Crosby and Sonenshine, JJ., concurring.)

Headnotes

CA(1) [] (1)**Appellate Review § 128—Review—Scope and Extent—Rulings on Demurrs.**

--The facts alleged in a complaint are presumed to be true for purposes of reviewing an order sustaining a demurrer.

CA(2a) [] (2a) **CA(2b)** [] (2b)**Escrows § 6—Pleadings and Actions—Controlled Escrows—Limitation of Actions.**

--Civ. Code, § 2995, which provides recovery when use of a particular escrow is required as a condition precedent to the transfer of a single family home, was enacted as a remedial statute to protect the buyer against in-house escrow services and was intended to assure the buyer's freedom to select an escrow entity and that entity's independence and neutrality. It is concerned with the effect of a buyer/seller agreement rather than the intent of the seller. Since liability is not dependent on some degree of culpability, recovery under § 2995 is remedial in nature. Accordingly, in an action alleging a violation of § 2995, the applicable limitations period was the three-year period provided by Civ. Code, § 338, subd. 1 (actions on a liability created by statute, other than a penalty or forfeiture), and not the one-year period provided by Civ. Code, § 340, subd. 1 (actions on a statute for a penalty or forfeiture).

CA(3) [] (3)**Escrows § 6—Pleadings and Actions—Controlled Escrows—Limitation of Actions.**

--The determination of the limitation period applicable to an action predicated on an alleged violation of Civ. Code, § 2995, which prohibits a real estate developer from requiring the provision of escrow services by an entity in which the developer has a financial interest, was a judicial function, since the Legislature did not prescribe a period of limitations within the statute. Such determination was dependent on whether the statute was characterized as penal or remedial, in light of its language and the legislative intent.

CA(4) [] (4)**Escrows § 6—Pleadings and Actions—Controlled Escrows—Limitation of Actions—Accrual of Cause of Action.**

--Civ. Code, § 2995, which provides recovery when use of a particular escrow is required as a condition precedent to the transfer of a single family home, accords a right of action to the "purchaser" of the residence, i.e., one who has acquired title or to whom title has been transferred. Further, there is no claim under the statute unless the party suffers injury as a result of the use of a particular escrow entity. This can only arise when escrow closes and the fees are paid. Accordingly, a cause of action alleging a violation of § 2995 accrued on the date escrow closed and fees were collected by the escrow agent, and not on the dates the purchase agreement or escrow instructions were signed.

CA(5) [] (5)**Escrows § 6—Pleadings and Actions—Controlled Escrows—Complaint—Sufficiency to Withstand Demurrer.**

--In an action against a real estate developer and others alleging a violation of Civ. Code, § 2995, which provides recovery against a real estate developer with a financial interest in a particular escrow entity who conditions the sale of a single family residence on the procurement of that escrow entity's services, the trial court erred in

sustaining defendants' demurrer, where the complaint alleged that the developer required buyers to use the services of its wholly owned entity as a condition precedent to acquiring title to single family residences, and where such allegations were supported in the complaint by specific facts rather than by conclusionary assertions. Whether a condition precedent existed as pleaded and whether the escrow instructions negated its existence were questions of fact to be resolved at trial.

CA(6) (6)

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Applicability of Federal Precedent.

--Bus. & Prof. Code, 16720, which prohibits the combination of resources of two or more persons to prevent market competition or to restrain trade, and Bus. & Prof. Code, § 16726, which declares such combinations unlawful, against public policy, and void, are patterned after the Sherman Act (15 U.S.C. § 1), and cases construing the Sherman Act are applicable to problems arising under state law. However, state courts may exercise their prerogative to disagree with federal case law.

CA(7) (7)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Illegality Per Se.

--Although the literal language of Bus. & Prof. Code, §§ 16720 and 16726, and their federal counterpart prohibit any combination to restrain trade, courts have required the restraints to be unreasonable. However, certain practices 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 because of their pernicious effect on competition and lack of any redeeming virtue. Such practices, considered illegal per se, include tying arrangements.

CA(8) (8)

Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—Required Allegations.

--In order to allege an illegal per se tying arrangement, which involves a seller's refusal to sell one product (the tying product) unless the buyer also purchases a second product (the tied product) from the seller, the complaint must show that a tying arrangement existed, i.e., that the sale of a tying product was linked to the purchase of the tied product; that the seller had sufficient economic power in the tying market to coerce the sale of the tied product; that a substantial amount of commerce was affected by the tying arrangement; and that the buyer suffered damages proximately caused by the arrangement.

CA(9) (9)

Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—Sufficiency of Complaint.

--In an action by home buyers against a real estate developer and an escrow company that it owned, allegations that the developer conditioned the sale of its homes on the use of its subsidiary's escrow services were sufficient to allege a tying arrangement (Bus. & Prof. Code, §§ 16720, 16726), where such allegations were supported in the complaint by specific facts rather than by conclusionary assertions. Whether a condition precedent existed as pleaded and whether escrow instructions negated its existence were questions of fact to be resolved at trial.

CA(10) [] (10)**Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—Economic Power.**

--In an action by home buyers against a real estate developer and an escrow company that it owned alleging an illegal per se tying arrangement ([Bus. & Prof. Code, §§ 16720, 16726](#)), the facts alleged in the complaint were sufficient to support an allegation that the developer had sufficient economic power in the real estate market to coerce the purchase of escrow services, where it was alleged that the developer sold 6,404 residential properties for a total sum of \$ 591 million in the 4 preceding years, that there was a housing shortage during this time, and that each home was marketed as a unique product. Sufficient economic power may be inferred if the seller occupies a dominant position in the relevant market. The power is sufficient even though it falls short of dominance and exists only with respect to some buyers. The requisite power may also be inferred from the tying product's uniqueness or desirability to buyers.

CA(11a) [] (11a) **CA(11b)** [] (11b)**Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—Combinations Between Distinct Entities.**

--In an action by home buyers against a real estate developer and an escrow company that it owned, the complaint, on its face, satisfied the threshold requirement for a showing of a combination or conspiracy between two distinct business entities. Whether or not the companies operated as a single entity had no effect on the cause of action for violation of the Cartwright Act ([Bus. & Prof. Code, §§ 16720, 16726](#)), where tying arrangements were alleged between the purchase of a home from the developer and the purchase of escrow services from its subsidiary. Under such circumstances, the required combination could exist as between the defendants and the victims.

CA(12) [] (12)**Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Combinations Between Distinct or Single Entities.**

--The showing of a combination or conspiracy between two distinct business entities is a threshold requirement which must be met before the reasonableness of an alleged restraint of trade can be considered. This requirement precludes liability for coordinated activity among multiple corporations operating as a single entity. The definition of a single entity turns on the particular facts. For example, the single entity test is easily satisfied when corporate policies are set by one individual or by a parent corporation to the extent there is no autonomy. Conversely, jointly owned corporations that compete in the marketplace, hold themselves out to the public as competing corporations, or set policy independently are capable of conspiring to restrain trade as distinct entities.

CA(13a) [] (13a) **CA(13b)** [] (13b)**Monopolies and Restraints of Trade § 7.4—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—Injury to Competition.**

--In an action by home buyers against a real estate developer and an escrow company that it owned alleging an illegal per se tying arrangement ([Bus. & Prof. Code, §§ 16720, 16726](#)), the trial court erred in ruling, as a matter of law, that the elements of intent to injure competition and resulting injury to competition were insufficiently pleaded. An allegation of defendants' intent to injure competition could be inferred from the face of the complaint, where it

was alleged that defendants carried out enumerated practices in furtherance of a combination for the unlawful purpose of restricting trade, thus injuring competition. It also claimed direct and proximate damages resulting from the sale of homes conditioned on the use of the developer's escrow company to the extent plaintiffs were forced to pay inflated escrow fees.

CA(14)[] (14)

Monopolies and Restraints of Trade § 4—Particular Agreements and Combinations—Sherman Act—Intent to Injure Competition.

--The Sherman Act requires only a general intent to injure competition on the part of a defendant, which is usually inferred from the particular circumstances. A plaintiff need only show that a defendant acted with the intention that his acts have their natural consequences and with knowledge that at least one other person would act in conjunction with the defendant.

Counsel: Frederick O. MacManus, in pro. per., A. Thomas Golden and Cheri L. Hubka-Sparhawk for Plaintiffs and Appellants, Marvin A. Freedland as Amicus Curiae on behalf of Plaintiffs and Appellants.

Gibson, Dunn & Crutcher, John J. Swenson, Mary Laura Davis and Charles J. Stevens for Defendants and Respondents.

Judges: Opinion by Trotter, P. J., with Crosby and Sonenshine, JJ., concurring.

Opinion by: TROTTER

Opinion

[*280] [**568] Plaintiffs appeal a judgment of dismissal following the sustaining of a demurrer to their third amended complaint without leave to amend. We reverse the judgment holding the complaint states a cause of action for violations of [Civil Code section 2995](#) and the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#))

CA(1)[] (1) The complaint alleges the following facts which are presumed true for purposes of reviewing [***2] the order sustaining the demurrer. ([Bohrer v. County of San Diego \(1980\) 104 Cal.App.3d 155, 158 \[163 Cal.Rptr. 419\].](#))

Frederick O. MacManus and Barbara-Helene Smith (plaintiffs) purchased a home in Westwind, a subdivision developed by A.E. Realty Partners (AERP) in San Diego County. AERP, doing business as Ponderosa Homes, is a major developer and seller of residential real estate in California. Its principal place of business is in Irvine. Realty Escrow, Inc. (REI) is owned and controlled by AERP and derives all of its business from that company. Its principal place of business is also in Irvine.

[*281] [**569] From 1976 through 1980, AERP gained an income of \$ 591 million from its sale of 6,404 homes. REI provided the escrow services for more than 99.9 percent of the conveyances and received fees totalling \$ 2,045,343.

When plaintiffs decided to purchase their home, they were given a copy of the Real Estate Commissioner's Public Report which informed prospective buyers of AERP's financial interest in the escrow company to be used in the sale or lease of Westwind residences. After plaintiffs had read the report, an AERP sales agent prepared [***3] an offer to purchase (Agreement) for their signature. Among other conditions, the Agreement required the home buyer to sign escrow instructions on forms provided by AERP within 10 days after its acceptance of the buyer's offer. The buyer was further obligated to execute and deposit additional documents, including the escrow instructions, or be

considered in default. Should the buyer default, AERP could cancel the Agreement and retain as liquidated damages any fees the buyer previously paid.

Before signing the Agreement, plaintiffs asked if changes could be made. They were told only AERP's Agreement form could be used, no changes could be made in the preprinted terms and, if changes were made, the Agreement would not be accepted by AERP.

Upon signing the Agreement, plaintiffs were furnished written notice of their right to choose a title insurance company. They selected, in writing, St. Paul Title Company. Plaintiffs then received escrow instructions identifying REI as the entity to provide escrow services for their conveyance.

Included in the instructions (attached as an exhibit to the complaint) was the following Notice of Interest:

"All Parties to This Transaction Are Hereby [***4] Advised That Realty Escrow, Inc., the Escrow Agent Above Named Is a Corporation Wholly Owned by AE Realty Partners, a General Partnership by Aetna Life Insurance Company, a Connecticut Corporation and AE Development Group, Inc., a Connecticut Corporation a Wholly Owned Subsidiary of Aetna Casualty [sic] Surety Company, and for Whom Realty Escrow, Inc. Performs Escrow Services at a Negotiated Bulk Rate. All Parties to This Transaction Are Further Advised That the Sole Stockholder of Realty Escrow, Inc. Is Also the Sole Stockholder of Ponderosa Brokerage Company, a California Corporation and Further AE Realty Partners Is Engaged in Business Under the Name and Style Ponderosa Homes. All Parties Agree That the Services of Any of the Foregoing Companies May Be Used in Connection With This Transaction, That Such Use Has [*282] Not Been Made a Condition of This Sale by Any Party." Plaintiffs signed and returned the escrow instructions as required by the Agreement.

The conveyance of the Westwind residence was completed in July 1979. Plaintiffs paid REI various closing fees totaling \$ 319. Comparable escrow services in San Diego County were available at costs of \$ 127.50 to \$ [***5] 269.

From August 25, 1978,¹ through July 16, 1980,² AERP conveyed 386 lots in San Diego County containing single family residences. REI provided escrow services for all of the conveyances at costs \$ 50 to \$ 191.50 higher than those of local competitors. During the same period AERP also conveyed 2,080 lots of single family residences in other California counties. REI handled all but two of the closings and charged buyers inflated fees. The purchase of AERP properties was conditioned upon the procurement of REI escrow services.

[**570] Plaintiffs filed a class action on behalf of themselves and other buyers of AERP homes who were compelled to use the services of REI between August 25, 1978, and July 16, 1980.

Discussion

Alleged Violation of Civil Code Section 2995

CA(2a)[↑] (2a) Plaintiffs' first cause of action is predicated on Civil Code section 2995[***6] (hereafter section 2995).³ [*283] At the outset we must decide whether it is barred by section 340, subdivision (1) of the Code

¹ The date Civil Code section 2995 was enacted.

² The date the instant suit was commenced.

³ Section 2995 provides: HN1[↑] "No real estate developer shall require as a condition precedent to the transfer of real property containing a single family residential dwelling that escrow services effectuating such transfer shall be provided by an escrow entity in which the real estate developer has a financial interest."

"A real estate developer who violates the provisions of this section shall be liable to the purchaser of the real property in the amount of three times the amount charged for the escrow services, but in no event less than two hundred fifty dollars (\$ 250), plus reasonable attorney's fees and costs.

of Civil Procedure.⁴AERP and REI demurred on the ground plaintiffs filed the action more than one year after signing the Agreement and escrow instructions. Plaintiffs argue the action is subject to a three-year statute of limitations (Code Civ. Proc., § 338, subd. 1)⁵ and it did not accrue until the transfer of title to their residences.⁶

CA(3)[] (3) Since the Legislature did not prescribe a period of limitations within section 2995, we must determine the applicable period. (See Huntington v. Attrill (1892) 146 U.S. 657 [36 L.Ed. 1123, 13 S.Ct. 224]; Levy v. Superior Court (1895) 105 Cal. 600 [38 P. 965].) Our decision must depend upon whether the statute is characterized as "penal" [***8] or "remedial." (*Ibid.*) The distinction is rarely clear cut, for the same provision may be penal to the offender and remedial to the victim. (See Levy, supra, at pp. 607-608; Riggs v. Government Emp. Financial Corp. (9th Cir. 1980) 623 F.2d 68, 72, citing Huntington v. Attrill, supra, 146 U.S. at p. 667 [36 L.Ed. at p. 1127]) Nevertheless, to determine the applicable limitations period of section 2995, we examine its intent and language. (See Riggs v. Government Emp. Financial Corp., supra, 623 F.2d 68, 69-71.)

CA(2b)[] (2b) Its legislative history reveals residential buyers have often been forced to use an escrow entity in which the seller has an interest. Section 2995 was enacted as a remedial statute to protect the buyer against in-house escrow services. It was intended to assure the buyer's freedom to select an escrow entity and that entity's independence and neutrality.

Section 2995 provides recovery where use of a particular escrow is required as a condition precedent to the transfer of a single family residence. It is concerned with the effect of a buyer/seller agreement rather than [***9] the intent of the seller. Since liability is not dependent on some degree of culpability, recovery is construed as remedial in nature. (See Riggs, supra, at p. 71.)

Section 2995 also provides the aggrieved buyer shall receive treble damages, not less than \$ 250. "That a portion of such damages [**571] is statutorily set, rather than being subject to proof like most remedial damages, does not necessarily make the statute penal." (Riggs, supra, at p. 71.) Further, the [*284] liquidated damage measure is consistent with a remedial purpose, for when a buyer is deprived of using comparable escrow services, the value of those services, or actual damages, may be difficult to ascertain. (*Ibid.*)

In light of the intent and language of section 2995 we characterize it as remedial, and a three-year limitations period will be applied. (Code Civ. Proc., § 338, subd. 1.)

CA(4)[] (4) Finally, plaintiffs' first cause of action accrued on July 18, 1979, the date escrow closed and fees were collected by REI, and not on the dates the Agreement or escrow instructions were signed. Section 2995

"For purposes of this section 'financial interest' means ownership or control of 5 percent or more of an escrow entity.

"For purposes of this section 'real estate developer' means a person or entity having an ownership interest in real property which is improved by such person or entity with single family residential [sic] dwellings which are offered for sale to the public.

"For purposes of this section 'escrow entity' includes a person, firm or corporation.

"Any waiver of the prohibition contained in this section shall be against public policy and void."

⁴ Code of Civil Procedure section 335 provides: **HN2[]** "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

Section 340, subdivision (1), provides in pertinent part: **HN3[]** "Within one year:

"An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

⁵ Section 338, subdivision 1, provides in pertinent part: **HN4[]** "Within three years:

"An action upon a liability created by statute, other than a penalty or forfeiture."

⁶ The trial court did not address this issue.

accords a right of [***10] action to the "purchaser" of the residence, i.e., one who has acquired title (see [Anderson v. Badger \(1948\) 84 Cal.App.2d 736, 744 \[191 P.2d 768\]](#)) or to whom title has been "transferred." (See [Civ. Code, §1039.](#)) Further, a plain reading of the statute shows there is no claim unless the party suffers injury as a result of a condition precedent, i.e., the use of a particular escrow entity. This can only arise when escrow closes and the fees are paid. Plaintiffs' cause of action is clearly not time barred.

CA(5)[↑] (5) The demurrer interposed by AERP and REI was sustained on the following grounds: "Insufficient facts are pleaded to support a requisite element of a claim under [Civil Code Section 2995](#), namely, that A.E. Realty Partners conditioned the sale of Ponderosa Homes on the use of Realty Escrow's escrow services, and the escrow instructions . . . expressly negate the existence of a conditioned sale." We disagree.

HN5[↑] The elements constituting a claim under [section 2995](#) appear on its face: (1) A real estate developer with a financial interest in a particular escrow entity, (2) who conditions the sale [***11] of a single family residence, (3) on the procurement of that escrow entity's services.

The complaint alleged AERP required buyers to use the services of REI, its wholly owned entity, as a condition precedent to acquiring title to single family residences. These allegations are supported in the complaint by specific facts rather than by conclusionary assertions. (See e.g., [People v. McKale \(1979\) 25 Cal.3d 626, 635 \[159 Cal.Rptr. 811, 602 P.2d 731\]](#); 3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 268, pp. 1939-1940.) Plaintiffs' first cause of action clearly withstands demurrer. Whether a condition precedent existed as pleaded and whether the escrow instructions negated its existence are questions of fact to be resolved at trial. (E.g., [McKale, supra, at pp. 634-635.](#))

Alleged Violation of Cartwright Act

CA(6)[↑] (6) The second cause of action is based on [Business and Professions Code sections 16720](#) and [16726](#) of the Cartwright Act, the principal California [*285] antitrust statute. Both sections are patterned after [section 1](#) of the Sherman Act ([15 U.S.C. § 1](#); [***12] see [Corwin v. Los Angeles Newspaper Service Bureau, Inc. \(1971\) 4 Cal.3d 842, 852 \[94 Cal.Rptr. 785, 484 P.2d 953\]](#)) and cases construing the Sherman Act are applicable to problems arising under the Cartwright Act. ([Marin County Bd. of Realtors, Inc. v. Palsson \(1976\) 16 Cal.3d 920, 925 \[130 Cal.Rptr. 1, 549 P.2d 833\].](#))⁷

[Section 16720 HN6\[↑\]](#) prohibits the combination of resources of two or more persons to prevent market competition or to restrain trade as detailed in the section.⁸ Such combinations [**572] or trusts are "unlawful,

⁷ In [Bruno v. Superior Court \(1981\) 127 Cal.App.3d 120, 131 \[179 Cal.Rptr. 342\]](#), the court declared: "Interpretations of the federal antitrust laws are of relevance to the Cartwright Act problems [citation], but we respectfully exercise our prerogative to disagree with the cited cases."

⁸ [Business and Professions Code section 16720](#) provides: **HN7[↑]** "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

"(a) To create or carry out restrictions in trade or commerce.

"(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

"(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

"(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

against public policy and void." ([Bus. & Prof. Code, § 16726.](#)) **CA(7)** (7) Although the [***13] literal language of these sections and their federal counterpart prohibit any combination to restrain trade, courts have added a judicial gloss requiring the restraints to be "unreasonable." ([Chicago Board of Trade v. United States \(1918\) 246 U.S. 231, 238-241 \[62 L.Ed. 683, 687-688, 38 S.Ct. 242\]; People v. Building Maintenance etc. Assn. \(1953\) 41 Cal.2d 719, 727 \[264 P.2d 31\].](#)) However, certain practices 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" because of "their pernicious effect on competition and lack of any redeeming virtue." ([Northern Pac. R. Co. v. United States \(1958\) 356 U.S. 1, 5 \[2 L.Ed.2d 1*286\] 545, 549, 78 S.Ct. 514\], partially quoted in *Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* \(1980\) 101 Cal.App.3d532, 541 \[\[161 Cal.Rptr. 811\]\(#\)\].](#)) Such practices, considered illegal per se, include tying arrangements.

[***14] **CA(8)** (8)

HN8 (8) Tying arrangements involve a seller's refusal to sell one product (the tying product) unless the buyer also purchases a second product (the tied product) from the seller. ([Id. at pp. 542-543.](#))

HN9 (9) To allege an illegal per se tying arrangement, the complaint must show: (1) a tying arrangement existed, i.e., the sale of a tying product was linked to the purchase of the tied product; (2) the seller had sufficient economic power in the tying market to coerce the sale of the tied product; (3) a substantial amount of commerce was effected by the tying arrangement; and (4) the buyer suffered damages proximately caused by the arrangement. ([Suburban Mobile Homes, supra, at pp. 542-543; see also Classen v. Weller \(1983\) 145 Cal.App.3d 27 \[192 Cal.Rptr. 914\].](#))

CA(9) (9) The trial court ruled plaintiffs failed to allege sufficient facts to support two elements of an illegal per se tying claim under [sections 16720](#) and [16726](#): (1) that AERP conditioned the sale of Ponderosa Homes on the use of REI's escrow services, and the escrow instructions expressly negate the existence of a conditioned sale; and (2) that AERP had sufficient economic [***15] power in any tying product market to compel the purchase of escrow services, the tied product. However, the complaint alleges AERP conditioned the sale of its residential property (the tying product) on the "purchase" of REI's escrow services (the tied product) thereby violating [sections 16720](#) and [16726](#).

We conclude the tying arrangement, or conditioned sale of Ponderosa Homes, was sufficiently alleged for reasons already stated in our discussion of the first cause of action. (See also [Classen, supra, at pp. 36-37.](#)) Plaintiffs also stated facts to support the element of economic power in the tying market.

CA(10) (10) **HN10** (10) Sufficient economic power may be inferred if the seller occupies a dominant position in the relevant market. (See e.g., [International Business Machines Corp. v. U.S. \(1936\) 298 U.S. 131, 135-136 \[80 L.Ed. 1085, 1088-1089, 56 S.Ct. 701\]; Moore v. Jas. H. Matthews & Co. \(9th Cir. 1977\) 550 F.2d 1207, 1215.](#)) The power is sufficient even though it falls short of dominance and exists only with respect to [**573] some buyers. ([Suburban Mobile Homes, supra, at p. 544.](#)) Finally, the requisite power [***16] can be inferred from the tying product's uniqueness or desirability to buyers. (*Ibid.*; [Moore, supra, at pp. 1215-1216.](#))

[*287] The complaint alleged AERP sold 6,404 residential properties for a total sum of \$ 591 million in the four years preceding this litigation. During this time, there was a housing shortage especially acute in those areas

"(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

"(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

"(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

"(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected."

where AERP conducted business. Each Ponderosa Home was marketed as a unique product, "custom [designed] by award winning architects" in "choice and convenient locations" throughout the state. These facts support an allegation of AERP's sufficient economic power in the real estate market.

CA(11a)[] (11a) The trial court further sustained the demurrer to plaintiffs' second cause of action for failure to state facts sufficient to support the element of a combination in restraint of trade between two distinct business entities.

CA(12)[] (12) **HN11[]** The showing of a combination or conspiracy is a threshold requirement which must be met before the reasonableness of an alleged restraint of trade can be considered. (*Harvey v. Fearless Farris Wholesale, Inc.* (9th Cir. 1979) [589 F.2d 451, 453](#).) [***17] This requirement precludes liability for coordinated activity among multiple corporations operating as a single entity. (*Thomsen v. Western Elec. Co. Inc.* (9th Cir. 1982) [680F.2d 1263](#); *Las Vegas Sun, Inc. v. Summa Corp.* (9th Cir. 1979) [610 F.2d 614](#); *Knutson v. Dailey Review* (9th Cir. 1976) [548 F.2d 795](#); see also *Bondi v. Jewels by Edwar, Ltd.* (1968) [267 Cal.App.2d 672](#) [[73 Cal.Rptr. 494](#)].)

The single entity test, or intraenterprise conspiracy theory, is a frequently litigated issue. The problem, defining a single entity, turns on the particular facts. (*Mutual Fund Investors v. Putnam Management Co.* (9th Cir. 1977) [553 F.2d 620](#).) This test is easily satisfied when corporate policies are set by one individual or by a parent corporation (see, e.g., *Las Vegas Sun, supra, at p. 618*) to the extent there is no autonomy (see *Harvey, supra*, p. 457). At the other extreme, **HN12[]** jointly owned corporations that compete in the marketplace, hold themselves out to the public as competing corporations, or set policy independently, are capable of conspiring to restrain trade as distinct [***18] entities. (*General Business Systems v. North Am. Philips Corp.* (9th Cir. 1983) [699 F.2d 965, 980](#).)

CA(11b)[] (11b) REI is wholly owned by AERP for whom it performs escrow services at a negotiated bulk rate. REI paid cash dividends to AERP, its sole shareholder, during the four years preceding this action. All but one of the current officers of REI are officers of AERP. All but one of the directors of REI are also officers of AERP. However, the degree of control AERP exercises over REI's day-to-day operations is not shown. (See, e.g., *General Business Systems v. North Am. Philips Corp., supra, 699 F.2d 965*.)

Nevertheless, whether or not AERP and REI operate as a single entity has no effect on plaintiffs' cause of action which, on its face, satisfies the [*288] threshold requirement. **HN13[]** Where tying arrangements are alleged, there is ample authority the required combination can exist as between the defendants and the plaintiff/victim. (See e.g., *Roberts v. Elaine Powers Figure Salons, Inc.* (9th Cir. 1983) [708 F.2d 1476](#); *Siegel v. Chicken Delight, Inc.* (9th Cir. 1971) [448 F.2d 43](#).)

In [***19] *Perma Mufflers v. Int'l Parts Corp.* (1968) [392 U.S. 134, 141-142](#) [[20 L.Ed.2d 982, 991-992, 88 S.Ct. 1981](#)], the Supreme Court determined: "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 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 save them from any of the obligations that the law imposes on separate entities. [Citations.] In any event each petitioner can clearly charge a combination between [**574] Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements [citations]"

This line of reasoning was recently followed by the Oregon Supreme Court in *King City Realty, Inc. v. Sunspace Corp.* (1981) [291 Ore. 573](#) [[633 P.2d 784](#)], which concerned a tying arrangement between a seller and buyer of lots with a "list back" agreement. Faced with arguments [***20] akin to those of AERP and REI, the *King* court held the defendant's affirmative defense sufficiently pled the "elements" of an illegal tying arrangement under the Oregon equivalent of *section 1* of the Sherman Act. ([633 P.2d at pp. 787-789](#).)

In light of the preceding cases, we conclude the second cause of action alleged facts sufficient to show a combination in restraint of trade between plaintiffs and AERP/REI, as distinct business entities.

CA(13a)[] (13a) Lastly, we address the trial court's determination that two additional elements of an unreasonable restraint of trade were not sufficiently alleged: (1) AERP's and REI's intention to injure competition, and (2) injury to competition as a result of their conduct.

CA(14)[] (14) **HN14[]** Section 1 of the Sherman Act requires only a general intent on the part of a defendant. (16A Von Kalinowski, Business Organizations, Antitrust Laws and Trade Regulation, § 36.01[3][b].) **HN15[]** General intent is usually inferred from the particular circumstances. (*Ibid.*) A plaintiff need only show a defendant acted with the intention that his acts have their natural consequences and with knowledge at least one other person [***21] would act in conjunction with the defendant. (*Interstate Circuit v. U.S. (1939) 306 U.S. 208 [**289] [83 L.Ed. 610, 59 S.Ct. 467]; Northern California Pharmaceutical Ass'n v. United States (9th Cir. 1962) 306 F.2d 379.*)

CA(13b)[] (13b) From the face of the complaint, an allegation of AERP's and REI's intent to injure competition can be inferred. It alleged defendants carried out enumerated practices in furtherance of a combination for the unlawful purpose of restricting trade, thus injuring competition. It also claimed direct and proximate damages resulting from the conditioned sale, to the extent plaintiffs were forced to pay inflated escrow fees. The trial court erred in ruling, as a matter of law, that such elements were not sufficiently pleaded. (See *Saxer v. Philip Morris, Inc. (1975) 54 Cal.App.3d 7 [126 Cal.Rptr. 327].*)

Judgment of dismissal is reversed, and the matter is ordered to proceed on the third amended complaint.

End of Document



Mission Hills Condominium Asso. M-1 v. Corley

United States District Court for the Northern District of Illinois, Eastern Division

August 22, 1983

No. 82 C 0308

Reporter

570 F. Supp. 453 *; 1983 U.S. Dist. LEXIS 14431 **; 1983-2 Trade Cas. (CCH) P65,659

MISSION HILLS CONDOMINIUM ASSOCIATION M-1, MISSION HILLS CONDOMINIUM ASSOCIATION M-2, MISSION HILLS CONDOMINIUM ASSOCIATION M-3 and MISSION HILLS CONDOMINIUM ASSOCIATION M-4, Plaintiffs, v. EUGENE R. CORLEY, individually and d/b/a EUGENE R. CORLEY BUILDERS, THE CORLEY COMPANIES, INC., an Illinois corporation, CORLEY, INC. (previously known as Corley Management Corp.), an Illinois corporation, and PHOENIX MUTUAL LIFE INSURANCE CO., a foreign corporation, Defendants

Core Terms

defendants', amended complaint, condominium, motion to dismiss, Counts, injunctive relief, anti trust law, associations, allegations, Sherman Act, intervene, antitrust, damages, condominium association, alleged violation, tying arrangement, per se violation, lack standing, unit owner, plaintiffs', condominium unit, instant action, tied product, Property Act, standing to sue, economic power, treble damages, Clayton Act, unconscionability, contracts

LexisNexis® Headnotes

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

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

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

HN1[] Private Actions, Standing

The Supreme Court has recognized that an association has standing to bring suit on behalf of its members when: (1) its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to the association's purpose; and (3) neither the claim asserted or relief sought requires the individual participation of the members in the lawsuit.

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

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

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

HN2 [down] **Private Actions, Standing**

Associations may seek injunctive relief because it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

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

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

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

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

HN3 [down] **Remedies, Injunctions**

Courts have upheld associational standing in federal antitrust actions seeking injunctive relief pursuant to § 16 of the Clayton Act, [15 U.S.C.S. § 26](#).

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

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

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

HN4 [down] **Private Actions, Standing**

See [15 U.S.C.S. § 26](#).

Antitrust & Trade Law > Clayton Act > General Overview

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN5 [down] **Antitrust & Trade Law, Clayton Act**

An association's right to bring a claim under § 16 of the Clayton Act, [15 U.S.C.S. § 26](#), shall be scrutinized the same as in any other action brought by an association on behalf of its members.

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

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

570 F. Supp. 453, *453L^A1983 U.S. Dist. LEXIS 14431, **14431

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Condominiums > Management

HN6 Private Actions, Standing

See Ill. Rev. Stat. ch. 30, § 309.1 (1978).

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

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN7 Private Actions, Standing

The Illinois courts have construed Illinois Condominium Property Act, Ill. Rev. Stat. ch. 30, § 309.1 (1978), to allow a condominium association to sue on behalf of its members.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN8 Clayton Act, Claims

The damage provision of § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), expressly restricts suit to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.

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

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

HN9 Clayton Act, Claims

570 F. Supp. 453, *453L^A 1983 U.S. Dist. LEXIS 14431, **14431

Section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), precludes an association -- as distinct from its individual members -- from bringing a claim for treble damages for alleged antitrust violations, where the association has not been injured in its business or property.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

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

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

[**HN10**](#) [] Remedies, Damages

Standing to sue for damages under Clayton Act, § 4, [15 U.S.C.S. § 15](#), is more limited than standing to sue for injunctive relief under § 16 of the Clayton Act, [15 U.S.C.S. § 26](#).

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

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

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

[**HN11**](#) [] Remedies, Damages

The language in § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), was intended to screen out some potential plaintiffs from bringing treble damage actions, even though they could bring suits for injunctive relief.

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

Antitrust & Trade Law > Sherman Act > General Overview

[**HN12**](#) [] Regulated Practices, Price Fixing & Restraints of Trade

[Section 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), provides that any restraint of trade or commerce among the several states is illegal.

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

570 F. Supp. 453, *453L983 U.S. Dist. LEXIS 14431, **14431

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN13 [blue icon] **Tying Arrangements, Clayton Act**

Tying arrangements comprise conduct that is illegal per se under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

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

Contracts Law > Personal Property > Personality Leases > General Overview

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

HN14 [blue icon] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement generally is defined as an arrangement whereby a seller agrees to sell or lease one product (the tying product) only on the condition that the buyer also purchase or lease a second product (the tied product).

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

HN15 [blue icon] **Price Fixing & Restraints of Trade, Tying Arrangements**

Tying arrangements have been considered violative of the antitrust laws because by using their monopoly power in the tying product to create a monopoly in the tied product, sellers inhibit competition in the market for the tied product.

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

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

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

HN16 [blue icon] **Private Actions, Standing**

To maintain an action for damages due to an allegedly illegal tying arrangement, a plaintiff must show: (1) separate tying and tied products; (2) evidence of actual coercion by the seller that forced the buyer to accept the tied product; (3) sufficient economic power held by the seller in the tying product to coerce purchaser acceptance of the tied product; (4) anticompetitive effects in the tied market; and (5) a not insubstantial effect on interstate commerce.

Contracts Law > Defenses > Unconscionability > General Overview

HN17 [blue icon] **Defenses, Unconscionability**

The term "unconscionability" is used to describe a contract that is improvident, totally one-sided or oppressive.

Judges: [**1] Hart

Opinion by: HART

Opinion

[*455] MEMORANDUM OPINION AND ORDER

The plaintiffs to this action are Mission Hills Condominium Association M-1, Mission Hills Condominium Association M-2, Mission Hills Condominium Association M-3 and Mission Hills Condominium Association M-4 ("Associations"), and they have sued on behalf of their members who purchased condominium units in the Mission Hills Country Club Village ("Development"). The defendants are Eugene R. Corley, individually and d/b/a Eugene R. Corley Builders, The Corley Companies, Inc., Corley, Inc., ("Corley"), and Phoenix Mutual Life Insurance Co. ("Phoenix"). Jurisdiction over the plaintiffs' two federal claims is conferred by [28 U.S.C. § 1337](#), and the plaintiffs ask the Court to assert pendent [*456] jurisdiction over their twelve state law claims.

Presently before the Court is defendants' motion to dismiss the amended complaint. For the reasons set forth below, defendants' motion to dismiss is granted in part and denied in part. Also before the Court is the petition of six individuals, owners of units in the Development, to intervene as plaintiffs. That motion is granted.

FACTS

On a motion to dismiss, the court [**2] must accept as true the allegations pled by the plaintiffs. The amended complaint and briefs filed relative to the instant motion reveal the following. The Development is a residential development located in Northfield, Illinois. Constructed and developed by Corley and Phoenix, the Development comprises approximately thirteen condominium properties, a private country club and other various amenities.

On or about August 8, 1973, a Blanket Declaration governing the Development was recorded. The Declaration, the legal instrument by which condominium property is created, imposed certain obligations and requirements with respect to the ownership and operation of the Development. Pursuant to the Development's Blanket Declaration, Corley and Phoenix retained three votes in the Mission Hills Homeowners Association ("Homeowners Association") for every unsold condominium unit. Approximately one year later, the Homeowners Association's By-laws were amended, giving Corley and Phoenix the authority to continue to administer the Homeowners Association and to disregard any vote of the unit owners until 60 days after the last condominium unit was sold. In their capacity as administrators of [**3] the Homeowners Association, Corley and Phoenix have entered into management, maintenance, and other property-related service contracts, for work on the Development's common areas, with business entities affiliated with either Corley or Phoenix. The services include snow removal, general maintenance, and landscaping. These service contracts were worth approximately \$2 million in the four years preceding this action.

On March 24, 1982, the plaintiff Associations (they claim to represent the interests of all unit owners in four of the Development's thirteen condominium properties) filed an amended complaint. In their fourteen count amended complaint, plaintiffs charge that defendants' conduct violates [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#), the Illinois Antitrust Act, Ill. Rev. Stat. ch. 38 § 60-1 *et seq.*, the Illinois Condominium Property Act, Ill. Rev. Stat. ch. 30, § 301, *et seq.*, and the common law of Illinois.

First, plaintiffs charge that as a result of controlling the Homeowners Association, Corley and Phoenix are able to require unit owners to accept property-related services from entities controlled by Corley and Phoenix. They claim that but for the defendants' [**4] actions, the plaintiffs could purchase these services from various other independent and more competent concerns on more favorable terms. They state that the defendants have conspired to reject lower bids from potential competitors, and that the plaintiffs have paid \$750,000 more to

defendants than plaintiffs would have paid to others. Plaintiffs allege that this constitutes an illegal tying arrangement violative of federal and Illinois antitrust laws (Counts I-IV).

Second, plaintiffs allege that provisions of the Declaration and By-laws, giving Corley and Phoenix allegedly total authority over the administration of the Homeowners Association, are unconscionable and therefore invalid (Count V). In this connection, plaintiffs further allege that defendants' continued control over the Homeowners Association and defendants' behavior violate the Illinois Condominium Property Act (Counts VI, X, XIV). Third, plaintiffs charge that during the course of their administration of the Homeowners Association, Corley and Phoenix have breached various common law duties owed to the unit owners, and in the process have committed fraud and conversion (Counts VII-IX, XI-XIII).

[*457] Defendants [*5] have filed a motion to dismiss the entire amended complaint. In support of their motion, defendants argue that plaintiffs, as associations, lack standing to bring Counts I-IV. Second, defendants argue that Counts I-IV of the amended complaint fail to state claims under the antitrust laws, and that Counts VI and XIV fail to state claims under the Illinois Condominium Property Act. Third, defendants argue that the Declaration and By-laws are valid and enforceable contracts and are not unconscionable (Count V). Finally, defendants argue that since the amended complaint fails to state claims cognizable under federal law, the Court should dismiss the entire amended complaint (including the pendent claims) for lack of subject matter jurisdiction.

STANDING

Counts I, II, III and IV of the amended complaint allege violations of federal and Illinois antitrust laws. Specifically, Count I seeks to recover treble damages, in the amount of \$2,250,000, pursuant to Section 4 of the Clayton Act, [15 U.S.C. § 15](#), for defendants' alleged violation of [Section 1](#) of the Sherman Act, [15 U.S.C. § 1](#). Count II, incorporating by reference the allegations of Count I and brought under Section 16 of the [*6] Clayton Act, [15 U.S.C. § 26](#), seeks to enjoin defendants from exercising any control over the Homeowners Association and taking any action for which the unit owners would incur a cost. Count III seeks to recover treble damages for defendants' alleged violations of the Illinois Antitrust Act, Ill. Rev. Stat. ch. 38, §§ 60-1 *et seq.*, and Count IV, incorporating by reference the allegations of Counts II and III, also seeks injunctive relief.

Defendants move to dismiss all four counts on the ground that plaintiffs, as associations, lack standing to bring these claims. Asserting that these counts allege violations of antitrust laws arising from purchase agreements to which plaintiffs were not parties, defendants argue that plaintiffs have not been injured by defendants' conduct. Furthermore, defendants argue that plaintiffs should not be granted representative standing because plaintiffs have failed to satisfy the necessary requirements for such. Defendants claim that representative standing is inappropriate in the instant action due to a conflict of interest between the plaintiff associations and their members regarding the decision to bring the instant action.

[HN1](#)[[↑]] The Supreme Court [*7] has recognized that an association has standing to bring suit on behalf of its members when: (1) its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to the association's purpose; and (3) neither the claim asserted or relief sought requires the individual participation of the members in the lawsuit. [Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 \(1977\)](#). Furthermore, [HN2](#)[[↑]] the Court specifically has found that associations may seek injunctive relief because "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." [Warth v. Seldin, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 95 S. Ct. 2197 \(1975\)](#).

Relying upon these Supreme Court decisions, [HN3](#)[[↑]] courts have upheld associational standing in federal antitrust actions seeking injunctive relief pursuant to Section 16 of the Clayton Act, [15 U.S.C. § 26](#). [Associated General Contractors of North Dakota v. Otter Tail Power Company, 611 F.2d 684, 690 \(8th Cir. 1979\)](#); [National Office Machine Dealers Association v. Monroe, The Calculator Co., 484 F. \[**81\] Supp. 1306, 1307 \(N.D. Ill. 1980\)](#). Section 16 states, in pertinent part, that "[HN4](#)[[↑]] any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . ." (emphasis added). In recognizing associational standing in Section 16 cases, the courts have emphasized the

absence of statutory language convincing an intent to restrict standing beyond the limitations established in Article III of the Constitution.

[*458] This Court concurs with the decisions reached by these courts and concludes that [HN5](#) an association's right to bring a claim under Section 16 shall be scrutinized the same as in any other action brought by an association on behalf of its members. Applying the criteria set forth in [Hunt, supra](#), the Court finds that plaintiffs have standing to seek injunctive relief against defendants for alleged antitrust violations. First, the individual members of the associations would have standing to bring this action since the injury claimed is to the members' condominium property. Second, given that plaintiffs are seeking to protect their members' property and to prevent [**9](#) their members from paying assessments derived from allegedly noncompetitive fees, the interests plaintiffs seek to protect are germane to the associations' purposes. Third, neither the relief requested nor the claim asserted require the participation of the association members. Plaintiffs allege that defendants have engaged in conduct resulting in an illegal tying arrangement. Proof of these allegations would not require member participation.

Defendants cite two Fifth Circuit cases holding that condominium associations lack standing to bring antitrust claims on behalf of their members. [Buckley Towers Condominium, Inc. v. Buchwald](#), 533 F.2d 934 (5th Cir. 1976), cert. denied, 429 U.S. 1121, 51 L. Ed. 2d 571, 97 S. Ct. 1157 (1977); [Chatham Condominium Ass'n. v. Century Village, Inc.](#), 597 F.2d 1002 (5th Cir. 1979). Buckley preceded [Hunt v. Washington State Apple, supra](#), the leading Supreme Court case on associational standing. Further, while Buckley did refer to [Warth v. Seldin, supra](#), see [533 F.2d at 938 n.3](#), the Fifth Circuit found Warth "inapposite":

The Court in *Warth* held that an association may have standing as the representative [**10](#) of its members even in the absence of injury to itself, but the association must allege that its members are suffering or threatened with injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves been parties to the suit.

The plaintiff associations have here alleged what the *Buckley* court apparently there found lacking (para. 18, Amended Complaint). The Fifth Circuit in *Chatham* followed its earlier decision in *Buckley* in addressing a question of associational standing, without citing or discussing any other cases.

The Court believes *Buckley* is distinguishable, since the *Warth* test, apparently not met in *Buckley*, has been met here. However, even if it were not so distinguishable, this Court would not follow *Buckley* because it seems not to follow Supreme Court precedent. Furthermore, it is against the overwhelming weight of other authority on the issue of associational standing. In addition to the cases cited above (*Hunt*, *Warth*, *Otter Tail*, and *Monroe*, *The Calculator Co.*), see also [National Collegiate Athletic Ass'n. v. Califano](#), 622 F.2d 1382, 1387 (10th Cir. 1980); [**11 Chicago-Midwest Meat Ass'n. v. City of Evanston](#), 589 F.2d 278, 280 (7th Cir. 1978), cert. denied, 442 U.S. 946, 61 L. Ed. 2d 318, 99 S. Ct. 2895 (1979). This Court does not believe that the associational standing rule is different when the plaintiff is an association of condominium owners.

The Court also finds that plaintiffs have standing to seek injunctive relief against defendants for alleged violations of the Illinois Antitrust Act. Claims for injunctive relief do not require the members' individual participation and there is every reason to expect that, if granted, the relief sought will benefit all of the members equally. Further, Illinois law explicitly allows an association to bring suit on behalf of its members. The Illinois Condominium Property Act, Ill. Rev. Stat. 1978, ch. 30, § 309.1, states in relevant part: "[HN6](#) The board of managers [of the condominium association] shall have standing to act in a representative capacity in relation to matters involving the common elements of more than one unit, on behalf of the unit owners, as their interests may appear." [HN7](#) The Illinois courts have construed this statute to allow a condominium association to sue on behalf of [**12](#) its members. [Tassan v. United Development Co.](#), 88 Ill.App.3d 581, [\[*459\]](#) 410 N.E.2d 902, 914-15, 43 Ill. Dec. 769 (1st Dist. 1980) (§ 309.1 gives association right to sue on behalf of its members; individual owners also retain right to sue); [St. Francis Courts v. Investors Real Estate](#), 104 Ill.App.3d 663, 432 N.E.2d 1274, 1275-76, 60 Ill. Dec. 375 (1st Dist. 1982) (§ 309.1 gives association standing to sue; *Tassan* interpreted to allow either association or individual to bring suit).

Defendants argue that plaintiffs should be denied standing here due to an alleged conflict among the members regarding the decision to institute the instant action. Defendants' argument is unpersuasive. Contrary to the naked assertion in defendants' brief, there is no allegation in plaintiffs' amended complaint indicating any conflict among the associations' members. The Court will not deny plaintiffs standing to seek injunctive relief simply on the basis of a vague and unsubstantiated allegation.

Plaintiffs, however, lack standing to bring a claim for damages pursuant to Section 4 of the Clayton Act, [15 U.S.C. § 15](#). Unlike the injunctive provision of Section 16, [HN8](#) the damage provision [\[**13\]](#) of Section 4 expressly restricts suit to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." The Court interprets [HN9](#) this language as precluding an association -- as distinct from its individual members -- from bringing a claim for treble damages for alleged antitrust violations, where the association has not been injured in its "business or property."

The Supreme Court has noted that [HN10](#) standing to sue for damages under Section 4 is more limited than standing to sue for injunctive relief under Section 16. [Hawaii v. Standard Oil Co., 405 U.S. 251, 262, 31 L. Ed. 2d 184, 92 S. Ct. 885 n.14 \(1972\)](#). [HN11](#) The "language in § 4 was intended to screen out some potential plaintiffs from bringing treble damage actions, even though they could bring suits for injunctive relief." [Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1175 \(5th Cir. 1976\)](#). See also [National Constructors v. National Elec. Contractors, 498 F. Supp. 510, 518-20 \(D. Md. 1980\)](#) (association has standing to sue for injunctive relief under Section 16, but may not sue for damages under Section 4), *aff'd*, [678 F.2d 492 \(4th Cir. 1982\)](#), *petition for [**14] cert. filed*, [51 U.S.L.W. 3535](#) (U.S. Jan. 18, 1983) (No. 82-1146). The associations here have not alleged to have been damaged in their business or property. Instead, the members are the ones who have suffered money damages. Further, under the *Hunt* test, association standing would be inappropriate for the damage claims here, since the individuals would be required to participate to prove the damages suffered.

Similarly, the Court finds that the plaintiffs lack standing to bring a claim for treble damages against defendants for alleged violation of the Illinois antitrust laws. Ill. Rev. Stat. ch. 38, § 60-7(2), uses the same words ("business or property") as Section 4 of the Clayton Act. The legal analysis is the same as recited above.

In summary, the Court concludes that plaintiffs have standing to seek injunctive relief against defendants for alleged violations of federal and Illinois antitrust laws. However, plaintiffs do not have standing to seek monetary damages for the aforementioned allegations. Accordingly, Counts I and III of the amended complaint (both of which seek money damages), are dismissed, while Counts II and IV (seeking injunctive relief) remain.

FEDERAL [\[**15\]](#) ANTITRUST CLAIMS

Defendants move to dismiss Count II of the amended complaint, claiming violations of [Section 1](#) of the Sherman Act, asserting that this count does not allege the substantive elements necessary to support a "tying action" under [Section 1](#). Characterizing Count II as constituting a claim solely for *per se* violations of [Section 1](#), defendants argue that Count II is defective because it fails to allege the existence of two distinct products and defendants' "sufficient economic power." In opposing the motion, plaintiffs argue that Count II sets forth the essential elements to maintain an action for a *per se* violation of [Section 1](#). Furthermore, [\[*460\]](#) plaintiffs argue that, even if Count II does not support a claim for a *per se* violation of the Sherman Act, their allegations state a claim under a Rule of Reason theory.

1. PER SE VIOLATIONS OF [SECTION 1](#)

[HN12](#) [Section 1](#) of the Sherman Act provides that any restraint of trade or commerce among the several states is illegal. It is well established that [HN13](#) tying arrangements comprise conduct that is illegal *per se* under [Section 1](#) of the Sherman Act. [Kentucky Fried Chicken Corporation v. Diversified Packaging \[**16\]](#) [Corporation, 549 F.2d 368, 374 \(5th Cir. 1977\)](#); see generally [Hovenkamp, Tying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy](#), 33 Hast. L.J. 325 (1981) ("Hovenkamp"). [HN14](#) A tying arrangement generally is defined as an arrangement whereby a seller agrees to sell or lease one product (the "tying product") only on the condition that the buyer also purchase or lease a second product (the "tied product").

See *Hovenkamp, supra* at 325. [HN15](#) Tying arrangements have been considered violative of the antitrust laws because by using their monopoly power in the tying product to create a monopoly in the tied product, sellers inhibit competition in the market for the tied product. *Hovenkamp, supra* at 327.

[HN16](#) To maintain an action for damages due to an allegedly illegal tying arrangement, a plaintiff must show: (1) separate tying and tied products; (2) evidence of actual coercion by the seller that forced the buyer to accept the tied product; (3) sufficient economic power held by the seller in the tying product to coerce purchaser acceptance of the tied product; (4) anticompetitive effects in the tied market; and (5) a not insubstantial effect [**17](#) on interstate commerce. [*Yentsch v. Texaco, Inc., 630 F.2d 46, 56-57 \(2d Cir. 1980\)*](#). See also [*Forther Enterprises, Inc. v. United States Steel, 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 \(1969\)*](#).

Defendants argue that plaintiffs have failed to set forth the necessary allegations, since in defendants' view the instant action involves only one product, i.e., a "leisure living package." The Court rejects this argument, however, and finds (at this pleading juncture, at least) that this case involves two distinct products.

The instant action involves both the sale of condominium units and property-related service contracts. Management services and the sale of condominium units are generically different and are not the same product. *Jones v. 247 E. Chestnut Properties*, [1975-2] Trade Cas. P 60,491, at 67,162 (N.D. Ill. 1974). It is inappropriate to characterize such disparate items as one product simply because they both are related, in some way, to a condominium development. *But see Levinson v. Maison Grande Inc., 517 F. Supp. 963 (S.D. Fla. 1981)* (court sees purchase of condominium with 99 year lease to swimming pool, located on condominium common area, to [**18](#) be a "single condominium development"; swimming pool property could not be separated from rest of condominium property).

In [*Johnson v. Nationwide Industries, Inc., 450 F. Supp. 948 \(N.D. Ill. 1978\)*](#), the court found that the purchase of a condominium was not "tied" (within the meaning of the Sherman Act) to a long-term garage lease, where the lease had been entered into years before the apartment building was converted to condominiums. However, in the same case the court held that the condominium could be illegally "tied" to a contract to manage the building. The management contract is equivalent to the service contracts at issue here. Though *Johnson* is cited by the defendants, it supports the plaintiffs' position.

Further, the reasoning of [*Chatham Condominium Ass'n., supra, 597 F.2d at 1013*](#), supports the view that the "leisure living package" argument is in the middle of the spectrum of antitrust tying law, and that facts must be developed before a court should rule as a matter of law that a leisure living package is one product. See also [*Miller v. Granados, 529 F.2d 393 \(5th Cir. 1976\)*](#) (purchase of condominium conditioned [**19](#) on acceptance of management [**19](#) contract to provide various services states a cause of action under [Section 1](#) of Sherman Act.)

Defendants also claim that plaintiffs have failed to allege that defendants have "sufficient economic power" in the tying product, i.e., the condominium real estate market. Therefore, defendants argue that plaintiffs have failed to state a claim for a *per se* violation of [Section 1](#) of the Sherman Act.

The Court finds defendants' argument unpersuasive. A fair reading of plaintiffs' amended complaint reveals that plaintiffs have alleged that defendants maintained such an economic position so as to have "the power to exact extraordinary nonprice concessions from the purchasers over and above the premium price." Amended Complaint, Count I para. 7A. Since on a motion to dismiss the Court must construe allegations in the plaintiffs' complaint as being true, the Court concludes that plaintiffs have set forth the necessary allegations to maintain an action for a *per se* violation of [Section 1](#) of the Sherman Act.

The defendants' request that the Court take judicial notice that the Chicago condominium market was "hot" in the 1970's, so that defendants cannot be said to have had "sufficient [**20](#) economic power," is disregarded. This is a matter for proof, not pleading. Cf. [*Levinson v. Maison Grande, supra*](#) (jury finds defendants did not have sufficient economic power in market).

2. RULE OF REASON

Even if unsuccessful in demonstrating all of the essential elements of a tying arrangement, plaintiffs may nevertheless prevail by showing that defendants' conduct unreasonably restrains competition. See [Fortner Enterprises, Inc. v. United States Steel Corp.](#), 394 U.S. 495, 500, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969). In the instant action, the amended complaint is replete with allegations with respect to the ways in which defendants' conduct allegedly restrained competition. Thus even if plaintiffs are unsuccessful in establishing a claim for a *per se* violation of [Section 1](#), the amended complaint nonetheless sets forth a cause of action under the federal antitrust laws.

ILLINOIS CONDOMINIUM PROPERTY ACT

Counts VI and XIV of the amended complaint allege violations of the Illinois Condominium Property Act, Ill. Rev. Stat. ch. 30 § 318.2, due to defendants' continued control over the Homeowners Association. Defendants move to dismiss these counts on the ground that [**21](#) the Homeowners Association is not subject to the Illinois Condominium Property Act.

The Court finds that Counts VI and XIV state claims upon which relief may be granted. Section 318.2 provides, in pertinent part, that the election of the board of directors of an association of condominium unit owners shall be held no later than sixty days after seventy-five percent of the units have been sold or three years after recording of the Declaration, whichever is earlier. The Declaration was recorded approximately ten years ago and no such election has taken place. The plaintiffs have alleged that the defendants adopted provisions of the Blanket Declaration and By-laws which violate the express terms of § 318.2, and that it is defendants who have refused to abide by the requirements of § 318.2. Defendants' position (obscure at best) is unsupported by case law. The Court cannot say that defendants have shown that plaintiffs cannot recover under § 318.2 as a matter of law. The motion to dismiss Counts VI and XIV is denied.

UNCONSCIONABILITY OF THE DECLARATION AND BY-LAWS

Similarly, the Court denies defendants' motion to dismiss Count V of the amended complaint, alleging the invalidity [**22](#) of certain provisions of the Declaration and By-laws. [HN17](#) The term "unconscionability" is used to describe a contract that is "improvident, totally one-sided or oppressive." [Neal v. Lacob](#), 31 Ill.App.3d 137, 334 N.E.2d 435, 439 (1st Dist. 1975). This cannot be decided on a motion to dismiss. The Court finds [*462](#) that Count V sets forth sufficient allegations to state a claim for unconscionability, and the motion to dismiss is denied.

CONCLUSION ON DEFENDANTS' MOTION TO DISMISS

Since the defendants' motion to dismiss the federal cause of action is denied, the Court has subject matter jurisdiction to hear the federal claim. By virtue of the doctrine of pendent jurisdiction, the Court will assert (at this juncture) jurisdiction over the remaining state law causes of action brought by the plaintiffs. [United Mine Workers v. Gibbs](#), 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966).

PETITION TO INTERVENE

Six individuals who were residents and owners of units in the Development have sought leave to intervene in this action, pursuant to [Fed. R. Civ. P. 24\(a\)](#), as party plaintiffs. They have attached a copy of their proposed complaint. This complaint sets forth the same [**23](#) basic facts and legal theories of the plaintiff Associations' amended complaint. In addition, the potential intervenors seek leave to represent a class of all persons who owned units in the Development during the period between May 18, 1978, and May 18, 1982. They allege that the class consists of more than 600 unit owners.

The defendants oppose the petition to intervene and present a curious argument. They say that the intervenors need not appear here because their interests are adequately represented by the plaintiff Associations. Yet in their motion to dismiss, they have argued that the Associations lack standing to bring the amended complaint, because "any rights of recovery lie with the individual unit owners, not with plaintiff Condominium Associations . . ." (Defendants' Motion to Dismiss, at 1-2). The inconsistency of the defendants' positions is apparent.

In any case, for the reasons stated above the plaintiff Associations lack standing under the antitrust laws to sue for money damages. However, the individuals themselves are not so disabled. They can fill the gap left open by the Court's ruling on defendants' motion to dismiss Counts I and III. Further, they meet **[**24]** the criteria set forth in Fed. R. Civ. P. 24(a), for intervention as of right. The petition to intervene is granted, and the intervening plaintiffs are granted leave to file their complaint. Of course, the Court has not yet ruled upon whether the intervening plaintiffs may represent a class.

IT IS THEREFORE ORDERED that

- (1) Defendants' motion to dismiss is granted as to Counts I and III of the amended complaint, and is denied in all other respects.
- (2) The petition to intervene is granted, and the intervening plaintiffs are granted leave to file their complaint.
- (3) Defendants are to answer the plaintiffs' amended complaint and the intervening plaintiffs' complaint within 21 days.
- (4) A status hearing is set for September 16, 1983, at 9:45 a.m. Parties are to present a proposed discovery schedule at that time, specifying dates for the exchange of documents, the propounding of interrogatories, and the taking of depositions.

End of Document



Southaven Land Co. v. Malone & Hyde, Inc.

United States Court of Appeals for the Sixth Circuit

December 9, 1982, Cause Argued ; August 23, 1983, Decided

No. 81-5736

Reporter

715 F.2d 1079 *; 1983 U.S. App. LEXIS 24590 **; 1983-2 Trade Cas. (CCH) P65,564

SOUTHHAVEN LAND CO., INC., Plaintiff-Appellant, v. MALONE & HYDE, INC., Defendant-Appellee

Prior History: [*1] ON APPEAL from the United States District Court for the Western District of Tennessee.

Disposition: AFFIRMED.

Core Terms

damages, antitrust, consumer, grocery, target area, premises, relevant market, retail, antitrust violation, remote, direct injury, competitor, injuries, lease, food, Clayton Act, adjudged, initiate, shopping, tests, inextricably intertwined, antitrust action, geographic area, anti trust law, direct victim, grocery store, psychologists, conspirators, monopolize, inflicted

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Motions to Dismiss

HN1 [] **Defenses, Demurrsers & Objections, Motions to Dismiss**

The allegations of the complaint must be accepted as true for purposes of Fed. R. Civ. P. 12(b)(6) analysis.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

HN2 [] **Private Actions, Standing**

Section 4 of the Clayton Act, 15 U.S.C.S. § 15, identifies in sweeping language those "persons" entitled to initiate an antitrust action. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue and shall recover threefold the damages by him sustained.

715 F.2d 1079, *1079 (1983 U.S. App. LEXIS 24590, **1

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

Antitrust & Trade Law > Clayton Act > General Overview

HN3 **Private Actions, Standing**

Although on its face, § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), contains little in the way of restrictive language, and consistent with congressional intent, the federal forum must guard against engrafting artificial limitations on the § 4 remedy, application of § 4 has of necessity been judicially confined to limit the remedy available thereunder to particular classes of persons and for redress of particular forms of injury.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

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

HN4 **Private Actions, Standing**

Judicial limitation of the remedy under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), to those persons and injuries within the core of congressional concern, while simultaneously guarding against the imposition of "artificial limitations" of the facially unrestrictive § 4 remedy, has proven to be less than an empirical judicial science. In an attempt to relieve this dichotomy, the circuit courts have embraced various analytical doctrines including the "direct injury" test and "target area" test. Under the target area test the injured party must be the "target" of the anticompetitive practice before he may sue.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

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

Antitrust & Trade Law > Clayton Act > General Overview

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN5 **Remedies, Damages**

The court has committed itself to the principles that in order to have "standing" to sue for treble damages under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), a person must be within the "target area" of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly, courts have drawn a line excluding those who have suffered economic damage by virtue of their relationships with "targets" or with participants in an alleged antitrust conspiracy, rather than being "targets" themselves. Excluded as targets are those who have suffered economic damage by virtue of their relationships with "targets." A "target" is

715 F.2d 1079, *1079 (1983 U.S. App. LEXIS 24590, **1

defined as a person or business against which competitive aim is taken. The line is clearly drawn by requiring that to have standing one must be an object of an antitrust conspiracy.

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

[**HN6**](#) [down] Antitrust & Trade Law, Clayton Act

The "target area" test arose as a means of limiting the class of potential treble-damage plaintiffs to those persons who could most adequately vindicate the purposes of the antitrust laws. To attain standing a person whether a corporation or individual must be one against whom the conspiracy is aimed. The complainant must show that he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

[**HN7**](#) [down] Clayton Act, Claims

Under the "direct injury" test the injury of the plaintiff alleging violations of § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), must not be too remote from the alleged antitrust violation. The concept of "direct injury" focuses on the relationship between the plaintiff and the defendant. If the alleged injury is "remote," such as that of a stockholder or creditor of a corporation injured by the defendant, standing is denied. The direct injury test, accordingly, injects into the § 4 inquiry concepts of "relationship" very analogous to those of foreseeability developed in doctrines of common law negligence.

Antitrust & Trade Law > Clayton Act > Scope

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Environmental Law > Land Use & Zoning > Constitutional Limits

Antitrust & Trade Law > Clayton Act > General Overview

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

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

[**HN8**](#) [down] Antitrust & Trade Law, Clayton Act

715 F.2d 1079, *1079 (1983 U.S. App. LEXIS 24590, **1

A less restrictive test of "standing" is that the "person" pleading (1) injury in fact and (2) an interest arguably within the zone of interests to be protected or regulated by § 4 of the Clayton Act, [15 U.S.C.S. § 15](#) possess "standing" to initiate an antitrust action.

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

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

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Constitutional Law > The Judiciary > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

[HN9](#) [down] Justiciability, Standing

Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of U.S. Const. art. III which restricts judicial power to "cases" and "controversies." In terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. The doctrine of standing poses the question whether a particular person is a proper party to litigate a given issue. Undoubtedly, the principal function of the doctrine is as a device to eliminate those plaintiffs who are jurisdictionally barred by Article III from maintaining a suit.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

[HN10](#) [down] Clayton Act, Claims

As a prerequisite to "standing" under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), plaintiffs must prove an antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would be likely to cause.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Antitrust & Trade Law > Clayton Act > General Overview

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

715 F.2d 1079, *1079 (1983 U.S. App. LEXIS 24590, **1

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

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

[**HN11**](#) [down] **Clayton Act, Claims**

In order to establish standing in an antitrust action, the circuit continues to require (1) that the plaintiff allege injury in fact and (2) that the interest which the plaintiff seeks to protect is arguably within the zone of interests protected by the statute in question. Added to that standard is the requirement that the plaintiff allege antitrust injury when seeking treble damages under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#). Unlike the "direct injury" and "target area" tests, an element of proximate cause is not injected into the standing inquiry; rather, it compels the court to focus on the type of injury pleaded and its relationship to the alleged anticompetitive conduct.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

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

[**HN12**](#) [down] **Private Actions, Standing**

Two areas of sub-analysis are employed by the court to identify those injuries characterized as "too remote." The court looks (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#).

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

Torts > ... > Elements > Causation > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

[**HN13**](#) [down] **Private Actions, Standing**

In its most recent antitrust "standing" decision, the supreme court has removed all doubt as to the relevant inquiries to be implemented by federal courts confronting the perimeters of § 4 of the Clayton Act, [15 U.S.C.S. § 15](#). Examination of the legislative history of § 4 has prompted the Supreme Court to conclude that congress simply assumed that the antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation. The judicially-created doctrines which circumscribed the availability of damages at the time of promulgation of § 4 include concepts of foreseeability, proximate cause, directness of injury, certainty of damages, and privity of contract. The issue of whether a § 4 plaintiff may recover for the injury it allegedly suffered requires the federal court, as mandated in common-law damages litigation evolving from the 1890s, to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Antitrust & Trade Law > Clayton Act > General Overview

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

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

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

HN14 [+] **Clayton Act, Claims**

The inquiry under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), is distinct from the constitutional "standing" inquiry. The label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN15 [+] **Private Actions, Standing**

In an obvious attempt to implement uniformity among the circuits in the area of antitrust "standing," and discourage use of analytical "tests" which may impermissibly restrict inquiry under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), the Supreme Court has forewarned that labels such as directness of the injury, target area, and zone of interests may lead to contradictory and inconsistent results and has proclaimed that courts should analyze each situation in light of certain factors. The "factors" include: (1) the causal connection between the antitrust violation and harm to plaintiff and whether that harm was intended to be caused; (2) the nature of plaintiff's alleged injury including the status of plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN16 [+] **Private Actions, Standing**

It is virtually impossible to announce a black-letter rule for standing that will dictate the result in every case.

Antitrust & Trade Law > Clayton Act > Claims

715 F.2d 1079, *1079 (1983 U.S. App. LEXIS 24590, **1

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN17 [blue icon] **Clayton Act, Claims**

A significant element of the "standing" inquiry under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), is the nature of the plaintiff's alleged injury either as a "customer" or "participant" in the "relevant market." It is appropriate to focus on the nature of the plaintiff's alleged injury.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN18 [blue icon] **Private Actions, Standing**

An injury "inextricably intertwined" with the injury sought to be inflicted upon the relevant market or participants therein may fall "within the area of congressional concern" so as to satisfy the inquiry under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

HN19 [blue icon] **Clayton Act, Claims**

The "existence of more direct victims" of the alleged antitrust violation is another related area of inquiry in evaluating "standing" under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#). More direct victims may justify denial of a § 4 remedy to those only tangentially injured since such is not likely to leave a significant antitrust violation undetected or unremedied.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

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

HN20 [blue icon] **Remedies, Damages**

Yet another relationship to be considered in the "standing" inquiry under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), is the directness or indirectness of the asserted injury. Particularly, indirect injuries may render damages highly speculative or create situations of complexity that would foreclose an equitable determination and apportionment of damages.

Counsel: Robert M. Fargarson, Neely, Green & Fargarson, Memphis, Tennessee, Bruce Brooke, for Appellant.
Jef Feibelman, Memphis, Tennessee, for Appellee.

Judges: Lively and Krupansky, Circuit Judges, and Celebrezze, Senior Circuit Judge.

Opinion by: KRUPANSKY

Opinion

[*1080] KRUPANSKY, Circuit Judge.

This action joins inquiry into the evolving doctrine of antitrust "standing" under Section 4 of the Clayton Act, [15 U.S.C. § 15](#). Plaintiff Southaven Land Company, Inc. (Southaven) initiated the instant cause of action against Malone & Hyde, Inc. (Malone) seeking injunctive and monetary relief for injuries allegedly resulting from Malone's violation of [Section 2](#) of the Sherman Act, [15 U.S.C. § 2](#). Southaven appealed from the judgment of the United States District Court for the Western District of Tennessee granting Malone's motion to dismiss, [Rule 12\(b\), Fed. R. Civ. P.](#), adjudging that Southaven lacked "standing" to initiate an antitrust action.

HN1 [**2] The allegations of the complaint must be accepted as true for purposes of [Rule 12\(b\)\(6\)](#) analysis. Briefly summarized the complaint asserts Southaven is an owner-lessor of retail commercial space in the geographic area of Southaven, Mississippi. Malone is engaged in the wholesale and retail sale of food, drugs and sundries in a multistate area including the geographical area of Southaven, Mississippi. On or about May 15, 1974, Malone assumed a lease to premises owned by Southaven, which incorporated a covenant restricting the use of the premises to the operation of a retail grocery business. Subsequent to its assumption of the lease, Malone executed a series of subleases with successive third parties to operate grocery stores at the Southaven location in accordance with the above defined restrictive covenant. The last of these successive subtenants, Southaven Food Center, Inc. (SFC), filed a petition in bankruptcy. Malone has not subleased the premises since SFC's business demise.

During 1974, and thereafter, Malone also owned and operated other retail grocery outlets in the Southaven geographical area and, it is alleged, intentionally sought to destroy competition, monopolize and control [***3] the food supply in that area, and had undertaken to cut prices and otherwise destroy and foreclose the operation of a successful grocery store at Southaven's commercial property.

Subsequent to the bankruptcy of SFC, Malone's last subtenant, Southaven initiated negotiations with Malone seeking a cancellation of Malone's lease to enable Southaven to replace Malone with a viable grocery operator in the premises. Pursuant to the negotiations whereby Southaven sought to regain control of the property, an agreement ¹ was derived providing for the cancellation of the Malone lease and delivery of the premises and equipment to Southaven whereupon Malone would be released from [*1081] its obligations at the site. In reliance upon said agreement, Southaven secured a viable tenant to operate a grocery store at the shopping center site.

Upon learning that Southaven [***4] was prepared to immediately implement the operation of a grocery store at its commercial location, Malone refused to execute the mutual cancellation agreement with the calculated purpose to further its monopoly and eliminate competition. Malone, with intent to destroy the site as a present and future location for the operation of a retail grocery outlet, removed its equipment from the premises thereby rendering them unfit as a retail grocery outlet.

¹ It appears that this agreement was never reduced to writing. See: Complaint, Exhibit B (Mutual Cancellation Agreement executed only by Southaven.)

Accordingly, Southaven's injury is charged to have accrued as a result of its contract negotiations with the alleged antitrust violator. The complaint noticeably fails to aver that Southaven sustained any injury as a competitor, purchaser, consumer or other economic actor in the grocery industry. The district court, styling the issue as "whether a 'non-operating' lessor of premises has standing to complain about conduct purportedly aimed at monopolizing a market in which the lessor's tenants compete", adjudged that Southaven lacked "standing" under § 4 of the Clayton Act. This appeal ensued.

HN2 [↑] Section 4 of the Clayton Act, [15 U.S.C. § 15](#), [**5] identifies in sweeping language those "persons" entitled to initiate an antitrust action:

Any person who shall be injured in his business or property by reason of *anything* forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained . . . (emphasis added)

HN3 [↑] Although "on its face, § 4 contains little in the way of restrictive language", [Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 2545, 73 L. Ed. 2d 149 \(1982\)](#), [Reiter v. Sonotone Corp., 442 U.S. 330, 337, 99 S. Ct. 2326, 2330, 60 L. Ed. 2d 931 \(1979\)](#), and, consistent with congressional intent, the federal forum must guard against "engraft[ing] artificial limitations on the § 4 remedy", [McCready, supra, 102 S. Ct. at 2545](#), application of § 4 has of necessity been judicially confined to limit the remedy available thereunder to particular classes of persons and for redress of particular forms of injury. See also: [Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 \(1983\)](#). [**6]

HN4 [↑] Judicial limitation of the § 4 remedy to those persons and injuries within the core of congressional concern, while simultaneously guarding against the imposition of "artificial limitations" of the facially unrestrictive § 4 remedy, has proven to be less than an empirical judicial science. In an attempt to relieve this dichotomy, the circuit courts have embraced various analytical doctrines including the "direct injury" test and "target area" test. Under the target area test the injured party "must be the 'target' of the anti-competitive practice before he may sue." [Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546 \(5th Cir. 1980\)](#). The oft-cited decision of [Calderone Enterprises Corp. v. United Artists Theatre Circuit, 454 F.2d 1292 \(2d Cir. 1971\)](#) provides the following rule:

HN5 [↑] This court has committed itself to the principles that in order to have "standing" to sue for treble damages under § 4 of the Clayton Act, a person must be within the "target" [**7] area" of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly, we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with "targets" or with participants in an alleged antitrust conspiracy, rather than being "targets" themselves.

Id. at 1295 (emphasis added). ² *Calderone*, therefore, excludes as targets those "who have suffered economic damage by virtue of their relationships with 'targets' ". *Id. at 1295*.

[*1082] The Fifth Circuit, referencing a "target area" test, has also framed the pertinent inquiry in terms of sector of the economy:

² *Calderone* defined a "target" as

a person or business against which competitive aim is taken. The line is clearly drawn by requiring that to have standing one must be an object of an antitrust conspiracy.

Id. at 1296, note 2.

[**8]

HN6 [↑] The "target area" test arose as a means of limiting the class of potential treble-damage plaintiffs to those persons who could most adequately vindicate the purposes of the anti-trust laws. To attain standing a person (whether a corporation or individual) must be one against whom the conspiracy is aimed. Or, put in plutonomic terms, the complainant must show that he is *within that sector of the economy which is endangered by a breakdown of competitive conditions* in a particular industry. (emphasis added)

Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975). Accord: In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir. 1973), cert. denied sub nom. Morgan v. Automobile Manufacturing Association, 414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336 (1973) (compilation of cases referring to "direct injury" and "target area" tests). See also: In re Industrial Gas Antitrust Litigation, 681 F.2d 514 (7th Cir. 1982); Reading Industries, Inc. v. Kennecott Copper Corp., 631 F.2d 10, 12 (2d Cir. 1980); [**9] Long Island Lighting Co. v. Standard Oil Co. of Calif., 521 F.2d 1269, 1274 (2d Cir. 1975), cert. denied, 423 U.S. 1073, 96 S. Ct. 855, 47 L. Ed. 2d 83 (1976); In re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436 (5th Cir. 1982); Engine Specialties Inc. v. Bombardier, Ltd., 605 F.2d 1, 18-19 (1st Cir. 1979); Schwimmer v. Sony Corp. of America, 637 F.2d 41, 46 (2d Cir. 1980); Ostrofe v. H.S. Crocker Co., Inc., 670 F.2d 1378 (9th Cir. 1982).

HN7 [↑] Under the "direct injury" test the injury of the § 4 plaintiff must not be too remote from the alleged antitrust violation:

The concept of "direct injury," derived from Loeb v. Eastman Kodak, 183 F. 704 (3rd Cir. 1910), focuses on the relationship between the plaintiff and the defendant. If the alleged injury is "remote," such as that of a stockholder or creditor of a corporation injured by the defendant, standing is denied. Loeb, supra; Gerli v. Silk Association of America, 36 F.2d 959, 960 (S.D. N.Y. 1919). [**10]

Chrysler Corporation v. Fedders Corporation, 643 F.2d 1229, 1233 (6th Cir. 1981). The direct injury test, accordingly, injects into the § 4 inquiry concepts of "relationship" very analogous to those of foreseeability developed in doctrines of common law negligence.

This Circuit has on two occasions expressly rejected the "direct injury" and "target area" tests as limiting the § 4 remedy. See: Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975); Chrysler Corp. supra. In Malamud it was concluded that both tests "demand[ed] too much from plaintiffs at the pleading stage of a case", 521 F.2d at 1149, and further "enabled [the court] to make a determination on the merits of a claim under the guise of assessing the standing of the claimant." Id. at 1150 (original emphasis). **HN8** [↑] The less restrictive test of "standing" as pronounced in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970) was adopted in [**11] Malamud. Thereunder, the § 4 "person" pleading (1) injury in fact and (2) an interest arguably within the zone of interests to be protected or regulated by the statute in question possessed "standing" to initiate an antitrust action. Since the *Data Processing* zone of interests test was derivative of Article III of the United States Constitution, *Malamud* effectively engrafted a constitutional definition of standing into antitrust law.³

³The Supreme Court prefaced its discussion in *Data Processing* with the following observation:

HN9 [↑] Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to "cases" and "controversies". As we recently stated in Flast v. Cohen, 392 U.S. 83, 101, 88 S. Ct. 1942, 1953, 20 L. Ed. 2d 947 "In terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

397 U.S. at 151-52, 90 S. Ct. at 829. *Malamud* reflected:

[**12] [*1083] Subsequent to *Malamud* the Supreme Court issued [*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 \(1977\)*](#), establishing therein the requirement of "antitrust injury" [HN10](#)
[] as a prerequisite to § 4 "standing":

Plaintiffs must prove an *antitrust* injury, which is to say injury of the type the anti-trust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of the anti-competitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. [100] at 125, 89 S. Ct. [1562] at 1577.

[429 U.S. at 489, 97 S. Ct. at 697-98](#) (original emphasis; footnote omitted). In [*Chrysler Corp., supra*](#), this Circuit adjudged that *Brunswick* did not vitiate the *Malamud* test of § 4 "standing" but, rather, *added* an "antitrust" [\[*13\]](#) injury" requirement:

[HN11](#)[] In order to establish standing in an antitrust action, this circuit continues to require (1) that the plaintiff allege injury in fact and (2) that the interest which the plaintiff seeks to protect is arguably within the zone of interests protected by the statute in question. *Brunswick* adds to that standard the requirement that the plaintiff allege *antitrust* injury when seeking treble damages under § 4 of the Clayton Act. Unlike the "direct injury" and "target area" tests, *Brunswick* does not inject an element of proximate cause into the standing inquiry; rather, it compels the court to focus on the *type* of injury pleaded and its relationship to the alleged anti-competitive conduct.

[*Chrysler Corp., supra, 643 F.2d at 1235*](#). The "target area" test was again expressly rejected as overburdening the plaintiff at the pleading stage and impermissibly authorizing a court to issue a determination on the merits of a claim under the guise of assessing standing, [*Chrysler Corp., supra, 643 F.2d at 1233*](#), and, additionally, [\[*14\]](#) "inject[ing] an element of proximate cause into the standing inquiry." [*Id. at 1235*](#).

Re-examination of this Circuit's § 4 "standing" doctrine as enunciated in *Malamud* and *Chrysler Corp.* is mandated by the Supreme Court's recent decisions in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982) and [*Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 \(1983\)](#). In *McCready* plaintiff Carol McCready (McCready) subscribed to a group health plan which had been purchased by her employer, Prince William County, Virginia, from defendant Blue Shield of Virginia (Blue Shield). The Blue Shield health plan authorized reimbursement to subscribers for psychotherapy services provided by psychiatrists but did not provide similar reimbursement for services rendered by psychologists unless the treatment was supervised by and billed through a physician. McCready engaged the services of a psychologist and was subsequently denied reimbursement by Blue Shield in accordance with the plan's provisions. McCready [\[*15\]](#) thereupon initiated a class action alleging that Blue Shield and the Neuropsychiatric Society of Virginia, Inc. had conspired in violation of [§ 1](#) of the Sherman Act, [15 U.S.C. § 1](#), to exclude and boycott clinical psychologists from receiving compensation under Blue Shield group health plans. The Fourth Circuit, applying the target area doctrine, adjudged that McCready's loss was not "too remote" or indirect to be covered by the Act. [649 F.2d 228 \(4th Cir. 1981\)](#). Affirming, the Supreme Court majority in *McCready* concluded that deference to statutory policy had prompted acknowledgement of two categories of judicial confinement of the § 4 remedy: (1) cases presenting a risk of duplicative recovery and (2) cases wherein the persons "sustained injuries too remote [from an antitrust violation] to give them standing to sue" [\[*1084\]](#) for damages under § 4". [102 S. Ct. at 2547](#), citing [*Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 n.7, 52 L. Ed. 2d 707, 97 S. Ct. 2061 \(1977\)](#). [HN12](#)[] Two areas of sub-analysis were employed [\[*16\]](#) by the Court to identify those injuries characterized as "too remote":

The doctrine of standing poses the question whether a particular person is a proper party to litigate a given issue. Undoubtedly, the principal function of the doctrine is as a device to eliminate those plaintiffs who are jurisdictionally barred by Article III from maintaining a suit.

We look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.

102 S. Ct. at 2548.

Applying the first area of sub-analysis for identifying an injury as "too remote", to-wit, the physical and economic nexus between the alleged violation and the harm to the plaintiff, the Court concluded that McCready's injury was not too remote since, as a recipient of psychotherapy services, she was "within that area of the economy . . . endangered by [that] breakdown of competitive conditions' resulting from Blue Shield's selective refusal to reimburse." 102 S. Ct. at 2549, citing Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 129 (9th Cir. 1973).⁴ Applying the second area of sub-analysis for identifying an injury as "too remote", namely, the relationship of the injury **17 alleged with those forms of injury which Congress was likely to have been concerned, the Court adjudged that her injury was "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market", 102 S. Ct. at 2551, and therefor "squarely within the area of congressional concern." *Id.* Accordingly, McCready injects into the § 4 inquiry elements of proximity and directness which were deemed impermissible by this Court in *Chrysler Corporation*.⁵ The "constitutional" concept of standing, as espoused in *Data Processing* and adopted in *Malamud*, was not acknowledged in *McCready* as pertinent to the § 4 inquiry.

**18 HN13[] In its most recent antitrust "standing" decision, Associated General Contractors, supra, the Supreme Court removed all doubt as to the relevant inquiries to be implemented by federal courts confronting the perimeters of § 4. Examination of the legislative history of § 4 prompted the Supreme Court to conclude that "Congress simply assumed that the antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation". 459 U.S. at 533, 103 S. Ct. at 906. The judicially created doctrines which circumscribed the availability of damages at the time of promulgation of § 4 included concepts of foreseeability, proximate cause, directness of injury, certainty of damages and privity of contract. 459 U.S. at 532-33, 103 S. Ct. at 905-06. The issue of whether a § 4 plaintiff "may recover for the injury it allegedly suffered" requires the federal court, as mandated in common-law damages litigation evolving from the 1890s, to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, **19 and the relationship between them." 459 U.S. at 535, 103 S. Ct. at 907. HN14[] The § 4 inquiry is distinct from the constitutional "standing" inquiry:

The label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional **1085 standing requirement of injury in fact, but the court must make a *further* determination whether the plaintiff is a proper party to bring a private antitrust action.

459 U.S. at 535, note 31, S. Ct. at 907, note 31 (emphasis added). HN15[] Significantly, in an obvious attempt to implement uniformity among the circuits in the area of antitrust "standing", and discourage use of analytical "tests" which may impermissibly restrict the § 4 inquiry,⁶ **21 the Supreme Court forewarned **20 that labels such as

⁴ The language of *Multidistrict Vehicle Air Pollution*, cited with approval by the Supreme Court, was twice rejected by this Circuit. See Chrysler Corp., supra, 643 F.2d at 1233; Malamud, supra, 521 F.2d at 1149.

⁵ The inquiry of whether an injury is "too remote" from an antitrust violation was analogized to an inquiry of proximate cause: In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of "proximate cause".

directness of the injury, target area and zone of interests "may lead to contradictory and inconsistent results", and proclaimed that "in our view, courts should analyze each situation in light of the factors set forth in the text *infra*." [459 U.S. at 537, 103 S. Ct. at 908](#), note 33.⁷ The "factors" expressly identified as such in the text include, *inter alia*, (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. [103 S. Ct. at 908-13](#).

[**22] *McCready and Associated General Contractors* exemplify that innumerable elements, including proximity and directness, constitute proper areas of inquiry in identifying a "person" injured by reason of a violation of the antitrust laws within the meaning of § 4. Examination of these factors facilitates identification of "who is entitled to prosecute an action under § 4".⁸ [**23] *Associated General Contractors, supra*. [459 U.S. at 545](#), note 51, [103 S. Ct. at 912](#), note 51. These two most recent pronouncements by the Supreme Court encompass a divergent analysis from that articulated by this Circuit in *Malamud* and *Chrysler Corporation*. Accordingly, this Court acknowledges [*1086] the Supreme Court's concern that the various tests used by the Circuits, including this Circuit's zone of interests test, may result in inconsistent adjudications, and accordingly shall henceforth implement the Supreme Court's directive to consider the § 4 inquiry on a case by case basis by applying the criteria mandated by *Associated General Contractors*.⁹

⁶ The Court conceded that "[HN16](#)" it [is] virtually impossible to announce a black-letter rule that will dictate the result in every case". [Id., 459 U.S. at 536, 103 S. Ct. at 908](#).

⁷ Footnote 33 provides in full:

Some courts have focused on the directness of the injury, e.g., [Loeb v. Eastman Kodak Co., 183 F.704, 709 \(CCA3 1910\)](#); [Productive Inventions, Inc. v. Trico Prods. Corp., 224 F.2d 678, 679 \(CA2 1955\)](#), cert. denied, 350 U.S. 936, 76 S. Ct. 301, 100 L. Ed. 818 (1956); [Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 394-395 \(CA6 1962\)](#), cert. denied, 372 U.S. 907, 83 S. Ct. 721, 9 L. Ed. 2d 717 (1963). Others have applied the requirement that the plaintiff must be in the "target area" of the antitrust conspiracy, that is, the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. E.g., [Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546-547 \(CA5 1980\)](#); [Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 17-18 \(CA1 1979\)](#); [Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292-1295 \(CA2 1971\)](#). Another court of appeals has asked whether the injury is "arguably within the zone of interests protected by the antitrust laws." [Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151-1152 \(CA6 1975\)](#). See generally Berger & Bernstein, *supra* n.31.

As a number of commentators have observed, these labels may lead to contradictory and inconsistent results. See Berger & Bernstein, *supra* n.31, at 835, 843; Handler, The Shift From Substantive to Procedural Innovations in Antitrust Suits, 71 Colum.L.Rev. 1, 27-31 (1971); Sherman, Antitrust Standing: From *Loeb* to *Malamud*, 51 N.Y.U.L.Rev. 374, 407 (1976) ("it is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case"). In our view, courts should analyze each situation in light of the factors set forth in the text *infra*.

This directive to the federal forum appears to conclusively resolve the inquiry left open in *McCready* wherein the Court acknowledged that the various aids to analysis implemented by the circuit courts were "possibly conflicting" but refused to "evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury." [McCready, supra, 457 U.S. at 477-78, 102 S. Ct. at 2547](#), note 12.

⁸ Phrased differently, the antitrust court is to ascertain "whether the law affords a remedy in specific circumstances" or "whether the [plaintiff] may recover for the injury it allegedly suffered". [Associated General Contractors, supra, 459 U.S. at 535](#) and , 103 S. Ct. at 908 and 907.

⁹ The case at bar does not require this Court to confront the issue of whether the factors enunciated in *Associated General Contractors* are exhaustive or merely illustrative.

In the action *sub judice* it is alleged that Malone intentionally monopolized the food market industry in the Southaven, Mississippi geographical area. As previously narrated, when Malone became aware that Southaven had a tenant which was prepared to immediately compete in the relevant grocery market in its leased premises at the Southaven commercial center, it refused to execute a written mutual cancellation agreement to surrender the premises to Southaven. Malone's conduct, it is charged by the complaint, was intended to perpetuate and promote its monopoly of the grocery market.

HN17[] A significant element of the § 4 "standing" inquiry is the nature of the plaintiff's alleged injury either as a "customer" or "participant" in the "relevant market":

In this case it is appropriate to focus on the nature of the plaintiff's [**24] alleged injury. As the legislative history shows, the Sherman Act was enacted to assure *customers* the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of *participants* in the *relevant market*.

Associated General Contractors, supra, 459 U.S. 519, 103 S. Ct. at 908-09 (emphasis added). In the case before this Court the "relevant market" has been identified in the complaint as the retail grocery industry in the geographical area of Southaven, Mississippi. The pleading probatively concedes that Southaven is neither a consumer, competitor or participant in that market. Rather, Southaven is a lessor of commercial premises whose grocery outlet lessee's compete in the relevant product market. However, a finding or concession that Southaven is not a direct participant in the relevant market is not dispositive of the § 4 "standing" issue. *McCready* instructs that *HN18*[] an injury "inextricably intertwined" with the injury sought to be inflicted upon the relevant market or participants therein [**25] may fall "within the area of congressional concern" so as to satisfy the § 4 inquiry. In *McCready* it was alleged that Blue Shield and the Neuropsychiatric Society of Virginia, Inc., conspired to restrain competition in the market for psychotherapeutic services by providing insurance coverage only for consumers who patronize psychiatrists rather than psychologists. Through economic incentives, the conspirators were alleged to have channeled "consumers" of psychotherapeutic services, such as *McCready* and her class, to effect an economic boycott of competitors of psychiatrists in the relevant market. This manipulation of a class of consumers of psychotherapeutic services served to "inextricably intertwine[] their injuries with those injuries sought by the conspirators to be inflicted upon participants in the psychotherapy market. In the case at bar Southaven's injury cannot be construed as "inextricably intertwined", within the meaning of *McCready*, with the injury allegedly inflicted by Malone upon the relevant grocery market so as to make Southaven's injury "of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." *McCready, supra, 457 U.S. at 483, 102 S. Ct. at 2550,* [**26] referencing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697-98, 50 L. Ed. 2d 701 (1977)*. Southaven is not alleged to be a member of a class of "consumers" of grocery products or a class otherwise manipulated or utilized by Malone as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical markets. Although Southaven's injury may be a tangential by-product of Malone's averred monopolistic conduct, such injury is not *inextricably intertwined* to any injury inflicted [*1087] upon the relevant market. Accordingly, Southaven is not a consumer, customer, competitor or participant in the relevant market or otherwise inextricably intertwined with any such entity. Its injury is not sufficiently linked to the pro-competitive policy of the antitrust laws.¹⁰

[**27] *HN19*[]

¹⁰ Specifically, Malone is alleged to have monopolized the grocery industry in violation of *Section 2* of the Sherman Act. Monopoly power is the power to control prices or exclude competition. *U.S. v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Accord: *Borden, Inc. v. Federal Trade Commission, 674 F.2d 498, 507 (6th Cir. 1982); Bataseed, Inc. v. U & I Inc., 681 F.2d 1203, 1231 (9th Cir. 1982); Dimmit Agri Industries, Inc. v. CPC International Inc., 679 F.2d 516, 525 (5th Cir. 1982)*. Logic dictates, therefore, that the primary class of persons protected by *§ 2* are those adversely affected as a result of controlled prices or an exclusion of competition. In the case at bar Southaven has not adduced an injury resulting from either controlled prices of grocery products or exclusion of competitors or participants in the grocery industry.

The "existence of more direct victims" of the alleged antitrust violation is another related area of § 4 inquiry in evaluating "standing". [Associated General Contractors, supra, 459 U.S. at 545, 103 S. Ct. at 913](#). More direct victims may justify denial of a § 4 remedy to those only tangentially injured since such "is not likely to leave a significant antitrust violation undetected or unremedied." [Id., 459 U.S. at 542, 103 S. Ct. at 911](#). That there exists, in the case at bar, more direct victims of Malone's alleged monopoly follows as an inescapable corollary to the foregoing observation that Southaven is neither a consumer or participant in the relevant market. These two categories of potential plaintiffs -- consumers and participants -- are obviously more direct victims. Indeed, Southaven's complaint acknowledges the existence of both classes of injured parties.¹¹

[**28] [HN20](#)

Yet another relationship to be considered in the § 4 "standing" inquiry is " the directness or indirectness of the asserted injury." [Id., 459 U.S. at 540, 103 S. Ct. at 910](#). Particularly, indirect injuries may render damages highly speculative or create situations of complexity that would foreclose an equitable determination and apportionment of damages. Confronting the issue of Southaven's damages, the complaint is notable for what it fails to allege. Southaven has not plead that Malone has breached or failed to perform any condition or covenant in its lease which it assumed on May 15, 1974. Particularly, Southaven has not alleged that Malone has failed to tender rental payments. Nor does the complaint state that Southaven would receive greater rental from its proposed lessee than it would receive from Southaven under the existing lease. In sum, it has not been plead that Malone's alleged breach of contract caused Southaven financial disadvantage. Nevertheless, the complaint prays for "actual damages of \$500,000.00 or such damage as may be established at the trial [**29] and as provided in [15 U.S.C. § 15](#) including treble damages" and punitive damages in an equal amount. It appears that the only allegation in the pleading which serves to identify with any specificity economic injury to Southaven is the following:

Malone . . . has intentionally sought to destroy competition, monopolize and control the food market and food supply in interstate commerce and has undertaken to cut prices and otherwise *destroy the feasibility of a grocery store in Plaintiff's shopping center* and this area of interstate commerce. [Malone's] acts of unfair competition and monopolization have *subverted Plaintiff's business and financial interests* as well as the interests of the consuming public and other food suppliers and retailers. (Paragraph 6, emphasis added).

[*1088] Liberally construed, this allegation may support the inference that Southaven has been injured, as a lessor of retail premises, in its ability to command premium rent from *all* lessees due to an economically unattractive shopping area resulting from lack of a grocery enterprise therein. However, to the extent that Southaven's injury is predicated upon [**30] a diminished consumer interest in and activity at its shopping area as a result of consumer preference for shopping centers with grocery retailers, and a corresponding inability to realize high rents from other lessees, ascertainment of damages to compensate such injury would necessitate wide ranging speculation, particularly since diminished consumer activity at any given shopping area could result from myriad independent reasons unrelated to the alleged antitrust violation.¹² See: [Associated General Contractors, supra, 459 U.S. at 542, 103 S. Ct. at 911](#) ("the [plaintiff's] damages claim is also highly speculative").

¹¹ The complaint states at Paragraph 6:

Defendant's acts of unfair competition and monopolization have subverted Plaintiff's business and financial interests as well as the interests of the consuming public and other food suppliers and retailers.

Similarly, Paragraph 8 provides:

[Malone] desires to destroy the site as a present and future location for the retail sale of groceries and further desires to illegally dominate, control and monopolize the free competition in the area by damaging Plaintiff, the consuming public and other business in the trade area.

¹² Further, should Southaven possess a § 4 remedy against Malone predicated upon diminished lease revenue resulting from less consumer activity at a shopping area without a grocery enterprise, then it follows axiomatically that Southaven's non-grocery lessees would possess a similar cause of action predicated upon diminished sales resulting from less consumer activity. Not only would the potential damage claims of these absent plaintiffs be highly speculative, but apportionment of damages among

[**31] Last, it is observed that Southaven's injury is "remedial under other laws", namely, contract law. [Associated General Contractors, supra, 103 S. Ct. at 911.](#)

In the action *sub judice* Southaven has plead a causal connection between its injury and an antitrust violation; it has also adduced that Malone intended to cause that harm. However, these two factors were also satisfied in *Associated General Contractors* and adjudged insufficient, when compared with other factors, to satisfy the § 4 inquiry. A careful consideration and balancing of the most relevant criteria mandated in *Associated General Contractors* leads this Court to conclude that Southaven is not a proper plaintiff under § 4 of the Clayton Act. The judgment of the district court dismissing the cause of action is therefore AFFIRMED

End of Document

the lessees, and Southaven, would require complex calculations joining, at best, conceptual difficulties. See: [Associated General Contractors, supra, 459 U.S. at 545, 103 S. Ct. at 912](#) ("the District Court would face problems of identifying damages and apportioning them").



Bally Midway Mfg. Co. v. American Postage Mach.

United States District Court for the Eastern District of New York.

August 25, 1983

No. 82 C 2700.

Reporter

1983 U.S. Dist. LEXIS 14334 *; Copy. L. Rep. (CCH) P25,601

Bally Midway Mfg. Co., v. American Postage Machine, Inc., et al.

Core Terms

infringing, video game, summary judgment, copyright infringement, defendants', trademark, games, secondary meaning, statutory damages, features

LexisNexis® Headnotes

Copyright Law > ... > Damages > Types of Damages > Statutory Damages

Copyright Law > ... > Civil Infringement Actions > Remedies > General Overview

Copyright Law > ... > Remedies > Damages > General Overview

HN1 [] Types of Damages, Statutory Damages

In an action for copyright infringement, a request for only statutory damages is a valid election of remedies by plaintiff, which may make its choice at any time before final judgment is rendered. [17 U.S.C.S. § 504\(c\)](#).

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Designation of Origin > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > Trademark Cancellation & Establishment > Registration Procedures > General Overview

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Pictures

Trademark Law > Subject Matter of Trademarks > Terms Requiring Secondary Meaning > Titles of Artistic Works

HN2 Federal Unfair Competition Law, Trade Dress Protection

There is no reason to exclude a title from the reach of section 43(a) of the Lanham Act, [15 U.S.C.S. § 1125\(a\)](#), if its use would constitute a misleading designation of origin of a false description or representation.

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN3 Eligibility for Trademark Protection, Evidence of Secondary Meaning

A claim of false designation of origin or false description or representation under § 43(a) of the Lanham Act, [15 U.S.C.S. § 1125\(a\)](#), cannot succeed unless secondary meaning is shown, at least where the mark at issue is not arbitrary or fanciful.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Trademark Law > ... > Infringement Actions > Summary Judgment > Burdens of Proof

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

HN4 Consumer Protection, Likelihood of Confusion

To obtain equitable relief for Lanham Act violations -- or for "palming off" under the New York law of unfair competition -- plaintiff must demonstrate a likelihood of public confusion. A showing of likely confusion is sufficient, however, for purposes of summary judgment for damages. To obtain summary judgment plaintiff must show by undisputed or indisputable evidence that there was actual confusion.

Counsel: [*1] Alexander R. Sussman, Gregory P. Joseph, Daniel Shapiro, Russell Pearce, of Fried, Frank, Harris, Shriver and Jacobson, New York City, Eric C. Cohen, of Welsh & Katz, Chicago, for the plaintiff.

Daniel King, New York City, for the defendants.

Opinion by: NICKERSON

Opinion

Memorandum and Order

NICKERSON, District Judge:

This action gave rise to an amended memorandum and order dated April 21, 1983, familiarity with which is assumed. Plaintiff has moved for summary judgment against all defendants on the claims for copyright infringement, Lanhan Act violations, and unfair competition. Harold Wexler, Barbara Seneci, and Factory Direct Video, Inc. have moved to dismiss the amended complaint as against them and all defendants have moved for summary judgment on all counts other than copyright infringement. Plaintiff has filed a supplemental motion seeking injunctive relief.

Defendants are companies and officers of companies that sell video games, operate arcades, and arrange for placement of video games in arcades. Pursuant to the court's order in *Bally Midway Mfg. Co. v. Mazzilli*, 82 Cd 2490, on August 24, 1982, plaintiff seized twenty-one video games from defendant arcade Captain [*2] Lightning and the Fireflys.

Defendants do not deny the substantial similarity between the seized games and plaintiffs Pac-Man and Galaxian. Nor do defendants dispute access. The only defense asserted is an affirmative one based on antitrust law. Defendants argue that plaintiff has illegally tied sales of its circuit boards to sales of its cabinets.

Defendants offer little authority for the proposition that the antitrust claim would, if valid, constitute a defense to the claim of copyright infringement. Moreover, the record on the antitrust issues is undeveloped. For example, defendants have not shown any effects on the relevant markets. At least under these circumstances, the court will not treat the antitrust claim as a defense. See *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 106 (2d Cir. 1951). Defendants may protect their interests by pursuing it as a counterclaim. Thus the only questions on the copyright claim are who is liable and for how much.

Plaintiff contends that individuals who participate in the infringement are jointly and severally liable for it, and that a financially interested corporate officer is liable if he had the ability to supervise [*3] the infringing activity. Barbara Seneci was the vice president and the only other shareholder and director of defendant corporations in addition to Eugene Seneci. While she denies any role in their business, she may be held liable since she had the ability to supervise the infringing activity and a financial stake in it. *Lauratex Textile Corp. v. Allton Knitting Mills, Inc.*, 517 F.Supp. 900, 904 (S.D.N.Y. 1981).

The original deposition testimony of Eugene Seneci showed that Wexler was closely involved in the infringing activities. The corrected deposition provides no evidence that would justify liability on Harold Wexler's part. Moreover, Wexler denies active involvement with defendant corporations prior to April 15, 1982. Neither side, however, has shown whether Wexler participated in infringing acts after that date. Under the circumstances there are issues of fact as to Wexler's liability, and a trial is required on those issues.

Factory Direct Video, Inc. may not be held liable. Wexler's affidavit states that Factory Direct Video was not involved in the infringements which are the subject of this action, and there is nothing to refute this assertion.

In its original [*4] papers, plaintiff requested defendants' profits or, in the alternative, statutory damages for copyright infringement. In its reply and sur-reply papers, however, plaintiff requests only statutory damages. HN1[
↑] This is a valid election of remedies by plaintiff, which may make its choice "at any time before final judgment is rendered." *17 U.S.C. § 504(c)*, see *Oboler v. Goldin*, No. 83-7153, slip op. (2d Cir. August 1, 1983).

The record is sufficiently developed for the court to assess statutory damages at this time. The evidence makes manifest the fact that defendants' acts of copyright infringement were willful and numerous.

Defendants' only argument of good faith rests on Eugene Seneci's statement that defendants "obtained assurances from several manufacturers and distributors that they were legally entitled to sell them, and our sales were made in

reliance on those assurances." Two such "assurances" are attached to Seneci's affidavit. They do not represent that the games are not infringing, although one seems to say that manufacturers had done so in other statements. In any event, although Seneci alleges that defendants relied on the assurances, he does not say that defendants [*5] in fact doubted that the games were infringing. And if his affidavit should be interpreted to make that claim, the court would have had no difficulty under the circumstances in rejecting the claim of good faith as a matter of law.

Trade in infringing games concededly constituted a substantial part of defendants' business. Gaps in their business records and evasive response to discovery requests demonstrate consciousness of wrongdoing. The court sees no reason to award less than the maximum damages for such concerted and deliberate infringement in the course of a commercial enterprise.

Defendants argue that the maximum statutory damages are per action rather than per infringed work, but the statutory text and the committee notes make clear that this is not so. Defendants do not argue that Pac-Man and Ms. Pac-Man are "one work" for purposes of [§ 504\(c\)](#). Accordingly defendants are liable in statutory damages for each of the three infringed works.

Defendants have offered no convincing support for their contention that copyright and trademark protection are in some sense mutually exclusive. Moreover, the contention is rebutted by the saving clause in the Copyright Act, [17 U.S.C. § 301\(d\)](#), and the fact that the interests protected by the two statutes do not coincide. Even if innovation is sufficiently promoted by copyright law, there is reason to protect consumers against false or misleading designations of origin.

The second contention asserted against the Lanham Act claim is that titles cannot be trademarks. Defendants rely on a case denying registration for a book title on such grounds. However that may be, [HN2](#) there is no reason to exclude a title from the reach of section 43(a) of the Lanham Act, [15 U.S.C. § 1125\(a\)](#), if its use would constitute a misleading designation of origin of a false description or representation. See [Orion Pictures Co. v. Dell Publishing Co.](#), 471 F.Supp. 392 (S.D.N.Y. 1979); [National Lampoon, Inc. v. ABC](#), 376 F.Supp. 733 (S.D. N.Y.), aff'd, [497 F.2d 1343 \(2d Cir. 1974\)](#).

Plaintiffs also claim a trademark in the "nonfunctional design features" of the games' characters. This is contested on the ground that those design features are functional. However, even if some core of the characters' qualities is functional -- such as their status as mobile, vulnerable, gobbler characters -- the particular visual realization of [*7] those qualities is not. The details are decorative, nonfunctional, and subject to trademark for the same reasons that applied to the details of the cheerleaders' costumes in [Dallas Cowboys Cheerleaders, Inv. v. Pussycat Cinema, Ltd.](#), 604 F.2d 200 (2d Cir. 1979).

Defendants argue that the graphics must be found functional if there is to be competition. But competitors can market video games using different sorts of characters -- perhaps even ones that move through mazes, gobbling as they go -- as long as the incidental features, such as shapes and coloring are different from Pac-Man. See [Midway Mfg. Co. v. Dirkschneider](#), 543 F.Supp. 466, 484-85 (D. Neb. 1981).

[HN3](#) A claim of false designation of origin or false description or representation under § 43(a) cannot succeed unless secondary meaning is shown, at least where the mark at issue is not arbitrary or fanciful. [Vibrant Sales, Inc. v. New Body Boutique, Inc.](#), 652 F.2d 299, 303-04 & n.3 (2d Cir. 1981), cert. denied, 102 S.Ct. 1257 (1982). The court need not determine whether the marks here were fanciful and arbitrary so as to be protected without proof of secondary meaning, see [Miller Brewing Co. v. Meileman Brewing Co.](#), 561 F.2d 75, 79 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978), because there is ample, undisputed evidence to show that the names and characters in the games have acquired a secondary meaning. They have had extensive advertising and promotion as well as unsolicited media exposure. Moreover, they have had tremendous sales success. In addition, defendants consciously copied and exploited the marks in question. The deposition testimony of Eugene Seneci leaves little doubt that this is so. Such exploitation in itself may constitute "significant evidence" of secondary

meaning. See *Harlequin Enterprises Ltd. v. Gulf & Western Corp.*, 644 F.2d 946, 950 (2d Cir. 1981); *RJR Foods, Inc. v. White Rock Corp.*, 603 F.2d 1058 (2d Cir. 1979).

While plaintiff has submitted no surveys or other material showing directly that the public associates the marks with a particular source of video games, the evidence submitted is more than sufficient to justify the inference of secondary meaning. Indeed, defendants present nothing which casts doubt on that inference.[HN4](#)[

To obtain equitable relief for Lanham Act violations -- or for "palming off" under the New York law of unfair competition -- plaintiff [*9] must demonstrate a likelihood of public confusion. *Warner Bros. v. Gay Toys, Inc.*, 658 F.2d 76, 79 (2d Cir. 1981); *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 618 F.2d 950 (2d Cir. 1980). Plaintiff plainly made a sufficient showing for that purpose.

A showing of likely confusion is sufficient, however, for purposes of summary judgment for damages. To obtain summary judgment plaintiff must show by undisputed or indisputable evidence that there was actual confusion. *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 618 F.2d 950, 955 (2d Cir. 1980). Defendants contend that their customers were always informed of the differences among the various games. This would not save defendants from liability for contributory infringement. But defendants also say that in most cases non-Midway headboards and cabinets underlined the difference. Viewing the evidence in the light most favorable to the nonmoving party, the court cannot say that there is no issue of fact as to actual confusion.

Defendants' motion for summary judgment on the antidilution claim derives from the premise that the statute, *N.Y. General Business Law § 368-d*, serves to protect only against dilution from dissimilar [*10] or noncompeting products. This in turn is based on an overly literal reading of the court's opinion in *Allied Maintenance Corp. v. Allied Mechanical Trades, Inc.*, 42 N.Y.2d 538, 399 N.Y.S.2d 628, 369 N.E.2d 1162 (1977), and the legislative history it cites.

Both sources refer specifically to dilution by dissimilar products, but there is no reason to take the passages to refer to an exclusive concern of the statute rather than its primary one. Certainly the case does not turn on this question.

The motions of Harold Wexler, Barbara Seneci, and Factory Direct Video, Inc. are treated as ones for summary judgment. The motions of Wexler and Barbara Seneci are denied. The motion of Factory Direct Video, Inc. is granted and the action is dismissed as against it. Plaintiff's supplemented motion for summary judgment is granted to the following extent: (1) The defendants other than Factory Direct Video, Inc. are jointly and severally liable to plaintiff for copyright infringement in the amount of \$150,000.00; (2) those defendants are permanently enjoined from further infringing plaintiff's copyrights in Galaxian, Pac-Man, and Ms. Pac-Man in any manner, from inducing other to infringe [*11] such copyrights, or from contributing to such infringement; and (3) they are permanently enjoined from (a) operating for profit any video game which simulates the nonfunctional design features of Midway's Galaxian, Pac-Man, and Ms. Pac-Man video games, (b) operating for profit any video game under the names Galaxian, Pac-Man, or Ms. Pac-Man, or any names confusedly similar thereto, (c) manufacturing, assembling, importing, selling, offering for sale, or distributing in any manner any video games or components thereof that stimulate the nonfunctional design features of, or bear a trademark or name confusingly similar to a trademark or name of Midway's Galaxian, Pac-Man, or Ms. Pac-Man video games, (d) advertising for any purpose any products whatsoever as Galaxian, Pac-Man, or Ms. Pac-Man or as emanating from, manufactured by, or sponsored by Midway, and (e) competing unfairly with plaintiff in violation of New York law by palming off their products as emanating from Midway so as to cause consumer confusion. In all other respects, plaintiff's supplemented motion for summary judgment is denied. Except as provided above as to Factory Direct Video, Inc., defendants' motion for summary [*12] judgment on Counts II, III, and IV of the amended complaint is denied in all respects. So ordered.



Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft

United States Court of Appeals for the Fourth Circuit

June 9, 1983, Argued ; August 25, 1983, Decided

No. 82-2033

Reporter

716 F.2d 245 *; 1983 U.S. App. LEXIS 24524 **; 1983-2 Trade Cas. (CCH) P65,574

METRIX WAREHOUSE, INC., Respondent, v. DAIMLER-BENZ AKTIENGESELLSCHAFT, Defendant, Mercedes-Benz of North America, Inc., Petitioner

Subsequent History: [**1] As Amended September 2, 1983.

Prior History: Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

Disposition: Reversed.

Core Terms

dealers, incentive program, district court, Robinson-Patman Act, merchandise, orders

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN1 [?] **Types of Price Discrimination, Brokerage, Commissions & Compensation**

Section 2(c) of the Robinson-Patman Act, [15 U.S.C.S. § 13\(c\)](#), provides that 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.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

[HN2](#) [+] Types of Price Discrimination, Brokerage, Commissions & Compensation

Nothing in the language of § 2(c) of the Robinson-Patman Act, [15 U.S.C.S. § 13\(c\)](#), requires proof of an adverse effect on competition before a violation may be found where there is an admitted payment of a commission or other compensation to an agent of the purchaser.

Counsel: Paul Walter, (William C. Sammons, Thomas M. Wilson, III, Tydings & Rosenberg, Donald J. Zoeller, David A. Vaughan, Robert A. Cantor, Mudge, Rose, Guthrie & Alexander, Allan G. Freund, Wayne H. Samson), for Appellant.

H. Kenneth Kudon, (T. J. Pantaleo, Eric S. Engel, Pantaleo and Kudon, Chartered, Barry L. Steelman, Melnicove, Kaufman, Weiner & Smouse, P.A., David M. Sapiro, Sapiro & Gottlieb), for Appellee.

Judges: Sprouse, Ervin and Chapman, Circuit Judges.

Opinion by: CHAPMAN

Opinion

[*246] CHAPMAN, Circuit Judge:

This matter is before us upon a certification under [28 U.S.C. 1292\(b\)](#). The sole issue is whether section 2(c) of the Robinson-Patman Act, [15 U.S.C. § 13\(c\)](#),¹ proscribes an incentive program in which appellee Metrix Warehouse, Inc. (Metrix) makes payments to parts managers of Mercedes-Benz dealerships based on the number of Metrix products purchased by the parts managers' employers. The district court denied the motion of appellant [*2] Mercedes-Benz of North America (MBNA) for partial summary judgment. The court found that further inquiry was necessary because, instead of having an anticompetitive impact, the Metrix program seemed to have the effect of

¹ [HN1](#) [+] Section 2(c) of the Robinson-Patman Act provides:

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.

increasing competition. Section 2(c) does not address competitive effect and, under the clear language of the statute and the undisputed facts of the case, the incentive program constitutes a *prima facie* violation of section 2(c). We reverse the decision of the district court.

[**3] MBNA and Metrix are competitors in the sale of automobile parts to approximately 400 Mercedes-Benz dealers in the United States. MBNA, the exclusive United States distributor of Mercedes-Benz automobiles, has granted franchises to these automobile dealers to sell Mercedes-Benz automobiles and replacement parts and to perform repairs and maintenance work. Metrix, which also sells parts to the Mercedes-Benz dealers for use in Mercedes-Benz automobiles, sued MBNA for alleged violations of the Sherman Antitrust Act. MBNA counterclaimed, alleging that Metrix was engaged in acts in violation of the Robinson-Patman Act.

Metrix does not contest the fact that its incentive program involves the awarding of points redeemable for either merchandise or cash or the payment of cash directly to the parts managers of the Mercedes-Benz dealers. These payments are based on a percentage [*247] of total parts purchased from Metrix. As consideration for the payments, the payees perform no services other than placing their employers' purchase orders with Metrix.

Between February 1974 and June 1980, Metrix paid at least \$119,980.80 in cash and \$394,551.53 in cash and/or merchandise to parts managers [**4] of Mercedes-Benz dealers for the placement of approximately \$13,000,000 in spare parts orders with Metrix. Payments are mailed monthly by Metrix to the parts managers at their home address. The value of the points is approximately 3 1/2% of the purchase price.

Metrix argues, and the district court found, that questions of fact remain whether the incentive program decreases competition. HN2[] Nothing in the language of section 2(c), however, requires proof of an adverse effect on competition before a violation may be found where there is an admitted payment of a commission or other compensation to an agent of the purchaser. *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir. 1945), cert. denied, 326 U.S. 774, 90 L. Ed. 468, 66 S. Ct. 230 (1945); *Oliver Brothers v. FTC*, 102 F.2d 763 (4th Cir. 1939). See also *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65, 3 L. Ed. 2d 1079, 79 S. Ct. 1005 (1959) (dicta); see also n.11 on page 67. Any change in the law to address the competitive effect of such compensation must be made [*5] by Congress and not by the courts. The decision of the district court is accordingly

REVERSED.



Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency

United States Court of Appeals for the Eighth Circuit

June 15, 1983, Argued ; August 26, 1983, Decided

Nos. 83-1039, 83-1107

Reporter

715 F.2d 419 *; 1983 U.S. App. LEXIS 24501 **; 1983-2 Trade Cas. (CCH) P65,575

Central Iowa Refuse Systems, Inc., Appellant, v. Des Moines Metropolitan Solid Waste Agency, et al., Appellees

Prior History: [**1] Appeal from the United States District Court for the Southern District of Iowa.

Disposition: The judgment of the district court dismissing the plaintiff's complaint is affirmed.

Core Terms

municipalities, solid waste, disposal, anticompetitive, exemption, state action, landfill, revenue bond, anti trust law, facilities, provisions, antitrust, bonds, state policy, ordinances, metropolitan area, articulated, disposal facility, state legislature, municipal action, district court, restrictions, cooperative, supervision, authorizes, collecting, monopolize, regulation, plurality, sovereign

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN1[Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. § 1, et seq.](#), must be taken to be a prohibition of individual and not state action. Neither the express language nor the legislative history of the Sherman Act evidences an intention on the part of Congress to restrain state action.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Energy & Utilities Law > Antitrust Issues > General Overview

715 F.2d 419, *419U.S. App. LEXIS 24501, **1

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN2 Energy & Utilities, State Regulation

Municipalities, unlike states, are not automatically exempt from the strictures of the federal antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Public Improvements > General Overview

Real Property Law > Subdivisions > State Regulations

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN3 Exemptions & Immunities, Parker State Action Doctrine

A municipality may invoke the Parker doctrine in situations where the challenged conduct genuinely reflects state policy. The Parker doctrine exempts anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. Although there must be a clearly articulated and affirmatively expressed state policy decision behind anticompetitive conduct by municipalities, such a policy statement need not be a legislative directive to engage in anti-competitive actions, nor even a detailed authorization.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN4 Exemptions & Immunities, Parker State Action Doctrine

An adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area that the legislature contemplated the kind of action complained of. The state must have had some expectation that the municipality would engage in economic regulation of the particular area, but it need not specifically have directed the municipality to act in a certain way.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Home Rule

Governments > State & Territorial Governments > Relations With Governments

HN5 Exemptions & Immunities, Parker State Action Doctrine

A "home rule" provision in a state constitution granting autonomy to municipalities with respect to local matters does not constitute the adequate state mandate necessary to invoke the Parker exemption.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN6[] Exemptions & Immunities, Parker State Action Doctrine

Conduct of a subordinate governmental entity will not fall within the Parker state action exemption unless the state plays an affirmative role by, at the very least, providing the impetus for the anticompetitive activity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Public Improvements > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN7[] Exemptions & Immunities, Parker State Action Doctrine

There are two requirements of the Parker doctrine for immunity for municipal conduct. First, the state legislature must have authorized and challenged municipal activity. Second, and more important, the legislature must have intended to displace competition with regulation or some form of monopoly public service.

Governments > Public Improvements > General Overview

HN8[] Governments, Public Improvements

See [Iowa Code § 28F.5.](#)

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN9[] Exemptions & Immunities, Parker State Action Doctrine

Where private parties claim the benefit of the state action exemption, they are required to show active state supervision of the challenged restraint. However, a showing of state supervision is unnecessary where the restraint represents governmental conduct in an area of traditional municipal activity.

Counsel: <QPQ2>

F. Richard Lyford, Barbara G. Barrett, Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, Iowa, for Plaintiff-Appellant.

R. Michael Hayes, City Solicitor, Intergovernmental Programs, Des Moines, Iowa, for Defendant-Appellee City of Des Moines, Iowa.

Judges: Heaney, Circuit Judge, Gibson and Max Rosenn, * Senior Circuit Judges.

Opinion by: ROSENN

Opinion

[*420] ROSENN, Senior Circuit Judge.

This antitrust case raises a difficult question concerning the "state action" exemption from the federal antitrust laws. Plaintiff Central Iowa Refuse Systems, Inc. (CIRS) brought this action against the Des Moines Metropolitan Area Solid Waste Agency (Metro), and its constituent members, Polk County, Iowa and fifteen Iowa municipalities including the city of Des Moines (the municipal defendants). Metro operates a solid waste disposal site within the Des Moines metropolitan area, [*2] and plaintiff CIRS operates a similar facility outside the metropolitan area. The plaintiff's complaint alleged violations of [sections \[*421\] 1](#) and [2](#) of the Sherman Antitrust Act, [15 U.S.C. §§ 1, 2](#), as well as Iowa [antitrust law](#), arising out of Metro's attempt to require that all solid waste generated within the geographic area covered by Metro be disposed of at Metro's facilities.¹

The district court, [557 F. Supp. 131](#), held, on the basis of stipulated facts, that the defendants' activities were protected from antitrust scrutiny by the state action exemption from the federal antitrust laws, and entered judgment for the defendants. The plaintiff now appeals from this determination.² We affirm.

[**3] <QPQ1>

The seeds of this litigation were sown over fifteen years ago. In the mid-1960's, the city of Des Moines recognized that its municipal dump was rapidly becoming unable to accommodate the increasing quantities of refuse produced within the city. Knowing that several neighboring municipalities were experiencing similar problems, the City Manager of Des Moines proposed that the municipalities enter into a cooperative arrangement to construct adequate modern waste disposal facilities. In November 1966, the municipalities retained two consulting firms to conduct an engineering study, funded largely by a grant from the United States Public Health Service.³ The engineers' report, submitted in May 1968, recommended the formation of a single agency to manage the collection and disposal of all solid waste produced in the entire Des Moines metropolitan area. Such a cooperative effort was permitted under a newly-enacted chapter of the Iowa Code, Chapter 28E, which authorized political subdivisions of Iowa to join together to provide important and necessary services and facilities.⁴ Under Chapter 28F of the Iowa

* Honorable Max Rosenn, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

¹ The plaintiff invoked the district court's jurisdiction over the federal antitrust claims pursuant to [28 U.S.C. § 1337](#) and over the state antitrust claims under the doctrine of pendent jurisdiction.

² Certain of the defendants filed a cross-appeal, contesting the district court's preliminary determination that the activities complained of satisfied the Sherman Act's interstate commerce requirement. At oral argument this challenge was abandoned and the defendants conceded that their activities had a substantial effect on interstate commerce.

³ The federal government had numerous financial assistance programs designed to encourage states and local governments to develop comprehensive plans for solid waste disposal. One example was the Solid Waste Disposal Act of 1965. See [42 U.S.C. §§ 6901-6987](#).

⁴ Significantly, in May 1970, aware of the critical problem in solid waste disposal, the Iowa legislature enacted sections 455B.75-.83 for the purpose of encouraging municipalities to "provide sanitary disposal projects for the final disposition of solid wastes by their residents and, thereby, protect the citizens of this state from such hazards to their health, safety, and welfare that result from the uncontrolled disposal of solid wastes." See 1970 Iowa Legis. Serv. at 336 [§ 1](#). This statute required that municipalities establish and maintain solid waste disposal systems, and, like Chapter 28E, provided for cooperative arrangements between governmental units.

Code, enacted in 1969, such intergovernmental projects were to be **[**4]** financed by the issuance of revenue bonds.

In July 1969, the **[**5]** municipalities availed themselves of the provisions of Chapters 28E and 28F and established Metro. A formal intergovernmental cooperative agreement was executed in December 1969, expressly providing for financing of the project by revenue bonds.⁵

During 1971, Metro developed a plan for a single solid waste landfill on a site 10 miles east of Des Moines. At the same time, each of the municipalities and Metro entered into a Solid Waste Disposal Service Contract (the Service Contract) setting forth schedules of rates to be paid by the municipalities to Metro for disposal of refuse.⁶ **[**7]** Based on recommendations from **[*422]** Metro's bond consultants, the municipalities included in the Service Contract two provisions **[**6]** for the protection of the bondholders which would facilitate the underwriting and sale of the bonds. Section 105 of the Service Contract provided:

Disposal. The municipality does hereby agree, that to the full extent permitted by law, all Solid Waste generated from within its jurisdiction shall be disposed of at the Project.

In addition, under section 701 the Municipalities agreed that during the time the revenue bonds were outstanding, the Municipalities would not grant any license for any facility to compete with Metro.⁷ These provisions were included to guarantee the broadest possible financial base for Metro's activities, as a means of making the revenue bonds an attractive investment. The bond consultants believed that, in view of prevailing conditions in the financial markets, the bond issue would be unmarketable without these provisions.⁸

[8]** In October 1972, Metro duly issued pursuant to resolution \$1,500,000 of revenue bonds to finance the construction of the landfill. This resolution constitutes a contract between Metro and the bondholders. In accordance with the Solid Waste Disposal Service Contract, it was contemplated that the funds to pay the bondholders would come out of charges to be collected for use of Metro facilities. The bonds are secured by a lien on and a pledge of the revenues derived from the operation of the Metro facility. By 1974, however, only two of the municipalities in Metro had enacted ordinances requiring that all solid waste generated within their jurisdiction be disposed of at the Metro landfill. Accordingly, in 1974 Metro obtained a declaratory judgment in Iowa District Court for Polk County construing the exclusivity provisions in sections 105 and 701 of the Service Contract to require "that all solid waste within the territorial boundaries of the City of Des Moines . . . be transported to the [Metro] site . . . until such time as the bond obligations of [Metro] are retired," and requiring that all transfer stations within the Des Moines area

⁵ The Supreme Court of Iowa ruled that the delegation of legislative power to the municipalities and Metro under chapters 28E and 28F of the Iowa Code was proper under the Iowa constitution. [Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449 \(Iowa 1970\).](#)

⁶ Under Section 401 of the Service Contract, each of the Municipalities agreed to adopt an ordinance prior to the execution of the Service Contract authorizing the levying and collection of rates, charges, tolls, and other fees for the services and facilities of the Metro project. Each municipality adopted such a rate ordinance.

⁷ Section 701 provided in pertinent part:

Non-Competitive Facilities. So long as any Bonds of the Agency are outstanding, the Municipality shall not grant any franchise or license to any person, firm, association or corporation for a competing solid waste disposal system, nor shall they permit any municipal solid waste disposal system to compete with the Agency. . . .

The Agency however shall have the right to establish, construct and acquire any other disposal project, provided, however, that no such other disposal project shall be so established, constructed or acquired unless the Consulting Engineers shall certify that such other disposal project will not be competitive with said Project constructed and acquired pursuant to the terms of the Resolution, and will not materially or adversely affect the revenues to be derived from said Project, or the rights and security of the holders of the Bonds issued pursuant to said Resolution.

⁸ In addition, the municipalities were apprehensive that, unless future revenues could be assured, the municipalities themselves might become liable for any default by Metro in paying the bondholders. This would violate [section 28F.6 of the Iowa Code](#), which required the cooperative project to be self-supporting.

deposit all solid waste at the Metro landfill. **[**9]** As a result of this litigation, most of the constituent municipalities passed ordinances requiring persons collecting solid waste to bring the refuse to Metro's landfill or to other waste transfer stations for subsequent hauling to the Metro landfill. In addition, some members of Metro passed ordinances making it a crime to take solid waste produced within the jurisdiction to any place other than Metro's facilities.

Plaintiff CIRS is in the business of operating waste collection and disposal services in central Iowa. Until 1980, as part of this business, it operated a sanitary landfill in Madison County, 31 miles from the Des Moines central business district and outside the metropolitan area covered by Metro. CIRS brought this action in January 1979, ten years after the formation of Metro and over six years after the revenue bonds were issued. CIRS claimed that because of the **[*423]** exclusivity provisions of the Service Contract, CIRS and other persons collecting refuse within the area covered by Metro were not allowed to dispose of that refuse at the landfill operated by CIRS in Madison County. The plaintiff argued that this provision prevented CIRS from competing with Metro **[**10]** in the disposition of solid waste, and thus amounted to a restraint of trade in violation of federal and state antitrust laws.⁹ CIRS also accused Metro and the municipalities of monopolizing and attempting to monopolize the disposal of solid waste. The district court found it unnecessary to consider the question of liability, believing that the alleged anticompetitive arrangement was protected by the state action exemption to the federal antitrust laws.

[11] II.**

The state action antitrust exemption had its origin in *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943). In *Parker*, the Supreme Court held that the federal antitrust laws did not prevent the state of California from instituting a marketing program for raisins. Although such a program might well have been a violation of the Sherman Act if it had been privately run, the Court held that the state's involvement exempted the program from antitrust scrutiny. Explaining that the State of California, "as sovereign, imposed the restraint as an act of government," *id. at 352*, the Court stated that **HN1** the Sherman Act "must be taken to be a prohibition of individual and not state action." *Id.*

The *Parker* decision rested on basic principles of federalism. The Court determined that neither the express language nor the legislative history of the Sherman Act evidenced an intention on the part of Congress to restrain state action. *Id. at 350*. The Court therefore applied the general presumption against federal preemption **[**12]** of state law, explaining that "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." *Id. at 351*.

The *Parker* decision raised more questions than it answered. One of the most important of these questions was whether the antitrust exemption for "state action" encompasses actions by subordinate governmental entities, such as cities. The Court finally addressed this issue five years ago in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978). *City of Lafayette* involved a claim under the Sherman Act by a private utility company against several Louisiana cities, challenging various anticompetitive practices in the operation of the cities' own electric utility systems. The Supreme Court rejected the defendants' contention that

⁹ In its brief to the district court, plaintiff explained:

CIRS does not challenge the establishment of the Metro facility. It does not dispute the municipalities' powers to regulate the disposal of refuse and garbage, either pursuant to the municipal police power to promote and preserve the welfare and convenience of the people (citation) or pursuant to statutory mandate (citation). It does not challenge the municipalities' ability to jointly exercise their powers to provide for joint facilities, including sanitary disposal projects.

What CIRS does challenge here is the defendants' method of insuring the economic success of its project by destroying competition; i.e., requiring that, as long as the bonds are outstanding, all solid waste generated from within the Metro area be deposited at the Metro site, and the enforcement of that anti-competitive activity by way of permits and criminal ordinances. Such conduct obviously cannot be justified as a proper exercise of the Defendants' police power since the requirement is not tied to a health or welfare concern but rather to a financial one.

HN2[↑] municipalities, like states, are automatically **[**13]** exempt from the strictures of the federal antitrust laws. In a plurality opinion for four members of the Court, Justice Brennan wrote that the municipalities could not avail themselves of the state action exemption for the simple reason that cities are not states.

[*424] Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. *Parker*'s limitation of the exemption to "official action directed by a state" is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

[435 U.S. at 412-13](#) (footnote and citations omitted).¹⁰

[14]** Despite its unwillingness in *City of Lafayette* to equate municipal action with state action, the plurality observed that **HN3**[↑] a municipality could invoke the *Parker* doctrine in situations where the challenged conduct genuinely reflected state policy. The plurality emphasized that the *Parker* doctrine exempts "anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." [Id. at 413](#). Although there must be a "clearly articulated and affirmatively expressed" state policy decision behind anticompetitive conduct by municipalities, see [id. at 410](#), the plurality made it clear that such a policy statement need not be a legislative directive to engage in anti-competitive actions, nor even a detailed authorization. **HN4**[↑] An adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists **[**15]** when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. "[435 U.S. at 415](#) (footnote omitted) (quoting [City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431](#),^{<QPQ5>} 435 (5th Cir. 1976)). The state must have had some expectation that the municipality would engage in economic regulation of the particular area, but it need not specifically have directed the municipality to act in a certain way.¹¹

The Court again considered the matter of state action immunity for municipalities in [Community Communications Co. v. City of Boulder, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835 \(1982\)](#). **[**16]** In *Community Communications*, a majority of the Court endorsed the analysis of the plurality opinion in *City of Lafayette*, stating that the anticompetitive restraint imposed by the City of Boulder (an ordinance placing a moratorium on the expansion of cable television) "cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." [Id. at 52](#) (citations omitted). The Court held that **HN5**[↑] a "home rule" provision in the Colorado constitution granting autonomy to municipalities with respect to local matters did not constitute the "adequate state mandate" necessary to invoke the *Parker* exemption.

Plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they **[**17]** please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended" **[*425]** within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. . . . In Boulder's view, it can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe

¹⁰ In a concurring opinion, Chief Justice Burger developed the theory that municipal conduct should be subject to antitrust strictures if it was "proprietary" in nature but not if it was "governmental" in nature. See [435 U.S. at 418](#).

¹¹ State authorization can perhaps be inferred from concurrent state acts evincing a policy favoring regulation or from a delegation of authority to a municipality to act in an area which has customarily been regulated in an anticompetitive manner. See Note, *The Application of Antitrust Laws to Municipal Activities*, 79 Colum. L. Rev. 518, 523 (1979).

monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition -- that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances -- would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

Id. at 55-56 (emphasis in original). Thus, it is clear after *Community Communications* that [**18] [HN6](#) conduct of a subordinate governmental entity will not fall within the *Parker* state action exemption unless the State plays an affirmative role by, at the very least, providing the impetus for the anticompetitive activity.

Recently, this circuit has analyzed [HN7](#) the *Parker* doctrine in terms of two requirements for immunity for municipal conduct. First, the state legislature must have authorized <QPQ6> and challenged municipal activity. Second, and more important, the legislature must have intended to displace competition with regulation or some form of monopoly public service. See [*Gold Cross Ambulance & Transfer & Standby Service, Inc. v. City of Kansas City, 705 F.2d 1005, 1011 \(8th Cir. 1983\)*](#).

III.

In the instant case, plaintiff CIRS challenges the requirement imposed by Metro and the defendant municipalities that as long as the revenue bonds are outstanding, all solid waste produced within the Metro area is to be deposited at the Metro landfill. Plaintiff does not challenge [**19] either the establishment of Metro or the power of the municipalities jointly to regulate the disposal of refuse in the Des Moines metropolitan area. Plaintiff's claim is that Metro acted illegally in attempting to monopolize the disposal of solid waste produced in the Des Moines area and preventing the depositing of refuse at CIRS' landfill in Madison County.

Thus, the question is whether this alleged anticompetitive activity by Metro constitutes action "in furtherance or implementation of clearly articulated and affirmatively expressed state policy." [*Community Communications Co. v. City of Boulder, supra, 455 U.S. at 52*](#). We must ascertain whether the Iowa legislature authorized the challenged activity and, if so, whether it did so with an intent to displace competition. See [*Gold Cross Ambulance v. City of Kansas City, supra*](#); P. Areeda, *Antitrust Law* para. 212.3a, at 53 (1982 Supp.).

It cannot be denied that in the 1970's the Iowa state legislature made a deliberate policy decision to encourage the construction of sanitary landfills by local governments. Under the provisions of Chapter 455 of the Iowa Code, the cities and counties of Iowa are required [**20] to provide for environmentally safe and sanitary disposal of solid waste. See Iowa Code §§ 455B.76-.84.¹² This statute authorizes cities and counties to join together, pursuant to the provisions of Chapter 28 of the Iowa Code, to provide common disposal facilities.¹³

It is also clear that the Iowa legislature contemplated that such joint undertakings of municipalities under Chapter 28 would be financed through the issuance of revenue [\[*426\]](#) bonds. See Iowa Code, Chapter 28F. The bonds were to be repaid out of the revenues derived from operation of the facility. [Section 28F.5](#) specifically provides, in pertinent [**21] part: [HN8](#)

Such an entity shall have the power to fix . . . fees, rentals or other charges and collect the same from the public agencies participating in the agreement . . . for the payment of the services and facilities provided by said project. . . . Such . . . fees, rentals or other charges shall be so fixed, established and maintained and revised from time to time whenever necessary as will always provide revenues sufficient to pay the cost of . . . operating the project . . . to pay the principal of and interest on the bonds then outstanding . . . [and to provide certain reserves and provide for repairs].

¹² These sections, however, do not require that the cities and counties actually establish and operate such facilities themselves. The municipalities could have complied with their statutory obligation by contracting with private parties.

¹³ The statute also provides for administrative supervision and regulation of disposal facilities by the Iowa Environmental Quality Commission.

In addition, section 28F.6 expressly states that the revenue bonds are not to be general obligation bonds of any public agency, but are to be secured by and repaid out of the revenues realized from the project.

Nonetheless, there is no state statute or other authority indicating that the Iowa legislature actually contemplated that the agency responsible for construction and operation of the landfill facility would have the exclusive right to dispose of solid waste produced in [**22] the Des Moines area or would engage in practices in restraint of trade. Plaintiff argues that because the anticompetitive provisions were included in the Service Contract only to ensure the financial success of the Metro Project, and not for any public health or welfare reason, the restriction on competition in disposal services was not within the scope of the activities authorized by Iowa legislation.

Admittedly, one must engage in some speculation to determine whether the State of Iowa genuinely intended to displace competition in the disposal of solid waste. We agree with the district court, however, that notwithstanding the statutes' silence on the specific matter of monopolization, it is possible to infer the existence of an affirmative state policy permitting anticompetitive practices in the operation of municipal landfills.

An examination of the statutory provisions behind Metro's formation reveals that the Iowa legislature placed an extremely high priority on the activities of Metro and other inter-governmental agencies engaged in the disposal of solid waste. The comprehensive statutory scheme makes clear that the Iowa legislature encouraged cities and counties to join together [**23] to provide facilities for the disposal of solid waste. Moreover, the provisions of Chapter 455B, enacted in 1970, require every city and county in Iowa to provide for sanitary disposal facilities. The reasonable and perhaps even inescapable conclusion from this statutory scheme is that the legislature desired agencies such as Metro to have broad discretion to do whatever was necessary to ensure their success.

CIRS insists, however, that there is no basis for concluding that the Iowa legislature contemplated that Metro would monopolize the disposal of solid waste produced within the Des Moines area. Plaintiff emphasizes that the Iowa statutes did not impose on local governments any obligation to construct their own landfills. Although the municipalities were required to provide for the establishment of solid waste disposal facilities, they had the option of doing so by contracting with private enterprise. Plaintiff points to Community Communications, supra, in which the Supreme Court held that "a State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is [**24] sought." 455 U.S. at 55.

We believe the instant case is not controlled by *Community Communications* because the State's position here is not "one of mere neutrality respecting the municipal actions challenged as anticompetitive." 455 U.S. at 55. As we recently pointed out in Gold Cross Ambulance v. City of Kansas City, supra, 705 F.2d at 1013-14, the city's anticompetitive cable television ordinance in *Community Communications* was passed pursuant to a home rule provision in the Colorado constitution that [**427] failed even to refer to cable television. There was no indication of any Colorado legislative policy regarding this industry; the State simply had never considered the matter. See 455 U.S. at 55. By contrast, in the instant case, as in Gold Cross Ambulance, supra, the State of Iowa has affirmatively addressed the matter regulated by the municipalities. Indeed, the legislature has gone so far as to express its support for those municipalities electing to cooperate in the construction of common refuse facilities. Thus, although the State has left Iowa municipalities with a range of [**25] options concerning how best to provide for sanitary disposal facilities, by no means has the state adopted an approach of indifference or "mere neutrality." See also Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983). The State obviously has been very much concerned with the problem of state-wide solid waste disposal.

Plaintiff argues, however, that it requires an unwarranted leap to conclude that the state legislature actually contemplated the imposition of restrictions on competition in the disposal of solid waste in order to promote the financial viability of projects such as Metro. Chapter 28F.5 authorizes entities such as Metro to set rates, fees, and charges to insure sufficient revenue to pay for the bonds. Plaintiff asserts that the legislature may have expected that this power alone would be sufficient to guarantee the financial viability of the project. Thus, even assuming Metro's bond consultants were correct in their opinion that the revenue bonds would not be marketable without the

anticompetitive provisions in the Service Contract, plaintiff argues that there is no indication that the state legislature considered such a step necessary [**26] to ensure the financial viability of Metro.¹⁴

We believe that the Iowa legislature did indeed contemplate these restrictions on competition. Chapter 28F expressly authorizes municipalities to finance collective projects by issuing revenue bonds. When ascertaining what was in the minds of the legislators, we cannot ignore the realities of the municipal bond market in the mid 1970's. The legislature surely realized the importance of assuring a source of repayment in order to make the bonds marketable. Common sense and experience suggest that the Iowa legislature must have intended Metro to have the latitude necessary to impose restrictions on competition if [**27] Metro believed such restrictions necessary to promote the sale of the bonds. The bond experts had convinced Metro that the restrictions were essential for marketing the bonds. In short, even though the legislation does not speak to the precise question whether restraints of trade could be employed to guarantee the financial <QPQ6> viability of Metro, the comprehensive legislative scheme favoring the development of solid waste facilities demonstrates that the legislature intended the localities to have broad authority to act in furtherance of the legislative mandate.¹⁵ Thus, we believe that the restraint on competition was a "necessary or reasonable consequence" of engaging in the authorized activity of constructing a waste disposal facility with funds raised by revenue bonds. See *Gold Cross Ambulance v. City of Kansas City, supra, 705 F.2d at 1013*; Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 446 (1981).

[**28] The instant case is distinguishable from a case involving, for instance, a cooperative effort among governmental subdivisions to construct a recreational swimming pool. Without evidence that a state legislature considered such a swimming pool to be a high priority project, we would be unwilling to infer that the unauthorized anticompetitive actions of local governments were [*428] <QPQ6> without the contemplation of the legislature. In this modern era, however, the construction of solid waste disposal facilities is an essential governmental activity, and the obvious importance that the Iowa legislature placed on projects such as Metro justifies a broad interpretation of what the legislature must have contemplated. Thus we believe that Metro initiated its anticompetitive conduct pursuant to state policy, and such conduct is exempt from the federal antitrust laws under the *Parker* doctrine.

IV.

Plaintiff contends that, even if the restriction on disposal of refuse generated within the Des Moines area was pursuant to a clearly articulated and affirmatively expressed state policy, as required by *City of Lafayette and Community Communications, supra*, [**29] the defendants' anticompetitive conduct is still not immunized from antitrust scrutiny because it was not actively supervised by the state itself.

H9 [↑] Where private parties claim the benefit of the state action exemption, they are required to show active state supervision of the challenged restraint. See *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 104-06, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. See also *City of Lafayette v. Louisiana Power & Light Co, supra, 435 U.S. at 410*; *Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)*. The Supreme Court has not decided whether this active supervision requirement also applies to anticompetitive activities of municipal governments. See *Community Communications Co. v. City of Boulder, supra, 455 U.S. at 51 n.14*. This circuit, however, has recently held that a showing of state supervision is unnecessary where the restraint represents governmental conduct in an area of traditional municipal activity. *Gold Cross Ambulance & Transfer & Standby Service, Inc. v. City of Kansas City, supra, 705 F.2d at 1014-15*. [**30] Accord *Town of Hallie v. City of Eau Claire, supra, 700 F.2d at 383-84 (7th Cir. 1983)*. Metro's refuse disposal operations were within a well defined

¹⁴ Plaintiff also points out that the constituent municipalities in Metro could guarantee the financial stability of the agency by assessing a fee on all property owners in the area. This would eliminate the need for any monopoly of the disposal of solid waste, and would be permissible, since the activities of Metro involve the public health and welfare.

¹⁵ Indeed, this conclusion is strengthened by the Iowa Supreme Court's interpretation that Chapters 28E and 28F authorize the issuance of revenue bonds and the use of restrictions on competition to protect the liquidity and merchantability of the bonds. See *Goreham v. Des Moines Metro Area Solid Waste Agency, supra, 179 N.W.2d at 457-58*.

area of traditional municipal activity and thus we need not address the district court's reasoning that the supervision exercised by the State of Iowa over the activities of Metro was sufficient to satisfy the requirements of the state action exemption set forth in *California Retail Liquor Dealers Association v. Midcal Aluminum, supra.*¹⁶

Accordingly, the judgment of the district court dismissing the plaintiff's complaint is affirmed.¹⁷

[**31]

End of Document

¹⁶ In view of the district court's dismissal of the federal antitrust claims, dismissal of the pendent state antitrust claims was warranted.

¹⁷ Relying upon *National League of Cities v. Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981), the defendants have also argued that, even apart from the *Parker* exemption, their activities are protected from antitrust scrutiny by the *tenth amendment to the United States Constitution*. Because we hold that the *Parker* exemption applies, there is no need for us to consider the defendants' constitutional argument. It should be noted, however, that once the revenue bonds have been retired, the legislative justification for the anticompetitive provisions will disappear. If the ordinances are still in effect and plaintiff chooses to challenge them at that time, the *Parker* exemption might no longer be available to Metro.



Johnson v. Nationwide Industries, Inc.

United States Court of Appeals for the Seventh Circuit

September 28, 1981, Argued ; August 29, 1983, Decided

No. 81-1347

Reporter

715 F.2d 1233 *; 1983 U.S. App. LEXIS 24452 **; 1983-2 Trade Cas. (CCH) P65,580

ROBERT W. JOHNSON, et al., Plaintiffs-Appellees, v. NATIONWIDE INDUSTRIES, INC., et al., Defendants-Appellants

Prior History: [\[**1\]](#) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 77-C-1162 -- Frank J. McGarr, Judge.

Disposition: AFFIRMED.

Core Terms

management contract, condominium, duration, developer, unit owner, antitrust, products, tie-in

LexisNexis® Headnotes

Real Property Law > Estates > Present Estates > Fee Simple Estates

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Condominiums > Management

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

Real Property Law > Estates > Concurrent Ownership > Tenancies in Common

[**HN1**](#) **Present Estates, Fee Simple Estates**

In Illinois a condominium unit purchaser buys: (1) a fee simple estate in his apartment unit; and (2) a tenancy in common, a fractional undivided interest, in the shared areas such as the ground, outside hallways, elevator, roof, etc. Ill. Rev. Stat. ch. 30, para. 304, 306.

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

[**HN2**](#) **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement conditions the sale of a tying product upon the buyer's purchase of a distinct tied product. Courts associate tying with the exclusion of competitors from the market in the tied product and the restraint of buyers' independent judgment, both of which the courts perceive as fundamental economic evils. Therefore they have condemned such arrangements. In rejecting tying arrangements, courts often refer to tying by a party with sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, as a per se antitrust violation whenever a not insubstantial amount of interstate commerce is affected.

[Real Property Law > Common Interest Communities > Homeowners Associations](#)

[Real Property Law > Common Interest Communities > Condominiums > General Overview](#)

[Real Property Law > Common Interest Communities > Condominiums > Management](#)

[HN3](#) Common Interest Communities, Homeowners Associations

The Illinois Condominium Property Act obligates each unit owner to pay his proportionate share of the common expenses. Ill. Rev. Stat. ch. 30, para. 309. The courts have no doubt that such expenses include charges under management contracts executed by the developer, initially, or, later, by the board of managers pursuant to Ill. Rev. Stat. ch. 30, para. 318.2-318.4. The unit owner's obligation with respect to the common elements is inseparable from the ownership of his unit, and the sale by a developer to a unit owner is *prima facie* a sale of one property interest, the unit and appertaining percentage of ownership in the common elements, and not two. The choice of whether and with whom to contract for management belongs to the unit owners' association, once it assumes control from the developer, and not to unit owners individually.

[Real Property Law > Common Interest Communities > Condominiums > Management](#)

[Evidence > Inferences & Presumptions > General Overview](#)

[Real Property Law > Common Interest Communities > Condominiums > General Overview](#)

[Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale](#)

[Real Property Law > Landlord & Tenant > Rental Property Management](#)

[HN4](#) Condominiums, Management

Condominium owners bear the burden of producing evidence that the duration of a particular property management contract is unreasonable.

Counsel: Robert W. Berliner, Jr., Levy and Erens, Chicago, Illinois, Sheldon O. Collen, Friedman and Koven, Chicago, Illinois, for Appellants.

Thomas H. Fegan, Johnson, Cusack and Bell, Ltd., Chicago, Illinois, for Appellees.

Judges: Bauer, Circuit Judge, Fairchild, Senior Circuit Judge, and Wesley E. Brown, Senior District Judge. *

Opinion by: FAIRCHILD

* Senior District Judge Wesley E. Brown of the District of Kansas sitting by designation.

Opinion

[*1234] FAIRCHILD, Senior Circuit Judge.

This is an appeal from denial of defendants' motions to dismiss or for summary judgment.¹

Each of the two plaintiffs (suing also as class representatives) purchased and owns one unit of a high-rise condominium on Chicago's lakefront. It contains 940 units. They [*2] complain that defendants, some of whom were involved in the conversion of a rental building into this condominium in 1973 and some in later sales,² violated § 1 of the Sherman Act by tying a building management contract to the sale of the units.³ Defendants contend that the sale of a unit subject to a proportionate obligation under a pre-existing management contract is a sale of a single product.

[**3] On August 23, 1973, a trustee executed a declaration of condominium ownership for the building in question. Shortly thereafter, [*1235] the developer defendants contracted with one of their number, Moss Financial Corporation, for the management of the condominium's common elements. By its terms, the contract was to extend until five years after the date by which 80% of the units had been sold by the developer. About two and one-half years after the conversion to a condominium, the developer defendants sold the last 430 unpurchased residential units and all of the commercial properties except the garage to the Invsco defendants and assigned the management contract to American Invsco Management, Inc., one of the Invsco defendants. The condominium's developer-controlled board of directors⁴ (Johnson Dep. 109-14, 214-18) approved the assignment and agreed with the assignee to interpret the contract so that it would extend for the five years beginning January 1, 1976 and ending December 31, 1980. After December 31, 1980, American Invsco Management, Inc., ceased managing the condominium's common areas.

[**4] In denying defendants' motions for summary judgment, the district court rejected defendants' argument that there could be no tying arrangement because only a single product was sold. Noting that "a tying arrangement may avoid *per se* unreasonable status if it is shown to be reasonable and justifiable as a business necessity," the court concluded that the reasonableness of the management contract purchased from defendants is a factual issue.

¹ Leave was given for an interlocutory appeal. [28 U.S.C. § 1292\(b\)](#).

² The district court recognized three groups of defendants: (1) developer defendants who developed the building and converted it from a rental property into a condominium; (2) the three Invsco defendants, two of which succeeded the developer defendants as the title holders of the unsold residential units and one of which is the assignee of a contract to manage the condominium; and (3) garage lessee defendants. The district court dismissed the claims against the garage lessee defendants. See [Johnson v. Nationwide Industries, Inc., 450 F. Supp. 948 \(N.D. Ill. 1978\)](#).

³ [HN1](#) In Illinois a condominium unit purchaser buys: (1) a fee simple estate in his apartment unit; and (2) a tenancy in common (a fractional undivided interest) in the shared areas such as the ground, outside hallways, elevator, roof, etc. Ill. Rev. Stat. ch. 30, §§ 304, 306. The Illinois Condominium Property Act, Ill. Rev. Stat. ch. 30, §§ 301-31, has been amended several times since the declaration of condominium ownership and the contracting for management services in 1973. None of the changes affect the issue before us. We note, however, that an amendment to Ill. Rev. Stat. ch. 30, § 318.2, effective January 1, 1978, if applicable, would have provided an opportunity to cancel the contract in question or any developer negotiated contract which attempted to bind the unit owners' association for a period of more than two years from the recording of the declaration. 1977 Ill. Rev. Laws 80-1118.

Numerous states have chosen to limit the term of management contracts to which a developer may bind the purchasers of condominium units. See *Krebs, The Legislative Response to "Sweetheart" Management Contracts: Protecting the Condominium Purchaser*, 55 Chi-Kent L. Rev. 319, 324 (1979).

⁴ This characterization of the board of directors accords with the most favorable inference attributable to the deposition testimony of the plaintiffs, the party opposing summary judgment. We do not preclude the finding of a contrary fact upon remand.

HN2 A tying arrangement conditions the sale of a tying product upon the buyer's purchase of a distinct tied product. *Northern Pacific Railway v. United States*, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). Courts associate tying with the exclusion of competitors from the market in the tied product and the restraint of buyers' independent judgment, both of which the courts perceive as fundamental economic evils. Therefore they have condemned such arrangements. *Id. at 6*. In rejecting tying arrangements, courts often refer to tying by a party with "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product," as a *per se* antitrust [**5] violation whenever "a 'not insubstantial' amount of interstate commerce is affected." *Id.*

HN3 The Illinois Condominium Property Act obligates each unit owner to pay his proportionate share of the common expenses. Ill. Rev. Stat. ch. 30, § 309. We have no doubt that such expenses include charges under management contracts executed by the developer, initially, or, later, by the board of managers pursuant to §§ 318.2 to 318.4. The unit owner's obligation with respect to the common elements is inseparable from the ownership of his unit, and the sale by a developer to a unit owner is *prima facie* a sale of one property interest (the unit and appertaining percentage of ownership in the common elements) and not two (the unit and share of common elements plus a share of a management contract). The choice of whether and with whom to contract for management belongs to the unit owners' association, once it assumes control from the developer, and not to unit owners individually.

Defendants would have us focus on the sale of the unit, treating the management contract as "pre-existing." Where, however, the same person or group has both created the management contract and made the sale of a [**6] unit, we think the antitrust analysis must focus on the creation of the contract and the sale as if they were one transaction. Thus the original developer is not saved from a claim of antitrust violation by the fact that if one looked at the sale separately, no more than one product would be involved.

The substance of the matter would be different as to a group of units purchased at arm's length by another, subject to the management contract. Such purchasers would bear no responsibility for the pre-existing unity of the contract and the property. [*1236] Therefore in selling to unit owners they would be selling only one product in substance as well as form. Plaintiff Johnson purchased his unit from one of the developer defendants, and plaintiff Hansen claims to have purchased later from one of the Invsco groups. It is conceivable that their cases may have different results on this account. The Invsco defendants have not, up to now, claimed any difference in position on this basis, and there may be facts as to their relationship which would defeat any such claim if made.

It seems clear to us that in development and sale of a large condominium there is great advantage, perhaps [**7] necessity, in the existence of a management contract of substantial duration during the period of sale. The sale process may continue over a substantial period. Prospective purchasers will be highly interested in the identity and reputation of the manager, as well as the tenure and expense of the arrangement. Stability in management is essential to unit owners, and delay in an independent choice until there are enough unit owners to act collectively seems inevitable.

Affidavits submitted to the district court to support a request for reconsideration assert that it is the practice of the condominium industry in the Chicago area to contract for professional management services prior to unit sales and for a period thereafter. Prospective purchasers are reluctant to purchase in a building not professionally managed, and proper management helps protect the developer against loss in value of unsold units. Lenders generally require such contractual arrangements, and virtually all the large condominium buildings in the Chicago area have such contracts during and after the period of sales by the developer.

The decision dealing most directly with sale of condominium units subject to a management [**8] contract is *Foster v. West Alexandria Properties, Inc.*, 1980-1 CCH Trade Cases para. 63,223 (E.D. Va. 1980). There the court held that only one product was sold. It determined that it is neither possible nor practical for a unit and management services to be sold individually in a condominium with 800 units; that there was no evidence of hindrance in the market for condominiums or purchasers or diminution of the number of management service companies; and that it is the universal practice of the industry in the area to contract for the services of a professional management corporation. The court did emphasize the reasonableness of the provisions involved, which permitted earlier

termination of the contract than in the present case. The unit owners' association was permitted to choose a manager once unit owners held 75% of the units, and only eleven months needed to elapse before the decision could become effective. The court found this arrangement manifestly not unreasonable. The court noted that in *Jones v. 247 East Chestnut Properties*, 1975-2 CCH Trade Cases para. 60,491 (N.D. Ill. 1974) unit owners were required to maintain the same management [**9] company for five years after the sale of the last unit, and found *Jones* factually distinguishable on that basis.

Thus the *Foster* court appears to have considered the reasonableness of the duration of the management contract in deciding that the sale of the unit subject to such contract was the sale of only one product.

In *Jones, supra*, the court held that the management services and condominium units were separate products, but could not determine from the showing on the motion for summary judgment whether the duration of the management contract was reasonable. The court noted "the feasibility at some point of a collective choice by the owners with respect to the management of the building." The *Jones* court cited *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). *Jerrold* had held that defendant's insistence upon a buyer of its antenna system taking its service contract was a tie of two products, but reasonable and not in violation of § 1 of the Sherman Act under the circumstances at initial stages of the business. *187 F. Supp. at 557*. [**10]

Thus the *Jerrold* court considered reasonableness as a justification for tying two products, and the *Jones* court followed the [*1237] same analysis.⁵ An Illinois Appellate Court followed *Jones* in a state antitrust case involving the same condominium. *Luster v. Jones*, 70 Ill. App. 3d 1019, 388 N.E.2d 1029, 27 Ill. Dec. 66 (1st Dist. 1979).

Professor Areeda has commented: [**11]

Jerrold is a frank recognition of the room for exceptions to an apparently applicable per se condemnation. It makes clear that so-called per se rules are simply examples of the presumptions that exist throughout **antitrust law**. Of course, presumptions come in various breadths and strengths, and so do per se rules, as we shall see.

....

The court faced with an alleged tie-in that is said to be unlawful per se must, if there by any doubt about it, ask whether the challenged conduct ought to be condemned. That is, the court must decide whether the reasons for relatively categorical historical condemnation of tie-ins apply to the situation before it. If the answer is negative, the court may hold that the challenged conduct does not constitute a tie-in at all. Thus, a package transaction with substantial justifications or with few apparent harmful effects may be said not to be a "tie-in." [Citing in footnote *Principle v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), cert. denied, 451 U.S. 970, 68 L. Ed. 2d 349, 101 S. Ct. 2047 (1981).] Of course, it might be cleaner and clearer to say that harmful effects are a prerequisite for illegality [**12] or that justified tie-ins are lawful, but the immediate point is that courts achieve the same end by varying the definition of a per se classification.

P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues (Federal Judicial Center 1981), pp. 30, 31, 32.

One may wonder whether it makes much difference, except for allocating the burden of producing evidence, whether, in the situation here, a court requires a finding of unreasonable duration of the management contract before deciding that two products are tied, or first finds that two products are tied, but that the arrangement is lawful if the duration of the management contract is reasonable. In either approach there would be a finding as to whether the duration of the management contract was excessive and that is the factor which would foreclose competition.

⁵ *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969), implicitly distinguished the separability issue from the business justification defense. Compare: "Whatever the standards for determining exactly when a transaction involves only a 'single product,' we cannot see how an arrangement such as that present in this case could ever be said to involve only a single product," *394 U.S. at 507*, with "It may turn out that the arrangement involved here serves legitimate purposes." *394 U.S. at 506*.

Because practical considerations require that almost every sale of a condominium unit in a large condominium be subject to a management contract and because we ought not presume that most such contracts are of unreasonable duration, HN4[¹³] plaintiffs ought bear the burden of producing evidence that the duration of a particular management contract is unreasonable. [**13] Therefore we prefer the *Foster* approach and are satisfied that only one product is involved in the sale of a condominium unit subject to a management contract of reasonable duration.

Oddly enough all parties seem to take the position that the duration of the management contract in this case is irrelevant. We nevertheless conclude that the reasonableness of its duration is the critical issue and affirm the denial of summary judgment on that basis.

The order appealed from is AFFIRMED.

End of Document



Partee v. San Diego Chargers Football Co.

Supreme Court of California

August 29, 1983

L.A. No. 31560

Reporter

34 Cal. 3d 378 *; 668 P.2d 674 **; 194 Cal. Rptr. 367 ***; 1983 Cal. LEXIS 223 ****; 1983-2 Trade Cas. (CCH) P65,588

DENNIS PARTEE, Plaintiff and Respondent, v. SAN DIEGO CHARGERS FOOTBALL COMPANY, Defendant and Appellant

Subsequent History: [****1] Respondent's Petition for a Rehearing was Denied September 28, 1983, and the Judgment was Modified to Read as Printed Above.

Prior History: Superior Court of San Diego County, No. 391152, Franklin B. Orfield, Judge.

Disposition: The judgment is reversed insofar as it awards damages on the basis of violation of the Cartwright Act. Each party shall bear its own costs on appeal.

Core Terms

interstate commerce, baseball, antitrust, regulation, Cartwright Act, state regulation, commerce clause, anti trust law, professional football, state **antitrust law**, practices, league, exemption, football, Sherman Act, interstate, teams, players, cases, interstate activity, federal law, preclusion, state law, professional baseball, trial court, preempt, national uniformity, present case, intrastate, preemption

LexisNexis® Headnotes

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

Governments > State & Territorial Governments > Legislatures

Governments > Legislation > Effect & Operation > Prospective Operation

HN1 [?] Regulated Practices, Trade Practices & Unfair Competition

The federal and California antitrust laws, having identical objectives, are harmonious with each other.

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

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

34 Cal. 3d 378, *378LA668 P.2d 674, **674LA94 Cal. Rptr. 367, ***367LA983 Cal. LEXIS 223, ****1

Transportation Law > Interstate Commerce > Federal Powers

Governments > Federal Government > US Congress

HN2 Regulated Practices, Trade Practices & Unfair Competition

The Commerce Clause is a limitation upon the power of the states without implementing legislation by Congress.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Governments > State & Territorial Governments > Legislatures

Transportation Law > Interstate Commerce > Balancing Tests

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

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN3 Interstate Commerce, State Powers

Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Civil Procedure > Trials > Bench Trials

Governments > Legislation > Effect & Operation > Prospective Operation

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN4 Interstate Commerce, State Powers

The burden on interstate commerce will ordinarily be found unreasonable where a state regulation substantially impedes the free flow of commerce from state to state or governs those phases of national commerce which, because of the need of national uniformity, demand their regulation, if any, be prescribed by a single authority.

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

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Governments > State & Territorial Governments > Legislatures

HN5 Regulated Practices, Trade Practices & Unfair Competition

The Commerce Clause permits only incidental regulation of interstate commerce by the states; direct regulation is prohibited.

Antitrust & Trade Law > Regulated Industries > Sports > Football

Governments > State & Territorial Governments > Legislatures

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

[HN6](#)[] Sports, Football

It is settled that the National Football League is engaged in interstate commerce and that federal antitrust laws are applicable.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Civil Procedure > Trials > Bench Trials

Governments > State & Territorial Governments > Legislatures

[HN7](#)[] Sports, Baseball

Where the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extraterritorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A professional football player who played for a team member of the National Football League (NFL) and who was subject to certain nationwide NFL operating rules, such as the draft, option clause, Rozelle rule, tampering rule, and one-man rule, brought an antitrust action against the team for violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)). The trial court found all but the option clause to violate state antitrust laws and awarded the player treble damages based on the difference between his \$ 38,500 salary and a \$ 50,000 offer from a team in another league. (Superior Court of San Diego County, No. 391152, Franklin B. Orfield, Judge.)

The Supreme Court reversed insofar as the judgment awarded damages on the basis of a violation of the Cartwright Act, holding that application of state **antitrust law** to the interstate activities of professional football would impermissibly burden interstate commerce. Stating that professional football is a nationwide business

structured essentially the same as baseball, to which state antitrust laws are inapplicable, and that there was need for a nationwide league structure and a nationally uniform set of rules, the court held that the national uniformity required in the regulation of baseball and its reserve system was likewise required in the player-team-league relationships at issue. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions would likely compel all members to comply with the laws of the strictest state. (Opinion by Broussard, J., with Bird, C. J., Mosk, Richardson, Kaus, JJ., and Byrne, J., * concurring. Separate concurring opinion by Mosk, J. Separate dissenting opinion by Reynoso, J.)

Headnotes

CA(1a) [] (1a) CA(1b) [] (1b)

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Applicability to Interstate Activities of Professional Football.

--A professional football player who played for a team that was a member of the National Football League (NFL) and who was subject to certain nationwide NFL operating rules, such as the draft, option clause, Rozelle rule, tampering rule, and one-man rule, did not have an antitrust claim against the team for violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), and was improperly awarded treble damages based on the difference between his \$ 38,500 salary and a \$ 50,000 offer from a team in another league, since application of the Cartwright Act to the interstate activities of professional football would impermissibly burden interstate commerce. Professional football is a nationwide business structured essentially the same as baseball, to which state antitrust laws are inapplicable, in which there is need for a nationwide league structure and a nationally uniform set of rules. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions would likely compel all member teams to comply with the laws of the strictest state. Thus, the national uniformity required in the regulation of baseball and its reserve system was likewise required in the player-team-league relationships at issue.

CA(2) [] (2)

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Consistency Between State and Federal Law.

--The federal and state antitrust laws (*Bus. & Prof. Code, § 16700 et seq.*), having identical objectives, are harmonious with each other.

CA(3) [] (3)

Commerce § 3—State Regulation and Taxation of Interstate Commerce.

--The commerce clause is a limitation on the power of the states without implementing legislation by Congress and does not render invalid every exercise of state power with some impact on interstate commerce. However, the commerce clause permits only incidental regulation of interstate commerce by the states; direct regulation is prohibited. Accordingly, a state statute must be upheld if it regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. The burden on interstate commerce will ordinarily be found unreasonable when the state regulation substantially impedes the free flow of commerce from

* Assigned by the Chairperson of the Judicial Council.

state to state or governs 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.

CA(4) [] (4)

Monopolies and Restraints of Trade § 4—Sherman Act—Applicability to Professional Football.

--The National Football League is engaged in interstate commerce and is subject to federal antitrust laws.

Counsel: Terry Christensen, Andrew M. White, Michael E. Viebrock and Wyman, Bautzer, Rothman, Kuchel & Silbert for Defendant and Appellant.

Hamilton Carothers, Keith A. Teel and Covington & Burling as Amici Curiae on behalf of Defendant and Appellant.

Louis E. Goebel, Brian D. Monaghan, James E. Rubnitz and Goebel & Monaghan for Plaintiff and Respondent.

Judges: Opinion by Broussard, J., with Bird, C. J., Mosk, Richardson, Kaus, JJ., and Byrne, J., * concurring. Separate concurring opinion by Mosk, J. Separate dissenting opinion by Reynoso, J.

Opinion by: BROUSSARD

Opinion

[*380] [**675] [***368] The San Diego Chargers Football Company, a California limited partnership, appeals a judgment awarding damages for violation [***369] of the California antitrust law. [****2] ([Bus. & Prof. Code, § 16700 et seq.](#), hereinafter the [**676] Cartwright Act.) ¹ In accordance with other decisions considering the applicability of state antitrust laws to national professional sports leagues, we conclude that the Cartwright Act is not applicable to the interstate activities of professional football.

From 1968 to 1976, Dennis Partee, a California resident, played professional football as a punter and placekicker for the Chargers, a member of the National Football League (NFL). In 1974, the World Football League came into existence, and one of its teams offered Partee \$ 50,000 to play for [*381] it for a season. He subsequently entered into a contract with the Chargers for three years with a salary of \$ 38,500 in 1974, \$ 44,000 in 1975, and \$ 49,500 in 1976. The [***3] agreement was subject to the terms and conditions of the standard NFL players contract. The trial court fixed damages for violation of the Cartwright Act based on the difference between the \$ 50,000 offer and the 1974 salary, awarded for the three years of the contract and trebled for a total award of \$ 103,500.

In 1975, the last full year Partee played for the Chargers, the NFL had 26 teams located in 16 states and the District of Columbia. The league structure is characterized by a basic division into two conferences each having divisions composed of certain teams within the conference, and by play according to an ordered schedule between teams within the various divisions and the two conferences. The Chargers play nearly half their games outside of California, and most of their games are against teams located in other states. NFL games are regularly broadcast coast to coast over network television, and professional football has gained nationwide appeal.

To promote athletic competition by providing a means of keeping the teams on a par with each other and to foster the business success of the member teams, the NFL has certain operating rules, many of which are embodied in

* Assigned by the Chairperson of the Judicial Council.

¹ The judgment also awarded damages for breach of contract. On appeal, the Chargers did not challenge the part of the judgment awarding contract damages, and we dismissed the appeal insofar as it relates to that award.

the [****4] NFL constitution and bylaws. Partee's antitrust action concerns five of these operating rules as they existed in 1974: the draft, option clause, Rozelle rule, tampering rule and one-man rule.² These rules are applied nationwide to all of the teams in the league. The court found all but the option clause to violate California antitrust laws.

[****5] Since 1968, all NFL players have been represented by the NFL Players Association (NFLPA). In 1970, the NFLPA and NFL management entered [*382] a second collective bargaining agreement covering the 1970 and 1973 seasons. No new agreement was reached until March 1977, but this agreement was made retroactive to the expiration date of the prior agreement. This new agreement, which was effective into [***370] 1982, contains each of the rules or practices challenged by Partee.³

[****6] [CA\(1a\)](#)⁴ (1a) The [**677](#) Chargers contend that professional football is a unique activity of interstate commerce which requires nationally uniform governance, that only federal antitrust laws apply, that interstate commerce would be unreasonably burdened if state antitrust laws were applied to professional football's interstate activities, and that application of the Cartwright Act was a violation of the commerce and supremacy clauses of the Constitution.

[CA\(2\)](#)⁵ (2) The Chargers do not claim federal antitrust laws, the Sherman and Clayton Acts, "occupy" the field of antitrust regulation, or that the federal and state antitrust laws so conflict as to require preemption of the state scheme. [HN1](#)⁶ The federal and California antitrust laws, having identical objectives, are harmonious with each other. (See [Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal.2d 305, 315 \[70 Cal.Rptr. 849, 444 P.2d 481\]](#).)

[CA\(3\)](#)⁷ (3) [HN2](#)⁸ The commerce clause is a limitation upon the power of the states without implementing legislation by Congress. ([A.&P. Tea Co., Inc. v. Cottrell \(1976\) 424 U.S. 366, 370-371 \[47 L.Ed.2d 55, 60, 96 S.Ct. 923\]](#)) [HN3](#)⁹ "Not every exercise of state power with some impact on interstate [****7] commerce is invalid. A state statute must be upheld if it 'regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such-commerce is clearly excessive in relation to the putative local benefits.'" ([Edgar v. Mite Corp. \(1982\) 457 U.S. 624, 640 \[73 L.Ed.2d 269, 282, 102 S.Ct. 2629, 2640\]; Minnesota v. Clover Leaf Creamery Co. \(1981\) 449 U.S. 456, 471 \[66 L.Ed.2d 659, 673, 101 S.Ct. 715\]; Pike v. Bruce Church, Inc. \(1970\) 397 U.S. 137, 142 \[25 L.Ed.2d 174, 178, 90 S.Ct. 844\].](#)) [HN4](#)¹⁰ The burden on interstate commerce will ordinarily be found unreasonable where the state regulation

²The draft is a selection system whereby the respective NFL teams are awarded the initial rights to negotiate exclusively with football players graduating from college.

The option clause is a provision of the NFL Standard Player Contract which grants the team the right to renew a player's contract for one additional year if the team and player cannot agree to a new contract. After the option year expires, the player becomes a "free agent" and may negotiate and contract with teams of another league or with other NFL teams subject to the Rozelle rule.

The Rozelle rule is named after the NFL commissioner, Pete Rozelle. This rule provides if a free agent contracts with another NFL team, the new team must compensate the player's former team with draft choice(s) or other player contracts. If the new and former teams cannot agree as to the compensation, the commissioner arbitrates the matter and determines the compensation.

The tampering rule prohibits an NFL team from negotiating with a player currently under contract with another NFL team. Also, if one team has the exclusive right to negotiate with a player, no other team may tamper with that player.

The one-man rule refers to the commissioner's authority to compel a player to adhere to terms of an operative collective bargaining agreement between the players and the NFL teams.

³This second collective bargaining agreement was negotiated during the pendency of antitrust suits brought by players against the NFL. The most significant case, *Alexander v. National Football League* (D.Minn. 1977) 1977-2 Trade Cases (CCH) para. 61,730, was a class action. The agreement and *Alexander* incorporate a settlement which includes the practices and rules Partee challenges. The settlement also contains a covenant not to sue (in antitrust) by the class members. However, Partee, who filed this suit before the specified cutoff date, chose not to be a class member. This agreement terminated in mid-1982.

substantially impedes the free flow of commerce from state to state or governs "those phases of the national commerce which, because of the need of national uniformity, demand their [*383] regulation, if any, be prescribed by a single authority." (*Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761, 767 [89 L.Ed. 1915, 1923, 65 S.Ct. 1515].) **HN5**^[↑] The commerce clause permits only incidental regulation of interstate commerce by the states; direct regulation is prohibited. [****8] (*Edgar v. Mite Corp.*, *supra*, 457 U.S. 624, 641-643 [73 L.Ed.2d 269, 282-283, 102 S.Ct. 2629, 2640-2641].)

CA(4)^[↑] (4) **HN6**^[↑] It is settled that the NFL is engaged in interstate commerce and that federal antitrust laws are applicable. (*Radovich v. Nat. Football League* (1957) 352 U.S. 445, 452 [1 L.Ed.2d 456, 462, 77 S.Ct. 390].)

CA(1b)^[↑] (1b) A number of cases have considered the applicability of state antitrust laws to national professional sports leagues. The leading case is *Flood v. Kuhn* (S.D.N.Y. 1970) 316 F.Supp. 271, affirmed (2d Cir. 1971) 443 F.2d 264, affirmed 407 U.S. 258 [32 L.Ed.2d 728, 92 S.Ct. 2099]. Considering baseball's reserve system, the trial court found state antitrust laws inapplicable on alternative grounds: preemption and unreasonable burden on interstate commerce.⁴

[***9] [***371] Treating the applicability of state antitrust laws to professional baseball as a question of first impression, the Second Circuit affirmed. (*Flood v. Kuhn*, *supra*, 443 F.2d 264, 267-268.) [**678] The court stated: **HN7**^[↑] "[Where] the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extra-territorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce." (*Id.*, *at p. 267*.)

Analyzing the organization of professional baseball and the effect of state antitrust regulation balanced against its need, the court of appeals reasoned: "Professional baseball clubs, although existing as separate legal entities, are organized into so-called leagues for competitive play and are dependent on the league playing schedule to further the ends of their sports competition. Therefore, it is the league structure at which any state antitrust regulation must be aimed if organized professional [***10] baseball is not to be severely fragmented. On the one hand, it is apparent that each league extends over [*384] many states, and that, if state regulation were permissible, the internal structure of the leagues would require compliance with the strictest state antitrust standard. The consequent extra-territorial effect of necessary compliance would be considerably more far-reaching than that in *Southern Pacific Co. v. Arizona*, *supra*. On the other hand, we do not find that a state's interest in antitrust regulation, when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state **antitrust law**." (443 F.2d *at pp. 267-268*; fn. omitted.)

Affirming the circuit court, the United States Supreme Court stated: "The petitioner's argument as to the application of state antitrust laws deserves a word. Judge Cooper rejected the state law claims because state antitrust regulation would conflict with federal policy and because national 'uniformity [is required] in any regulation of [***11] baseball and its reserve system.' 316 F.Supp., *at 280*. The Court of Appeals, in affirming, stated, '[As] the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state **antitrust law**.' 443 F.2d, *at 268*. As applied to organized baseball, and in the light of this Court's observations and holdings in *Federal Baseball*, in *Toolson*, in *Shubert*, in *International Boxing*, and in *Radovich*, and despite baseball's allegedly inconsistent position taken in the past with respect to the application of state law, these statements adequately dispose of the state law claims." (407 U.S. *at*

⁴ As considered by the trial court in *Flood v. Kuhn*, baseball's reserve system had many of the attributes of the NFL rules and practices of which Partee complains. Baseball's reserve system involved an agreement by all of the teams to be involved in a draft creating exclusive bargaining rights in the club as to the draftee; a uniform player's contract empowering the signing club unilaterally to renew a player's contract from year to year; denial of any right in a player, once signed, to negotiate with any other team; a prescribed number of players per team; and the unilateral right of a team to assign the contract to another team. (See *Flood v. Kuhn*, *supra*, 316 F.Supp. 271, 273-275.)

34 Cal. 3d 378, *384 LEXIS 668 P.2d 674, **678 LEXIS 94 Cal. Rptr. 367, ***371 LEXIS 983 Cal. LEXIS 223, ****11

[pp. 284-285 \[32 L.Ed.2d at p. 745\]](#), fn. omitted; see [State of Wisconsin v. Milwaukee Braves, Inc. \(1966\) 31 Wis.2d 699 \[144 N.W.2d 1, 17-18\]](#); cert. den. 385 U.S. 990 [17 L.Ed.2d 451, 87 S.Ct. 598]; rehg. den. 385 U.S. 1044 [17 L.Ed.2d 689, 87 S.Ct. 770].)

Following *Flood v. Kuhn*, state antitrust regulation has been held inapplicable to professional basketball ([Robertson v. National Basketball Association \(S.D.N.Y. 1975\) 389 F.Supp. 867, 881](#); [HMC Management \[****12\] v. New Orleans Basketball Club \(La.App. 1979\) 375 So.2d 700, 706-707](#)) and professional football ([Matuszak v. Houston Oilers, Inc. \(Tex.Civ.App. 1974\) 515 S.W.2d 725, 728-729](#)). No case has been found applying state antitrust laws to the interstate activities of professional sports.

Professional football is a nationwide business structured essentially the same as baseball. Professional football's teams are dependent upon the league playing schedule for competitive play, just as in baseball. The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the [*385] league structure on the basis of state lines would adversely affect the success of the competitive business [***372] enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state. [**679] (*Flood v. Kuhn, supra*, 443 F.2d at pp. 267-268.)

We are satisfied that national uniformity required in regulation of baseball and its reserve [***13] system is likewise required in the player-team-league relationships challenged by Partee and that the burden on interstate commerce outweighs the state interests in applying state antitrust laws to those relationships.

Partee seeks to distinguish *Flood v. Kuhn*, on the ground that professional baseball enjoys a unique exemption from federal antitrust law (*Flood v. Kuhn, supra*, 407 U.S. 258, 269-284 [32 L.Ed.2d 728, 736-745]; [Toolson v. New York Yankees \(1953\) 346 U.S. 356 \[98 L.Ed. 64, 74 S.Ct. 78\]](#); [Federal Baseball Club v. National League \(1922\) 259 U.S. 200 \[66 L.Ed. 898, 42 S.Ct. 465, 26 A.L.R. 357\]](#)), and that the United States Supreme Court in upholding baseball's exemption from state law relied on the cases establishing baseball's federal exemption and stated that its holding applied to baseball. However, the high court specifically relied upon the court of appeals' statement: "[As] the burden on interstate commerce outweighs the states' interests in regulating baseball's system, the Commerce Clause precludes the application of state antitrust law." The high court also relied upon the district court judge's statement that "national 'uniformity [****14] [is required] in a regulation of baseball and its reserve system.'" ([407 U.S. at p. 284 \[32 L.Ed.2d at p. 745\]](#).) There is no justification to conclude that the United States Supreme Court did not fully consider the brief statements from the lower court opinions it chose to quote, approve, and rely upon. The statements are clear and unequivocal, and we are not free to disregard them. Because in all relevant respects the burden on interstate commerce and the state interest resulting from the player-team-league relationship in professional football attacked by Partee is substantially the equivalent of that resulting from the reserve clause in professional baseball, the statements are applicable to professional football.

Our conclusion that application of the Cartwright Act in the instant case would be in conflict with the commerce clause makes it unnecessary to consider the claim that application of the Cartwright Act would also be in conflict with federal labor law policy.⁵

[***15] [*386] The judgment is reversed insofar as it awards damages on the basis of violation of the Cartwright Act. Each party shall bear its own costs on appeal.

Concur by: MOSK

⁵ The dissent asserts that today's holding strikes a significant blow to the vitality of the Cartwright Act and that by this opinion "we would necessarily have to exempt all businesses engaged in multistate activities." (Dis. opn. at pp. 389, 408.) This opinion has a limited scope. The Cartwright Act remains vital. We do not mean to suggest that multistate activities of other businesses may not be subject to state regulation upon due consideration of the commerce clause. Our holding is limited to the issue directly before us, the inapplicability of the Cartwright Act to professional football.

Concur

MOSK, J., Concurring. I have signed the majority opinion, under compulsion of [*Flood v. Kuhn \(1972\) 407 U.S. 258 \[32 L.Ed.2d 728, 92 S.Ct. 2099\]*](#).

Though keenly aware of the need to vigilantly enforce the Cartwright Act, I cannot accept the unique theory of the dissent that professional baseball and professional football are governed by different law. Though the playing fields are of different configuration, the balls of a different shape, the equipment and uniforms of a varying appearance and the method of scoring inconsistent, both baseball and football are for all practical purposes identical coast to coast sporting ventures seeking a combination of glory and financial reward.

While I might not rhapsodize as effusively about baseball lore as did Justice Blackmun [***373] in *Flood* (*supra*, pp. 260-264 [32 L.Ed.2d pp. 732-734]), I am bound by the decision in that case and believe despite some dictum (*id.*, p. 283 [32 L.Ed.2d at p. 744]) that [**680] it must be applied [****16] equally to professional football. If a great outfielder like Curt Flood is barred by the United States Supreme Court from state antitrust protection, an outstanding gridiron performer like Dennis Partee must suffer the same fate.

Dissent by: REYNOSO

Dissent

REYNOSO, J., Dissenting. Is the application of our state antitrust law ([*Bus. & Prof. Code, § 16700 et seq.*](#); the Cartwright Act) to professional football precluded by the presence of interstate commerce and concurrent Sherman Act jurisdiction? I think not.

The Cartwright Act parallels and is in harmony with the Sherman Antitrust Act. A conflict would arise only if compliance with both federal and state regulations were impossible ([*Florida Avocado Growers v. Paul \(1963\) 373 U.S. 132, 142-143 \[10 L.Ed.2d 248, 256-257, 83 S.Ct. 1210\]*](#)) or if state regulation stood as an obstacle to achievement of congressional objectives ([*Hines v. Davidowitz \(1941\) 312 U.S. 52, 67 \[85 L.Ed. 581, 587, 61 S.Ct. 399\]*](#)). Nothing in the case before us even remotely suggests that application of the Cartwright Act conflicts with or is hostile to federal [*387] antitrust enforcement. To the contrary, federal courts have held the [****17] same National Football League (NFL) rules and practices challenged by Partee to be violative of the Sherman Act. Nor is there any interference with any congressionally declared, paramount national interest, notwithstanding the majority's implication that the league structure of professional sports entitles the individual team businesses to a state antitrust exemption not enjoyed by any other business engaged in interstate commerce.

As the majority correctly note, the doctrine of federal preemption under the supremacy clause ¹ is not involved in this case, i.e., Congress has not occupied the field of antitrust regulation to the exclusion of the states. Our focus then is on the narrow issue of federal preclusion under the commerce clause. ² [****19] The majority summarily conclude, without discussion, that application of the Cartwright Act to the NFL practices would virtually destroy "the

¹ (U.S. Const., art. VI, [*cl. 2.*](#))

² "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ." (U.S. [*Const., art. I, § 8, cl. 3.*](#)) The Supreme Court has explained: "The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods . . . or of persons who have been kidnapped . . . Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft . . . or persons or things in commerce, as, for example, thefts from interstate shipments . . . Third, those activities affecting commerce." ([*Perez v. United States \(1971\) 402 U.S. 146, 150 \[28 L.Ed.2d 686, 690, 91 S.Ct. 1357.\]*](#)) We are here concerned with the third element of interstate commerce jurisdiction.

player-team-league relationships challenged by Partee and that the burden on interstate commerce outweighs the state interests in applying state antitrust laws to those relationships." (*Ante*, at p. 385.) But we are not told why this is so when the trial court has done nothing more than remove restraints [****18] on free trade which have already been held violative of the federal act.³ I respectfully suggest that the majority fail to explain why there is a potential for lack of uniformity and a consequent burden on interstate commerce, because, in the present case, there can be no showing whatsoever that the application of the Cartwright Act to the challenged NFL practices will have *any* adverse effects on the free flow of commerce across state lines. In holding otherwise -- contrary to the record before us -- the majority ignore the unique and limited [***374] factual circumstances in which this case arises. The trial judge found that this case is one of only four cases remaining from a 1977 settlement of a class action [**681] antitrust suit brought by NFL players against the league. Pursuant to the settlement agreement, the players covenanted not to sue; thus only players opting out of the settlement -- e.g., Partee -- can challenge the practices here in issue.

[*388] Thus, in the circumstances of this case, I cannot agree that application of state **antitrust law** will impose on interstate commerce an undue -- indeed, any -- burden which "is clearly excessive in relation to the putative local benefits." (*Ante*, at p. 385.) This action, involving a California resident and a California corporation, arises under an employment contract expressly providing for the application of California law. The trial court, recognizing that antitrust regulation is an area of overlapping state and federal concern, correctly concluded the process is one of accommodation and that, in the present circumstances, application of state law is proper and preferable. Indeed, the state antitrust [****20] action was the only one available to Partee. A majority of this court have now left him with no remedy though the challenged practices manifestly violate state and federal antitrust laws.

The majority reverse the judgment in this case on the ground that "we are not free to disregard" the Supreme Court's holding in Flood v. Kuhn (1972) 407 U.S. 258 [32 L.Ed.2d 728, 92 S.Ct. 2099]. Finding *Flood* controlling, the majority think it unnecessary to decide whether state regulation of professional football actually conflicts with federal law or policy. As I shall explain, the *Flood* case, while binding on us, is in my view clearly distinguishable. I question the wisdom of deferring to a case which the high court candidly admits is an aberration in the law and a perpetuation of earlier, erroneously decided cases applicable only to professional baseball. More importantly, in *Flood*, state antitrust regulation would have inevitably resulted in conflict with federal law as baseball has historically been granted an exemption from federal antitrust regulation. In other contexts, the Supreme Court has consistently held that the mere potential of conflict with federal law [****21] is insufficient to preempt state regulation. Most recently, the high court has held that California's statutory provisions for the storage and disposal of nuclear waste are not preempted by, and do not conflict with federal law, notwithstanding Congress' passage of the Nuclear Waste Policy Act of 1982. (Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission (1983) U.S. [75 L.Ed.2d 752, 103 S.Ct. 1713].) I find it ironic that this court today holds that professional football -- for which Congress has *not* declared a national uniform policy -- is immune from state regulation.

The majority thus embrace the same dubious conclusion reached by the Court of Appeal below. Although we granted hearing to address this difficult federal preemption question -- the resolution of which requires a delicate balancing of state and federal interests in this area of mutual concern -- the majority simply conclude that we are presented with a nonissue as the result in this case is assertedly preordained by the Supreme Court's decision in *Flood*. My conclusion that this case is not controlled by *Flood* necessarily requires a more detailed [****22] analysis (and rejection) of the San Diego Chargers [*389] federal preclusion claim than that of the majority decision, which -- I respectfully suggest -- is rendered without apparent recognition of the significant blow dealt to the vitality of the Cartwright Act.

As I shall explain, the majority's holding represents a dramatic and abrupt departure from this court's previous teachings and uniform application of the Cartwright Act to activities affecting interstate commerce. I would not turn

³ "Consequently, it would be difficult to prove that a policy which removes privately instituted interferences, delays, interruptions, and inconveniences with interstate commerce, is itself a delay, interference, interruption, and inconvenience to interstate commerce when enforced at the local level by the States." (Flynn, *Federalism and State Antitrust Regulation* (1964) at p. 84.)

my back on sound precedent unless there is something unique about professional football which compels a marked deviation from the normal course of our consistent holdings in this area. In my view, professional sports enterprises, despite our society's fascination with them, are no different, in any legally significant way, than any other business engaged in [***375] interstate commerce. Accordingly, I fear that today's decision comes dangerously close to eliminating concurrent state-federal [**682] antitrust enforcement as it may be read as relegating state jurisdiction to solely intrastate conduct and activities, a realm of competence already severely restricted by the vast expansion [****23] of federal interstate authority.

In short, the majority fail to reconcile principles of federalism with the reality of a national economy dominated by interstate commercial activity. My review of the case law in this area convinces me that our state's interest in regulating anticompetitive practices is paramount if the subject matter is not one which requires exclusive federal regulation in order to achieve uniformity vital to national interests. An extended discussion of the relevant decisional authority is necessary to show that the majority today fashion the unprecedented rule that a wholly speculative conflict between state and federal law, founded on mere supposition and inference unsupported by the factual record before us, is sufficient to compel a finding of federal preemption. This approach is completely at odds with, and seriously misapprehends the commerce clause preclusion doctrine carefully delineated in legion Supreme Court decisions. I would not follow this misguided path at the expense of our state's Cartwright Act. Instead, I would hold that, consistent with the commerce clause, the Cartwright Act may apply to activities which affect interstate commerce if, as [****24] in the present case, there is neither a conflict with federal law or policy nor imposition of a burden on interstate commerce. I therefore dissent.

This case arises in a limited factual setting.

Partee filed this action alleging, inter alia, breach of contract in that the San Diego Chargers (Chargers) failed to pay his 1976 salary, and violation of the Cartwright Act in that the Chargers' adherence to various NFL rules and practices damaged his business and property interests. The antitrust action concerns five operating rules (contained in the NFL constitution and [*390] bylaws and incorporated by reference in the standard player contract) which, Partee alleged, imposed an unreasonable restraint on player transfer. Partee challenged these rules (the draft, option clause, Rozelle rule, tampering rule and one-man rule) as they existed in 1974.

These operating rules and practices have since been modified due in large part to several other actions against the NFL brought by players under federal antitrust laws. Three individual plaintiffs have prevailed on the merits of their challenge to these same rules. (*Smith v. Pro-Football (D.D.C. 1976)* 420 F.Supp. 738, [***25] revd. in part, affd. in part (D.C. Cir. 1976) 593 F.2d 1173; *Kapp v. National Football League* (N.D.Cal. 1974) 390 F.Supp. 73 (9th Cir. 1978) 586 F.2d 644, cert. den. 441 U.S. 907 [60 L.Ed.2d 375, 99 S.Ct. 1996]; *Mackey v. National Football League (D.Minn. 1975)* 407 F.Supp. 1000, affd. in part, revd. in part (8th Cir. 1976) 543 F.2d 606, petn. for cert. withdrawn (1977) 434 U.S. 801 [54 L.Ed.2d 59, 98 S.Ct. 28].) In *Kapp*, the district court granted summary judgment in favor of plaintiff, finding the draft, Rozelle rule, tampering rule and one man rule violative of the Sherman Act. The *Smith* court found the draft a "per se" restraint on trade; the circuit court affirmed on the "rule of reason" theory, but remanded for recomputation of damages. In *Mackey*, the circuit court affirmed a judgment that the Rozelle rule violated the Sherman Act; thereafter, the NFL's petition for writ of certiorari in the Supreme Court was withdrawn pursuant to the terms of a settlement agreement in *Alexander v. NFL* (D.Minn. 1977) 1977-2 Trade Cases (CCH) para. 61,730.

Alexander was a class action brought on behalf of all NFL players, during the same period that [***26] NFL management was attempting to negotiate a collective bargaining agreement with the NFL Players Association (NFLPA). In March 1977, the NFL and NFLPA agreed to a comprehensive settlement which included the adoption of a new collective bargaining agreement which was made retroactive to the expiration date of the prior agreement in 1974. (This [***376] agreement expired in 1982.) The 1977 collective bargaining agreement sought to stimulate player mobility and remedy the [**683] lack of competitive bidding by, for example, modifying the Rozelle rule, providing a team with a "right of first refusal" when a free agent negotiates with another team for his services, and requiring that compensation take the form of draft choices. (See, e.g., Comment, *Sport in Court: The Legality of Professional Football's System of Reserve and Compensation* (1980) 28 UCLA L.Rev. 252.) Thus, the 1977 agreement substantially modified the rules and practices challenged by Partee and may have obviated most of the

problems with unreasonable trade practices. (Of course, we are here concerned only with the NFL's rules and practices in effect in 1974 and need not consider whether the terms of the [****27] 1977, or for that matter the 1982, collective bargaining agreement are still so restrictive as to violate antitrust laws, state or federal.)

[*391] The *Alexander* settlement also contained a covenant not to sue in antitrust by the class members. Partee, however, is not bound by the settlement agreement as he filed this action before the specified cut-off date and chose not to be a class member.⁴ Thus, as earlier noted, he is one of a handful of players who is not precluded from challenging the NFL rules in force in 1974.

[****28] The present action proceeded to trial in 1979. After a nonjury trial, the court found in favor of Partee on the antitrust and breach of contract causes of action.⁵ As to the antitrust cause of action, the trial court found that "[the] facts of this case present no undue burden upon interstate commerce, nor is there any preemption of the field by the Sherman Act or other federal statutes or the Constitution" Based on the evidence and, alternatively, on the doctrine of collateral estoppel (in reliance on *Smith, Kapp, and Mackey*), the court found that all of the challenged rules, with the exception of the option clause, constituted an unreasonable restraint of trade in violation of the Cartwright Act. The court assessed actual damages under the antitrust cause of action in the amount of \$ 34,500 (based on the difference between the World Football League offer and Partee's 1974 salary from the Chargers computed through 1976) and trebled that amount under the Cartwright Act for a total amount of \$ 103,500. Damages under the breach of contract cause of action were assessed in the amount of \$ 30,550.

[****29] The Chargers do not appeal from the breach of contract judgment as they assert claims of error only as to the antitrust judgment. The Chargers contend that the trial court lacked jurisdiction to apply the Cartwright Act to the interstate activities of professional football.

The narrow issue before us involves federal preclusion under the commerce clause.

As the majority observe, the Chargers *do not* base their argument against state antitrust regulation of their business activities on the traditional [*392] preemption doctrine.⁶ [*684] [***377] The Chargers do not claim a violation of the supremacy clause. Nor can they do so. The contention that the Sherman Act ([15 U.S.C. § 1 et seq.](#)) occupies the field of antitrust (so that state regulation of the field is preempted as conflicting with the declared or presumed intent of Congress) was persuasively rejected in the well-reasoned Court of Appeal opinion [*R. E. Spriggs Co. v. Adolph Coors Co. \(1974\) 37 Cal.App.3d 653 \[112 Cal.Rptr. 585\]*](#).

⁴ Pursuant to federal rules of procedure for class actions, a notice was sent to all class members, including Partee, concerning the potential settlement. The settlement notice contained the following statement: "Neither the covenant not to sue, nor the dismissal with prejudice of this action shall prevent any member of the plaintiff class who duly commenced an individual action . . . in any Federal or State Court, prior to March 4, 1977, from pursuing such action to its lawful conclusion through trial and appeal." (Italics added.)

⁵ The court found in favor of the Chargers on fraud and unpaid wages causes of action.

⁶ The traditional preemption doctrine focuses on congressional intent. Thus, state regulation is preempted if Congress expresses a clear intent to reserve a field exclusively within its jurisdiction (see, e.g., [*Pennsylvania v. Nelson \(1956\) 350 U.S. 497 \[100 L.Ed. 640, 76 S.Ct. 477\]*](#); [*Charleston & W.C. Railway v. Varnville Furniture Co. \(1915\) 237 U.S. 597 \[59 L.Ed. 1137, 35 S.Ct. 715\]*](#)) or if such an intent can be inferred in a field dominated by pervasive federal regulation (see, e.g., [*Garner v. Teamsters Union \(1953\) 346 U.S. 485 \[98 L.Ed. 228, 74 S.Ct. 161\]*](#); [*Hines v. Davidowitz, supra, 312 U.S. 52*](#)). Conversely, in the absence of congressional occupation of a field, a state may regulate the interstate aspects of an activity, even though the regulation has some effect on interstate commerce. (See, e.g., [*Head v. New Mexico Board \(1936\) 374 U.S. 424 \[10 L.Ed.2d 983, 83 S.Ct. 1759\]*](#); [*Huron Cement Co. v. Detroit \(1960\) 362 U.S. 440 \[4 L.Ed.2d 852, 80 S.Ct. 813, 78 A.L.R.2d 1294\]*](#).) However, even in this latter area, state laws which conflict with federal law may be preempted. (E.g., [*California v. Zook \(1949\) 336 U.S. 725 \[93 L.Ed. 1005, 69 S.Ct. 841\]*](#); but see [*Exxon Corp. v. Governor of Maryland \(1978\) 437 U.S. 117 \[57 L.Ed.2d 91, 98 S.Ct. 2207\]*](#); [*Parker v. Brown \(1943\) 317 U.S. 341 \[87 L.Ed. 315, 63 S.Ct. 307\]*](#).)

[****30] The court in *Coors* noted that the legislative history of the Sherman Act unequivocably evidences a congressional intent to supplement, not preempt, state antitrust enforcement.⁷ [****32] Moreover, because the Cartwright Act was patterned after the Sherman Act, both laws have identical objectives and are harmonious with each other ([Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal.2d 305, 315 \[70 Cal.Rptr. 849, 444 P.2d 481\]](#)); thus, decisions under the latter act are applicable in construing the former ([Mailand v. Burckle \(1978\) 20 Cal.3d 367 \[143 Cal.Rptr. 1, 572 \[*393\] P.2d 1142\]](#)). The adoption and incorporation of federal precedent effectively precludes the possibility of conflicts.⁸ In light of Supreme Court holdings that "mere coincidence" of state and federal regulation is not enough to preempt state law (see, e.g., [California v. Zook, supra, 336 U.S. at pp. 731-733 \[93 L.Ed. at pp. 1010-1011\]](#)), it cannot be seriously disputed, therefore, that state and federal laws may operate concurrently in the area of antitrust regulation. (See [Younger v. Jenson \(1980\) 26 Cal.3d 397, 405 \[161 Cal.Rptr. 905, 605 P.2d 813\]](#) ["Obviously [****31] there is an overlap between coverages of the Sherman Act . . . and state antitrust laws that prohibit substantially the same conduct, . . ."].) Federal preemption, then, is applicable in this case, if at all, because of the operation of commerce clause limitations on this concurrent state jurisdiction.⁹

[***378] The Chargers make clear that their position is grounded on commerce clause principles. Particularly, they contend that state regulation [****33] through the Cartwright Act is [**685] precluded by the commerce clause because the structure of professional football is (1) "exclusively interstate commerce," and (2) "uniquely interstate commerce." The distinction set forth by the Chargers is not without significance. The former characterization -- exclusivity -- goes to the *impact* of the activity on the state: does it have a sufficient local consequence or nexus with the state? The latter -- uniqueness -- relates more properly to the *nature* of the activity: is it an activity requiring national uniformity, the regulation of which imposes a burden on interstate commerce?

The challenged activities in this case are not exclusively in interstate commerce.

It is axiomatic that where an activity is exclusively in interstate commerce without intrastate aspects, the commerce clause precludes state regulation or interference with that activity. ([R. E. Spriggs Co. v. Coors Co., supra, 37 Cal.App.3d at p. 657](#).) Of course, as a practical matter, all interstate commerce has intrastate effects, as it begins in one state and ends in another. [*394] We are here concerned, however, with "exclusive" federal

⁷ "The history of the Sherman Antitrust Act makes it clear that the Congress did not intend that the federal legislation preempt parallel state efforts to control unfair competitive practices. Before the enactment of the Sherman Act, some 21 states had legislation proscribing 'combinations in restraint of trade.' Thus, it was not by accident that Congress did not use language in its act that would expressly preclude state regulation though the activity possessed interstate qualities. Senator Sherman, in urging enactment of his bill, stated: 'This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and statute laws by the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal courts within the limit of their constitutional power *that they may cooperate with the state courts* in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States . . .' (21 Cong. Rec. 2457 (1890).)" ([R. E. Spriggs Co. v. Coors, supra, 37 Cal.App.3d at p. 660](#), original italics, fn. omitted.) Thus, the fact that federal antitrust enforcement has historically become the dominant force in the field does not in itself mean that state antitrust law is displaced or preempted by the Sherman Act which, as noted, was passed for the purpose of supplementing state antitrust enforcement by providing for more efficient regulation of anticompetitive interstate activities.

⁸ Also relevant in this regard is the shared common law heritage of state and federal antitrust laws. (See Flynn, *Federalism and State Antitrust Regulation, supra*, at p. 90.) As this court stated in [Speegle v. Board of Fire Underwriters \(1946\) 29 Cal.2d 34, 44 \[172 P.2d 867\]](#): "The Cartwright Act merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law" This policy is wholly in conformity with the purposes sought to be furthered by the Sherman Act. (See, e.g., [Northern Pac. R. Co. v. United States \(1958\) 356 U.S. 1 \[2 L.Ed.2d 545, 78 S.Ct. 514\]; Apex Hosiery Co. v. Leader \(1940\) 310 U.S. 469 \[84 L.Ed. 1311, 60 S.Ct. 982, 128 A.L.R. 1044\].](#))

⁹ Although some courts have employed supremacy clause preemption and commerce clause preclusion terminology interchangeably, it is apparent that preclusion has been treated as a species of preemption.

jurisdiction [****34] in the constitutional sense, i.e., the preclusion of state regulation of essentially interstate activity. The question, then, is whether the interstate activity has the requisite impact upon intrastate commerce to sanction state interference. It has been held that states may apply antitrust laws to interstate commerce only "when such commerce has significant local consequences."¹⁰ ([Baker v. Walter Reade Theatres, Inc. \(1962\) 37 Misc.2d 172, 173 \[237 N.Y.S.2d 795\]](#).)

[****35] The Chargers assert that the employment practices challenged by Partee are solely interstate in character. It is emphasized that the challenged rules and practices were applied uniformly by all the teams in the NFL. Thus, the Chargers argue, Partee's antitrust injury was the product of nationwide conduct by all NFL teams. Yet, we are not here concerned with the uniform adherence to the challenged rules and practices by NFL teams in general; rather, we are concerned with the anticompetitive practices of one team, a California partnership, which caused injury to a California resident. Moreover, the rules which were found to be a restraint on trade were incorporated in a service contract which, by its terms, expressly provides for the application of California law. Manifestly, the activity in the present case has both interstate and intrastate aspects.

I therefore conclude that the Chargers' conduct in this case does not present too remote or insubstantial a nexus with intrastate commerce so as to preclude state antitrust jurisdiction. (See [State v. Allied Chemical & Dye Corporation \(1960\) 9 Wis.2d 290 \[101 N.W.2d 133\]](#).)¹¹ I am not persuaded that this case involves [****36] exclusively interstate commerce and that this state has no legitimate local interest in its adjudication. Because the Cartwright Act is "within the tradition of 'the usual police' powers of the state," the state retains the right to protect its residents from trade restraints. ([Alfred M. Lewis Inc. v. Warehousemen etc. Local No. 542 \(1958\) 163 Cal.App.2d 771, 790 \[***379\] \[330 P.2d 53\]](#).) But may it do so when such restraints arise primarily from interstate activity? In other words, may state [**686] regulation affect [*395] all interstate activity which has a significant local impact? Although there is a dearth of authority in the area of antitrust, in other contexts the Supreme Court has consistently held, "[ever] since *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245, and [Cooley v. Board of Wardens, 12 How. 299](#)" that the commerce clause "does not exclude all state power of regulation" and that "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless . . . affect interstate commerce or even . . . regulate it." ([Southern Pacific Co. v. Arizona \(1944\) 325 U.S. 761, 766-767 \[89 L.Ed. 1915, 1923\]](#).)

The Cartwright Act is applicable to interstate activities.

The anticompetitive activity in the present case -- being both interstate and intrastate in character -- is in the penumbral zone of the antitrust jurisdictional continuum, i.e., subject to overlapping state and federal authority. As I have explained, there is no supremacy clause bar to concurrent state jurisdiction in this area. The inquiry, then, is whether, given the requisite local nexus, the state is precluded by the commerce clause from affecting interstate commerce in its regulation of restraints on trade. The Chargers contend that no California case has upheld state regulation of [****38] interstate conduct comparable to the national practices here at issue, and that Cartwright Act enforcement has been limited to activities wholly within California. They further argue that prior cases deal only with supremacy clause preemption and not commerce clause preclusion.¹² The Chargers mischaracterize our case

¹⁰ Conversely, the reach of federal antitrust jurisdiction into intrastate activity, while generally expansive, is also limited by the requirement that the impact of the local conduct on interstate commerce be more than incidental. (See, e.g., [Sun Valley Disposal Co. v. Silver State Disposal Co. \(9th Cir. 1969\) 420 F.2d 341](#) [garbage collection]; [Kallen v. Nexus Corp. \(N.D.Ill. 1973\) 353 F.Supp. 33](#) [bar review courses].) The boundaries in this area, however, are elusive. The courts have disagreed as to what type of activities are "essentially local" and thus not subject to federal intervention. (Compare [United States v. Yellow Cab Co. \(1947\) 332 U.S. 218, 230 \[91 L.Ed. 2010, 2020, 67 S.Ct. 1560\]](#) with [Times-Picayune v. United States \(1953\) 345 U.S. 594, 602, fn. 11 \[97 L.Ed. 1277, 1286, 73 S.Ct. 872\]](#).)

¹¹ In [Allied Chemical, supra, 101 N.W.2d 133](#), three out-of-state corporate defendants were charged with a price-fixing conspiracy under the Wisconsin **antitrust law**. Defendants had neither offices nor employees in the state; and prices were set nationwide. Nonetheless, the court found them within the purview of the Wisconsin law.

law. California cases have held, despite the lack of an unambiguous Supreme Court directive, that the state may, consistent with the commerce clause, regulate restraints on trade which affect interstate commerce.

[****39] This court has recently stated that "[neither] the Sherman Act nor the federal prohibition of undue burdens on interstate commerce . . . prevents [the Cartwright Act] from reaching transactions that have interstate aspects, [*396] but significantly affect state interests." (*Younger v. Jensen, supra, 26 Cal.3d 397, 405*; citing *Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d 34; R. E. Spriggs v. Coors Co., supra, 37 Cal.App.3d 653*.) Although the issue in *Younger* concerned the authority of the Attorney General to investigate into the existence of antitrust violations, this court's statement regarding preclusion reaffirmed prior cases which have held that our state may regulate anticompetitive activities that affect interstate commerce. *Speegle* and *Coors* inescapably support the conclusion that Cartwright Act enforcement is not limited to wholly intrastate activities.

Coors involved a Cartwright Act action alleging antitrust violations in the California beer distribution system of an out-of-state brewer. Although the Court of Appeal was primarily confronted with a preemption challenge, it explicitly recognized that any holding [****40] against federal exclusivity [***380] would affect interstate commerce; accordingly, it proceeded to discuss commerce clause preclusion. While acknowledging [**687] that only Coors' California distribution scheme was being challenged, the court correctly noted that as this state's regulation of the distribution scheme "would clearly affect Coors' overall methods of distribution which are in interstate commerce, interstate commerce is both involved and affected." (*37 Cal.App.3d at p. 658, fn. 4*) It had earlier observed that "[there] is no question but that at all times relevant to this case, Coors was engaged in interstate commerce." (*Id., at p. 656*.) After concluding that neither the supremacy clause nor the Sherman Act preempted the Cartwright Act, the court "[turned] to the question of whether the nature of the regulated subject requires federal preeminence." (*Id., at p. 660*, original italics.) The court answered this question in the negative by employing the balancing approach enunciated in *California v. Zook, supra, 336 U.S. 725*. "The approach has been to reconcile the relevant state and federal interests and to find that the states have a valid [****41] interest in regulating unfair competitive practices within their jurisdictions, and that this power is not lost merely because the activity affects interstate commerce." (*Id., at p. 663*, italics added.) Earlier, the *Coors* opinion had observed that there was no undue burden on interstate commerce "in that the Cartwright Act, . . . is complementary to the relevant provisions of the federal statutes and may be justified as a reasonable means of protecting a significant state interest, i.e., prevention of unfair competition." (*Id., at p. 659*.)

Of significance is the *Coors* court's recognition that finding state preclusion whenever interstate commerce is involved would effectively destroy most state antitrust enforcement since, in light of the vastly increased domain of federal commerce clause authority, states would be relegated to a severely restricted realm of intrastate commerce. With the demise of the mechanical "dual sovereignty" theory and the development of expansive [*397] federal power over activities merely "affecting" interstate commerce (see, e.g., *Manderille Farms v. Sugar Co. (1948) 334 U.S. 219 [92 L.Ed. 1328, 68 S.Ct. 996]; United States [****421] v. Frankfort Distilleries (1945) 324 U.S. 293, 298 [89 L.Ed. 951, 956, 65 S.Ct. 661]* ["Congress in passing the Sherman Act, left no area of its constitutional power unoccupied"]), the regulatory power of the national government has become so broad that, if fully exercised, virtually all intrastate activity might be regulated to the complete exclusion of state authority (see, e.g., *Perez v. United States (1971) 402 U.S. 146 [28 L.Ed.2d 686, 91 S.Ct. 1357]* [loan sharking]; *Atlanta Motel v. United States (1964) 379 U.S. 241 [13 L.Ed.2d 258, 85 S.Ct. 348]* [public accommodations]). Recognizing the potential for

¹² As previously noted, some cases do appear to discuss preclusion and preemption interchangeably. One example is *Alfred M. Lewis, Inc. v. Warehousemen etc. Local No. 542, supra, 163 Cal.App.2d 771*, which involved an agreement to restrict competition. The trial court had determined that the agreement "would have been in violation of the Cartwright Act if it involved 'local businesses not engaged in interstate commerce,' but that because appellant [Lewis] was engaged in interstate commerce, the laws of the United States apply." (*Id., at p. 783*.) Lewis was "engaged in interstate business, operating grocery stores in many states." (*Id., at p. 775*.) Thus, the issue of commerce clause preclusion was squarely raised. The Court of Appeal reversed, holding that the Sherman Act does not preempt the Cartwright Act since there is no conflict between the acts. The court also discussed commerce clause preclusion: it stated that, even assuming "that the activities in question are within the sphere of the commerce clause [,] . . . [the] fact that Congress has acted to prevent restraints on trade in commerce, of itself, does not invalidate legislation by a state effecting the substantially same result." (*Id., at p. 788*.)

"nullification of much state effort in the antitrust field[.]" the Court of Appeal aptly observed: "If state regulations were to lose effectiveness as soon as interstate commerce is affected, a large policing area would be excluded, and the states would become helpless to protect [their] citizens, though no national benefit would accrue. (*Commonwealth v. McHugh*, 326 Mass. 249 [93 N.E.2d 751, 761-764].) Exclusion would necessarily result whenever the subject activity 'substantially affects' interstate commerce." ¹³ (*37 Cal.App.3d* [****43] at p. 660; [***381] citing *Burke v. Ford* (1967) 389 U.S. 320 [19 L.Ed.2d 554, 88 S.Ct. 443].) Similarly, a federal court has recently [**688] noted that "[despite] the broad reach of the federal commerce power, state antitrust laws retain vitality in dealing with matters which, while having interstate aspects, significantly affect local interests." (*Salveson v. Western States Bankcard Ass'n.* (N.D.Cal. 1981) 525 F.Supp. 556, 573-574).

[****44] An earlier decision by this court, *Speegle v. Board of Fire Underwriters*, *supra*, 29 Cal.2d 34, further supports the view that the state is not precluded from regulating interstate activity once a local nexus is established. The issue before this court was whether the application of the Cartwright Act to the insurance business was precluded in light of a then-recent Supreme Court decision holding that insurance transactions were interstate commerce. (*U.S. v. Underwriters Assn.* (1944) 322 U.S. 533 [88 L.Ed. 1440, 64 S.Ct. 1142].) For three-quarters of a century prior to *South-Eastern*, insurance had been regulated by the states, as this business had been held [*398] not to constitute interstate commerce. (*Paul v. Virginia* (1869) 75 U.S. (8 Wall.) 168 [19 L.Ed. 357].) However, the Supreme Court strongly suggested that the redefinition of insurance as interstate activity did not necessarily deprive state courts of jurisdiction to regulate this business,¹⁴ and, accordingly, the court set forth a balancing test to decide the preclusion question: ". . . [The] primary test applied by the Court is not the mechanical one of whether the particular activity [****45] affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid . . ." (*South-Eastern*, *supra*, at pp. 548-549 [88 L.Ed. at pp. 1454-1455].)

[****46] Relying on the above-quoted language, this court held in *Speegle* that since there is no conflict between the Cartwright Act and the Sherman Act, state law applies "even if interstate commerce is involved." (*29 Cal.2d* at p. 51.) *Speegle* stated: "State laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress." (*Id.*, at p. 50.) (The *Speegle* court, however, omitted mention of the additional limitation -- enunciated in Supreme Court cases dealing with state regulations outside the antitrust context -- that the state may not impose an undue burden on interstate commerce -- see, e.g., *Pike v. Bruce Church Inc.* (1970) 397 U.S. 137, 142 [25 L.Ed.2d 174, 178-179, 90 S.Ct. 844]; *Bibb v. Navajo Freight Lines* (1959) 359 U.S. 520 [3 L.Ed.2d 1003, 79 S.Ct. 962].)

¹³ *McHugh*, the Massachusetts case cited by the Court of Appeal, makes the following pertinent observations in arguing against a restricted role for state antitrust regulation: "Monopolies and restraints of trade are of infinite form and variety Some expend their efforts almost wholly upon intrastate commerce and are of only local interest and some almost wholly upon interstate commerce and so become matters of national concern, and there are all gradations in between. In many cases it would be very difficult to draw the line. If State laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without, so far as we can perceive, any corresponding contribution to the national welfare Especially is this true in view of the immense broadening in the conception of interstate commerce in recent years." (*326 Mass.* at p. 265.)

¹⁴ The final paragraph of the opinion states: "The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as [greatly] exaggerated." (*322 U.S.* at p. 562 [88 L.Ed. at p. 1462].) In response to *South-Eastern*, Congress enacted the McCarran-Ferguson Act which provides that federal law is only "applicable to the business of insurance to the extent that such business is not regulated by state law." ((1945) 59 Stat. 33, *15 U.S.C. §§ 1011, 1012*.)

The foregoing demonstrates that the courts of this state have held, consistent with Supreme Court authority,¹⁵ [****48] that the [**689] [***382] state may regulate interstate [*399] anticompetitive activity subject to certain limitations. These limitations may be summarized as a three-part test [****47] of commerce clause preclusion: states may regulate interstate activity unless (1) the activity is exclusively in interstate commerce without intrastate aspects or a local nexus (*Coors, supra, 37 Cal.App.3d 653*); or (2) regulation of the activity imposes an undue burden upon or discriminates against interstate commerce (*Bruce Church, supra, 397 U.S. 137*; *Bibb, supra, 359 U.S. 520*); or (3) regulation of the activity conflicts with federal law or policy (*Speegle, supra, 29 Cal.2d 34; South-Eastern, supra, 322 U.S. 533*).¹⁶

I have thus far concluded that the anticompetitive conduct before us has significant intrastate aspects and is not exclusively in interstate commerce, and that the state may, consistent with the commerce clause, regulate restraints on trade which affect interstate conduct. The remaining inquiries focus on the second and third part of the test, and specifically, on the central issue before us in this case: whether state regulation of professional football burdens interstate commerce or conflicts with federal law or policy. We must [****49] "undertake[] a balancing approach in resolving these issues." (*Pike v. Bruce Church, Inc. (1970) 397 U.S. 137, 142 [25 L.Ed.2d 174, 178]*; see also *Huron Cement Co. v. Detroit, supra, 362 U.S. 440*; *Southern Pacific Co. v. Arizona, supra, 325 U.S. 761*.) The majority, however, do not engage in the impartial balancing of conflicting interests mandated in a host of Supreme Court decisions; instead they accept the Chargers' contention that Supreme Court authority compels this court to hold that state regulation of all professional sports is prohibited by the commerce clause.

[*400] *Flood v. Kuhn* does not control this case.

The Chargers, relying on *Flood v. Kuhn (S.D.N.Y. 1970) 316 F.Supp. 271*, affirmed (2d Cir. 1971) *443 F.2d 264*, affirmed (*1972* *407 U.S. 258 [32 L.Ed.2d 728, 92 S.Ct. 2099]*) -- a baseball case -- contend that because professional sports require national uniformity in their regulation, they can only be regulated, if at all, under the Sherman Act. The majority agree with the Chargers that we are precluded from applying the balancing test because, assertedly, we are bound by the Supreme Court's decision in *Flood*. As [****50] earlier noted, I conclude that the Supreme Court's cursory holding in *Flood* with respect to state antitrust preclusion is limited to baseball -- "a derelict in the stream of the law." (*Flood, supra, 407 U.S. at p. 286 [32 L.Ed.2d at p. 746]* [Douglas, J., dis.].)

¹⁵ While *Speegle* relied on an antitrust case (*South-Eastern, supra*), *Coors* necessarily relied on commerce clause decisions outside the field of antitrust because the Supreme Court, to my knowledge, has never specifically addressed itself to the question of the outer limit of state antitrust regulation of interstate commerce. Nevertheless, in every case I have found that raised the question factually, the high court has expressed a willingness to defer to state regulation. (See *Waters-Pierce Oil Co. v. Texas* (No. 1) (*1909* *212 U.S. 86 [53 L.Ed. 417, 29 S.Ct. 220]*); *Standard Oil Co. v. Tennessee* (*1910* *217 U.S. 413 [54 L.Ed. 817, 30 S.Ct. 543]*); *Straus v. Am. Publishers' Ass'n.* (*1913* *231 U.S. 222 [58 L.Ed. 192, 34 S.Ct. 84]*); cf. *Gibbs v. Buick* (*1939* *307 U.S. 66, 83 [83 L.Ed. 1111, 1121, 59 S.Ct. 725]* [Black, J., dis.]; see also *U.S. v. Underwriters Assn., supra* *322 U.S. 533*.) The early cases are of limited precedential value, however, since they only implicitly approved the application of state antitrust law, and also because these decisions were rendered in the era of strict adherence to the mechanical intrastate-interstate view of the commerce clause. It appears that in these early cases the court perceived the activity in question as purely intrastate in nature. As an example, see *Standard Oil's* rejection of a contention that the Tennessee antitrust law constituted "an unreasonable constitutional interference with commerce among the States." (*217 U.S. at p. 419 [54 L.Ed. at p. 820]*.) Justice Holmes responded: "The mere fact that [the Tennessee act] may happen to remove an interference with commerce among the States as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery that the person assaulted was engaged in peddling goods from another State. How far Congress could deal with such cases we need not consider, but certainly *there is nothing in the present state of the law at least that excludes the States from a familiar exercise of their power.*" (*Id. at p. 422 [54 L.Ed. at p. 821]*, italics added.)

¹⁶ I note that commentators are "overwhelmingly supportive of the extension of state antitrust regulation to include conduct and practices that, while possessing a local nexus, nonetheless 'affect' or are 'in' interstate commerce." (Rubin, *Rethinking State Antitrust Enforcement* (1974) *26 U.Fla.L.Rev.* 653, 670; see also Flynn, *Federalism and State Antitrust Regulation, supra*, at pp. 56-108; Mosk, *State Antitrust Enforcement* (1962) *21 A.B.A.*, Antitrust Section 358; Note, *The Commerce Clause and State Antitrust Enforcement* (1961) *61 Colum.L.Rev.* 1469.)

While a few lower courts, state and federal, have considered this difficult question, there is to my knowledge no Supreme Court opinion which sets forth guidelines as to the exact parameters of state antitrust regulation [***383] of interstate commerce. (See fn. 15, *ante*.) Finding no certain precedent to guide us, I would employ the balancing test [**690] enunciated in cases involving the interface of commerce clause requirements within other areas of state regulation.

In *Flood*, a baseball player challenged professional baseball's reserve system as violative of the Sherman Act and New York's **antitrust law**. The *Flood* litigation, however, was principally an assault on baseball's long-standing exemption from antitrust laws. In 1922, Justice Holmes, speaking for a unanimous court, ruled that baseball exhibitions were purely state affairs (to which the interstate transportation of players was merely [****51] incidental) and were not "trade or commerce in the commonly accepted use of those words" and hence "were not interference with commerce among the States." ([*Federal Baseball Club v. National League \(1922\) 259 U.S. 200, 209 \[66 L.Ed. 898, 900, 42 S.Ct. 465, 26 A.L.R. 357\]*](#)) Over the years, baseball was able to withstand intermittent antitrust attacks on the authority of *Federal Baseball*. The baseball exemption question again reached the Supreme Court in 1953, at a time when that court's decisions had greatly expanded federal commerce clause authority. In [*Toolson v. New York Yankees \(1953\) 346 U.S. 356 \[98 L.Ed. 64, 74 S.Ct. 78\]*](#), the court, with two justices dissenting, declined to reconsider *Federal Baseball* despite the considerable change during the intervening thirty years in the definition of "interstate commerce." The court referred to four reasons for its holding: (1) Congressional awareness of and inaction with respect to *Federal Baseball*; (2) baseball's development on the understanding that it was not subject to existing federal antitrust laws; (3) a reluctance to overrule *Federal Baseball* with a consequent retroactive effect; and (4) a professed [****52] desire that any remedy be supplied by Congress rather than by court decision. ([*346 U.S. at p. 357 \[98 L.Ed. at p. 68\]*](#).)

[*401] Four years after *Toolson*, the Supreme Court limited the exemption to the sport of baseball, and held that antitrust laws were applicable to professional football and its practices. ([*Radovich v. National Football League \(1957\) 352 U.S. 445 \[1 L.Ed.2d 456, 77 S.Ct. 390\]*](#).) Other decisions made it clear that *Toolson* applied only to baseball and that no other sport enjoyed exemption from the antitrust laws.¹⁷ (See, e.g., [*U.S. v. International Boxing Club \(1955\) 348 U.S. 236 \[99 L.Ed. 290, 75 S.Ct. 259\]*](#); [*Haywood v. National Basketball Assn. \(1971\) 401 U.S. 1204 \[28 L.Ed.2d 206, 91 S.Ct. 672\]*](#).)

[****53] Faced with this history, it is not surprising that *Flood* was not to prevail in his federal antitrust claim. The district court considered itself bound by the rule of stare decisis, stating that "decisions of the Supreme Court are not lightly overruled, . . ." ([*Flood, supra, 316 F.Supp. at p. 277*](#).) Further, the court held that in light of baseball's exemption from federal antitrust laws, state antitrust regulation would violate the supremacy and commerce clauses. The circuit court affirmed. However, it considered the state law claim a "question of first impression, . . . whether application of state **antitrust law** to professional baseball is barred by a federal pre-emption of the field under the Commerce Clause." ([*Flood, supra, 443 F.2d at p. 267*](#).) Citing [*Southern Pacific Co. v. Arizona, supra, 325 U.S. 761, 774-775 \[89 L.Ed. 1915, 1927-1928\]*](#), the court of appeals said: "[Where] the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate [***384] business extending over many states, the extraterritorial effect [****54] which the application of a particular state law would exact [**691] constitutes, absent a strong state interest, an impermissible burden on interstate commerce." (*Ibid.*) It thus held that the commerce clause precluded state regulation of baseball.

¹⁷ The lower courts accepted this inconsistent result, but they did so reluctantly. One circuit court stated: "We freely acknowledge our belief that *Federal Baseball* was not one of Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' [Citation.] . . . However, . . . we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions . . ." ([*Salerno v. American League of Prof. Baseball Clubs \(2d Cir. 1970\) 429 F.2d 1003*](#), quoting [*Radovich v. National Football League, supra, 352 U.S. at p. 452 \[1 L.Ed.2d at p. 461\]*](#).)

On petition for certiorari, the Supreme Court principally considered the baseball exemption question. Justice Blackmun's opinion conceded that the baseball exemption was aberrant in view of the court's failure to similarly exempt other sports: "[Baseball] is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball. Even though others might regard this as 'unrealistic, [**402] inconsistent, or illogical,' see *Radovich*, *supra*, the aberration is an established one, and . . . is an aberration that has been with us now for half a century, . . . If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court." ([407 U.S. at pp. 282-284 \[32 L.Ed.2d at pp. 743-744\]](#).) The court therefore concluded that Congress, "by its positive inaction," [****55] had sanctioned this anomaly and had "clearly evinced a desire" to keep baseball unregulated by federal antitrust laws. ([Id., at pp. 283-284 \[32 L.Ed.2d at p. 744\]](#).)

The court then disposed of the state antitrust issue in a terse concluding paragraph: "The petitioner's argument as to the application of state antitrust laws deserves a word. Judge Cooper rejected the state law claims because state antitrust regulation would conflict with federal policy and because national 'uniformity [is required] in any regulation of baseball and its reserve system' [316 F.Supp., at 280](#). The Court of Appeals, in affirming, stated, '[As] the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state **antitrust law** [443 F. 2d, at p. 268](#). As applied to organized baseball, and in the light of this Court's observation and holdings in *Federal Baseball* and *Toolson*, in [*United States v. Shubert* I(1955) [348 U.S. 222 \(99 L.Ed. 279, 75 S.Ct. 277\)](#)], in *International Boxing*, and in *Radovich*, and despite baseball's allegedly inconsistent position taken in the past with [****56] respect to the application of state law, these statements adequately dispose of the state law claims." ([407 U.S. at pp. 284-285 \[32 L.Ed.2d at p. 745\]](#), fn. omitted, italics added.)

While it is unfortunate that the court did not find it necessary to explain its reasons for affirming, the brief paragraph is nonetheless a constitutional holding rejecting Flood's alternate contention. Accordingly, we are bound by it. The court makes clear, however, that it agreed with the judgment below "[as] applied to . . . baseball . . ." As the New Mexico Supreme Court recently noted in rejecting a contention that *Flood* mandates preclusion of state antitrust laws: "In affirming the lower courts' decisions, the Supreme Court did not adopt any broad or rigid limitations on the applicability of state antitrust laws to transactions involving interstate commerce. The Court upheld those holdings '[as] applied to organized baseball, and in light of this Court's holdings in *Federal Baseball* [and] *Toolson* . . .'" ([United Nuclear Corp. v. General Atomic Co. \(1980\) 96 N.M. 155 \[629 P.2d 231, 273\]](#), quoting *Flood, supra, 407 U.S. at p. 284 [32 L.Ed.2d at p. 744]*.)

The [****57] Chargers argue that we can infer from the citation to *Radovich*, a football case, that the court intended its holding to apply to football as well. [*403] *Radovich*, however, held only that *Toolson* is specifically limited to baseball and that "the volume of interstate business involved in organized professional football places it within the provisions of the [Clayton] Act." ([352 U.S. at p. 452](#).) As I have explained, the mere fact that a defendant is engaged in interstate activities does not preclude application of state antitrust laws. More likely, the court cited *Radovich* and the other sports cases to emphasize the unique and anomalous treatment afforded baseball. While I agree with the majority that the organizational structure of football is factually indistinguishable from that of [***385] baseball, the long-standing, aberrant exemption provided baseball makes this case readily distinguishable from *Flood*.

[**692] The unique character of the baseball exemption provides a clear explanation for the Supreme Court's affirmation of the district court's supremacy rationale for preempting state regulation of baseball. Having concluded that the "positive [****58] inaction" of Congress serves to exempt baseball from federal antitrust regulation ([407 U.S. at p. 283 \[32 L.Ed.2d at p. 744\]](#)), the court found it necessary to imply federal preemption of state antitrust enforcement as well. (See *Bay Guardian Company v. Chronicle Publishing Company* (N.D.Cal. 1972) [344 F.Supp. 1155, 1160](#) [statutory exemption for joint operating agreements preempts state **antitrust law**].) Indeed, "the time honored, though unusual, exemption from federal antitrust laws which professional baseball enjoys would be meaningless if state antitrust laws were not also inapplicable." ([United Nuclear Corp., 629 P.2d at p. 273](#).) Thus, in *Flood* there was a clear conflict since the application of state antitrust laws would produce a result inconsistent with the congressional intent that baseball be unregulated.

The Supreme Court's alternate holding ¹⁸ in *Flood* -- affirming the circuit court's burden-on-commerce holding -- also appears to be grounded on baseball's unique exemption, again, as suggested by the citation to *Federal Baseball* and *Toolson*. The high court specifically approved the view of the circuit court that "the burden on interstate commerce [****59] outweighs the states' interests in regulating baseball's reserve system, . . ." ([407 U.S. at p. 284 \[32 L.Ed.2d at p. 745\]](#); quoting [443 F.2d at p. 268](#).) The circuit court, [*404] relying on [*Southern Pacific Co. v. Arizona, supra, 325 U.S. 761*](#), had reasoned that "if state regulation were permissible, the internal structure of the [baseball] leagues would require compliance with the strictest state antitrust standard." ([443 F.2d at p. 268](#).)

[****60] The Chargers place heavy reliance on *Southern Pacific*, a case in which the Supreme Court precluded application of an Arizona law requiring a change in the length of trains at the state line. The trial court had found that "the Arizona Law had no reasonable relation to safety, . . ." (325 U.S. at p. 775 [25 L.Ed.2d at p. 1928].) Balanced against this, the court held that the "Arizona Train Limit Law imposes a serious burden on interstate commerce, . . . [as] [it] materially impedes the movement of appellant's interstate trains through that state and interposes substantial obstruction to the *national policy proclaimed by Congress*, to promote adequate, economical and efficient railway transportation service. Interstate Commerce Act, preceding [§ 1](#), 54 Stat. 899." (*Id.*, at p. 773 [25 L.Ed.2d 1927], italics added.)

It seems evident that the circuit court in *Flood* quite properly relied on *Southern Pacific* because, as in the case of train regulation, there is, according to the Supreme Court, a "national policy" as to baseball. With respect to railroads and other interstate transportation, the needs of the subject matter clearly call for national uniformity.

[****61] (See [*Railroad Trainmen v. Terminal Co. \(1969\) 394 U.S. 369 \[22 L.Ed.2d 344, 89 S.Ct. 1109\]*](#); [*Bibb v. Navajo Freight Lines, supra, 359 U.S. 520*](#).) Similarly, professional baseball is entitled to uniform treatment as Congress has "clearly evinced a desire" for a policy of self-regulation and complete antitrust exemption for this particular sport. ([*Flood, supra, 407 U.S. at p. 284 \[32 L.Ed.2d at p. 744\]*](#).) State regulation of baseball [***386] would result in inherent conflict because states, unguided by federal antitrust precedent, [**693] would subject baseball to antitrust laws of varying strictness in violation of the commerce clause.

While the impact of diverse state regulation is unquestionable as to baseball, professional football, by marked contrast, can claim only a potential conflict in the absence of a corresponding "national policy" precluding federal antitrust regulation. Unlike baseball, football cannot claim a national policy supporting self-regulation. Nor is football "a subject demanding exclusive federal regulation in order to achieve uniformity vital to national interests."

¹⁹ [****63] ([*Florida Avocado Growers v. Paul, supra, 373 U.S. \[****62\] 132, 144 \[*405\] \[10 L.Ed.2d 248, 257\]*](#); see and compare [*Southern Pacific, supra, 325 U.S. 761*](#), and [*Navajo Freight Lines, supra, 359 U.S. 520*](#) with [*Pacific Gas & Elect., supra, U.S. , and United Nuclear, supra, 629 P.2d 231, 272*](#) [uranium industry not "vital to military posture of United States" and subject to state antitrust laws].) Nor has Congress manifested the intent, express or implied, to exempt football from federal antitrust regulation so as to preclude divergent state-enforcement. ²⁰ To the

¹⁸ I note that the preemption holding alone is sufficient to dispose of the *Flood* case. If state antitrust regulation is completely preempted by the supremacy clause there is no need to weigh the state's interest in regulating the activity against the burden imposed upon interstate commerce. Under a commerce clause analysis, state interference is presumed valid unless it unduly burdens commerce; therefore, such analysis must be preceded by a judicial determination (or litigant's concession) that state law is *not* preempted by the supremacy clause. In *Flood*, the circuit court did not discuss supremacy clause preemption; nor did it comment on the district court's preemption holding. It might be argued, therefore, that the high court's affirmation of the district court rendered the circuit court's commerce-clause-preclusion holding dictum, or that the court's affirmation of the circuit court is itself dictum.

¹⁹ The Supreme Court has sustained preemption challenges against state law in most cases where the "national interest" implicated is in the area of national security or labor policy, neither of which is in issue here. (See, e.g., [*Hines v. Davidowitz, supra, 312 U.S. 52*](#); [*Pennsylvania v. Nelson \(1956\) 350 U.S. 497 \[100 L.Ed. 640, 76 S.Ct. 477\]*](#); [*Garner v. Teamsters Union \(1955\) 346 U.S. 485 \[98 L.Ed. 228, 74 S.Ct. 161\]*](#); [*Hill v. Florida \(1945\) 325 U.S. 538 \[89 L.Ed. 1782, 65 S.Ct. 1373\]*](#).)

²⁰ Chief Justice Stone's statement in [*Parker v. Brown, supra, 317 U.S. at page 351 \[87 L.Ed. at p. 326\]*](#), is particularly apt in this regard: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may

contrary, the fact that football is subject to federal antitrust laws greatly reduces the potential for diverse treatment by states, like California, which have patterned their antitrust laws after the Sherman Act and have adopted federal precedent as their own. In fact, as I shall explain, the trial court judgment in the present case is consistent with federal authority holding the same rules and practices challenged here violative of the Sherman Act.

In sum, *Flood* and *Southern Pacific* are inapposite. The Chargers would have us assume a conflict between state and federal antitrust policies without assessing and weighing the perceived detrimental impact of state regulation on professional football against this state's strong interest in enforcing its antitrust laws. Although the mere potential of conflicting state regulation was held sufficient to impermissibly burden baseball by forcing it to conform to "the strictest state antitrust standard" (*Flood*, *supra*, 443 F.2d at p. 268), I interpret the *Flood* cases as limited to professional baseball because of their focus on the unique historic development of [****64] that sport.²¹ [*406]

[**694] [***387] Baseball is, to use the Supreme Court's own adjectives, "an exception and an anomaly." (*Flood*, *supra*, 407 U.S. at p. 282 [³² L.Ed.2d at p. 743].) I am not persuaded that this "aberration" (*ibid.*) should be extended to another professional sport. As in *Radovich*, the Chargers and amicus NFL seek refuge under a protective umbrella provided only to baseball. However, because football enjoys no congressional or judicially created exemption from antitrust laws, its asserted need for uniformity must be based, not on a national policy precluding state regulation, but, rather, only on the nature of its interstate operations. I would therefore balance this asserted need for uniformity against this state's interest in enforcing its antitrust laws in order to determine whether,

constitutionally subtract from their authority, an unexpressed purpose to nullify a state's [regulatory scheme] is not lightly to be attributed to Congress."

²¹ I recognize of course that state and federal lower courts have held state antitrust laws inapplicable to various professional sports. (See *State v. Milwaukee Braves, Inc.* (1966) 31 Wis.2d 699, 719-732 [¹⁴⁴ N.W.2d 1], cert. den. (1966) 385 U.S. 990 [¹⁷ L.Ed.2d 451, 87 S.Ct. 598]; *Matuszak v. Houston Oilers* (Tex.Civ.App. 1974) 515 S.W.2d 725; *Robertson v. National Basketball Association* (S.D.N.Y. 1975) 389 F.Supp. 867, 880-881; *HMC Management v. New Orleans Basketball Club* (La.App. 1979) 375 So.2d 700, 706, cert. den. (La. 1980) 379 So.2d 11.) These authorities, however, are not controlling.

In *Milwaukee Braves*, a pre-*Flood* case, Wisconsin brought an action against 10 baseball teams alleging that the league's decision to move the Braves' franchise to Atlanta violated its state **antitrust law**. In holding state law inapplicable, the majority opinion obliquely stated that "some members" of the court believed state law was preempted under the supremacy clause while "other members" preferred a commerce clause rationale. In either event, the court makes clear that its decision was grounded on baseball's unique "history of judicial action and legislative inaction" and the resulting "conflict between state and federal policy." (³¹ Wis.2d at p. 721.) Moreover, "transfer of a team franchise is certainly distinguishable (particularly with regard to the likelihood of state discrimination in favor of its own economic interests) from restraints imposed . . . upon players' freedom to negotiate, . . ." (*Flood*, *supra*, 316 F.Supp. 271, 279.)

Similarly, *HMC Management* involved an attempt to keep the "Jazz" basketball team from moving from New Orleans. Relying on *Flood*, the court held on preemption grounds that "most of the violations that are alleged cannot be subject to Louisiana Anti-Trust Laws." (³⁷⁵ So.2d at p. 706.) The court held, however, that the alleged violation of a lease, if proven to be the result of anticompetitive conspiracy, would be subject to the state law. (*Id.*, at p. 707.) As I have explained, though, this court cannot, absent an unambiguous Supreme Court directive to the contrary, limit our state **antitrust law** to purely intrastate activities.

In *Matuszak*, a football case, the Texas court simply quoted the circuit court's opinion in *Flood* and concluded, on "federal pre-emption" grounds and without analysis, that the circuit court's "holding is applicable to the instant case . . . [therefore], the question of whether Matuszak's contract violates federal law is a question for the Federal Courts." (⁵¹⁵ S.W.2d at pp. 728-729.)

Finally, in *Robertson* a federal district court found "the opinion of the Court of Appeals [in *Flood*] unquestionably applicable and controlling." (³⁸⁹ F.Supp. at p. 880.) The court held state antitrust regulation inapplicable to professional basketball because that sport is in the "same business" as baseball, involving "substantial volumes of interstate . . . commerce." (*Id.*, at p. 881.).

To the extent that *HMC Management*, *Matuszak* and *Robertson* held (either without analysis or in reliance on the virtually identical league structures and interstate nature of professional sports) that state **antitrust law** is preempted or precluded, we should decline to follow these cases. In my view we should not decide the instant case on the basis of the organizational similarities between professional football and baseball; rather, we should focus on the aberrant treatment historically accorded the latter sport.

34 Cal. 3d 378, *406 LEXIS 668 P.2d 674, **694 LEXIS 94 Cal. Rptr. 367, ***387 LEXIS 983 Cal. LEXIS 223, ****64

"under the circumstances of [this] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ([Hines v. Davidowitz, supra, 312 U.S. 52, 67 L.Ed. 581, 587.](#))

*Under the facts of this case, state antitrust regulation of football neither burdens interstate [****65] commerce nor conflicts with federal law or policy.*

[****66] In cases where there is no express or implied national policy with respect to a particular business enterprise, the Supreme Court has phrased the "general rule" for determining the validity of state regulation affecting interstate commerce as follows: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation.] If a legitimate local purpose is found, then the question becomes [*407] one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues [citation], but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens. [Citation.]" ([Pike v. Bruce Church, Inc., supra, 397 U.S. 137, 142 \[25 L.Ed.2d 174, 178\]](#); see also [Hughes v. Oklahoma \(1979\) 441 ****671 U.S. 322, 336 \[60 L.Ed.2d 250, 262, 99 S.Ct. 1727\]](#).) In applying this mode of analysis, I bear in mind that federal antitrust laws are applicable to professional football ([Radovich, supra, 352 U.S. at p. 452 \[1 L.Ed.2d at p. 461\]](#)), and that federal decisions under the Sherman Act are applicable in state antitrust [***388] cases brought under the Cartwright Act ([Mailand v. Burkle, supra, 20 Cal.3d 367, 373.](#))

[**695] With respect to the requirement that the state law regulate "even-handedly," it is the rule that the burden to show discrimination rests on the party challenging the state regulation. ([Hughes v. Oklahoma, supra, at p. 336 \[60 L.Ed.2d at p. 262\]](#).) This question needs no extended discussion as the Chargers do not contend the Cartwright Act discriminates between interstate and intrastate commerce. Clearly, this state's **antitrust law** is nondiscriminating. Because the Cartwright Act applies both to interstate and intrastate commerce, "the controlling question is whether the incidental burden imposed on interstate commerce by [the state] is 'clearly excessive in relation to the putative local benefits.'" ([Minnesota v. Clover Leaf Creamery \[****681 Co. \(1981\) 449 U.S. 456, 472 \[66 L.Ed.2d 659, 674, 101 S.Ct. 715\]](#), quoting from [Pike v. Bruce Church, Inc., supra, 397 U.S. 137, 142 \[25 L.Ed.2d 174, 178\]](#).) Though this is the central question before us, the majority do not balance California's interest in preventing unfair trade practices within its borders against the asserted burden on professional football's interstate operations and its need for nationally uniform antitrust regulation.

It is not open to dispute that California has a legitimate interest in protecting its citizens against unfair trade practices. Regulations which effectuate a legitimate public interest -- here antitrust regulation under the Cartwright Act -- are within the state's inherent police powers. ([Alfred M. Lewis, Inc. v. Warehousemen etc. Local No. 542, supra, 163 Cal.App.2d 771, 790.](#)) It has been consistently held that "the prevention of anti-competitive, monopolistic and predatory trade practices . . . is a legitimate exercise of the state's inherent police powers." ([United Nuclear, supra, 629 P.2d at p. 270;](#) citing [Giboney v. Empire Storage Co. \(1949\) 336 U.S. 490 \[93 L.Ed. 834, 69 S.Ct. 684\].](#))

The Chargers contend, [****69] though, that the state interest is outweighed because professional football is a unique activity of interstate commerce which [*408] requires nationally uniform governance. The Chargers argue that the nationwide character of the NFL league structure and operating practices prohibits the application of state antitrust laws.

The Supreme Court has rejected a similar argument, advanced by oil companies, that the nationwide character of the industry prohibited state regulation. The court stated: "[We] cannot adopt appellants' novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas. Appellants point out that . . . the cumulative effect of this sort of legislation may have serious implications for their national marketing operations. While this concern is a significant one, we do not find that the Commerce Clause, by its own force, pre-empts the field of retail gas marketing [This] Court has only rarely

held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods [****70] In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area." ([Exxon Corp. v. Governor of Maryland, supra, 437 U.S. 117, 128-129 \[57 L.Ed.2d 91, 101-102\].](#))

The *Exxon* analysis applies with equal force here. If we were to insulate football from this state's antitrust laws on the basis of its "national character," we would necessarily have to exempt all businesses engaged in multistate activities. The Chargers' arguments, carried to their logical extension, would severely restrict the applicability of the Cartwright Act since a large segment of this nation's businesses would be immunized from state antitrust regulation as soon as their activities became "national" in scope. Thus, "a very large area will be fenced off in which the states will be practically helpless to protect their citizens . . ." [**389] ([Commonwealth v. McHugh, supra, 326 Mass. 249, 265.](#))

The majority apparently accept the Chargers' argument that professional football [**696] is unique in that the league [****71] structure imposes a "necessary interdependence" among the teams, each of which is required to function pursuant to a uniform set of national rules. Thus, the Chargers argue, subjecting California teams to differing standards would adversely affect, and possibly result in the fragmentation of, the league structure of the NFL. This argument would be quite persuasive if these were the facts before us, but, because they are not, we cannot properly express any opinion as to the resolution of a hypothetical conflict. There is no showing whatsoever in the present case that the Chargers have been subjected to more stringent or inconsistent requirements under state law. (Cf. [Ray v. Atlantic Richfield Co. \[*409\] \(1978\) 435 U.S. 151, 165 \[55 L.Ed.2d 179, 193, 98 S.Ct. 988\]](#) (preemption of state statute which undermined uniform federal standards by setting more stringent oil tanker design requirements).) To the contrary, the judgment below is entirely consistent with federal court decisions finding the same practices violative of the Sherman Act. As earlier noted, the trial court was aware of, and in fact relied in part on the federal decisions in *Smith v. Pro-Football, Inc.*, [supra, 593 F.2d 1173, Kapp v. National Football League, supra, 390 F.Supp. 73, and Mackey v. National Football League, supra, 543 F.2d 606.](#) Thus, there is uniformity of treatment under both state and federal law. It certainly cannot be argued that state antitrust enforcement has in this case frustrated the purpose of the Sherman Act when the trial court, in complete harmony with its federal counterparts, has simply condemned anticompetitive practices that have already been condemned under federal law. Because both jurisdictions have sought to achieve the same result -- elimination of trade restraints -- there is no "showing of a specific . . . burdening of . . . interstate commerce." ([Exxon, supra, at pp. 128-129 \[57 L.Ed.2d at p. 102\].](#)) While professional football may indeed be entitled to uniform treatment, it has been provided it by the trial court.²²

[****73] The Chargers fall back on one final argument: they contend that they need not show specific, actual conflict but only that *potential* conflict may arise after an initial state and then subsequent states impose their own differing regulations on the activity. I disagree. Numerous Supreme Court decisions have deferred to concurrent state and federal regulation where the record "contains nothing to suggest the existence of any . . . competing or conflicting local regulations" ([Huron Cement, supra, 362 U.S. 440, at p. 448 \[4 L.Ed.2d 852 at p. 859\]](#) or where the "record demonstrates no inevitable collision between the two schemes of regulation, despite the dissimilarity of standards." ([Florida Avocado, supra, 373 U.S. 132, at p. 143 \[10 L.Ed.2d 248 at p. 257\].](#)) Moreover, the limited scope of the present case militates against finding even a potential conflict. As noted earlier, the NFL rules and practices challenged by Partee have been substantially modified pursuant to the settlement in *Alexander*. There was evidence before the trial court that Partee was one of only four players who opted-out of the *Alexander* class and refused to covenant not to sue. Thus, there [****74] is potential for conflict *only* if a court in one of the remaining cases rules *in favor* of the NFL, and contrary to the present case and *Smith, Kapp, and Mackey*.

"Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does [state] regulation violate the Commerce Clause." [*410] ([Minnesota v. Clover Leaf Creamery Co. \(1981\) 449 U.S. 456, 474 \[66](#)

²²I do not mean to suggest that under different factual circumstances state antitrust regulation may not unreasonably burden interstate commerce. Such a case, however, is not before us.

L.Ed.2d 659, 675, 101 S.Ct. 715.) On the record before us, I conclude there is no specific burdening of interstate commerce; nor is there a showing of actual or potential conflict in an area where uniformity [***390] of regulation is required pursuant to a congressional declaration of policy. "[Where] the effect of the application of [**697] the Cartwright Act upon interstate commerce is to facilitate competition and not to place a restraint upon it, it is one which conforms with like policies of the federal government . . ." (Coors, supra, 37 Cal.App.3d at p. 666.)

In sum, the present case illustrates a successful accommodation of state and federal policies. I am simply unable to find that the stringent federal preclusion standard has been met in this case. [****75] ²³ Yet, this court today relies on the Chargers' unwarranted and unproven speculations as to a purported irreconcilable undermining of federal law without requiring them to meet their burden of clearly demonstrating that the application of the Cartwright Act in this case inexorably conflicts with the purposes underlying the federal act. The reasoning process which leads the majority to conclude that a citizen of this state is without power to enforce our state's antitrust laws because of the mere existence of concurrent federal regulation of professional football is both legally and factually defective. Though it may be correctly said that the national operations of professional football require uniform antitrust regulation, this alone does not justify ignoring the "thoroughly established" principle that where Congress has not expressly prohibited regulation of a given field, state law "is superseded *only* where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" (Kelly v. Washington (1937) 302 U.S. 1, 10 [82 L.Ed. 3, 10-11, 58 S.Ct. 87], italics added.) Our primary inquiry, then, should be [****76] whether state antitrust enforcement in this case is so repugnant that it inevitably undermines the purpose of the Sherman Act. As I have explained, we simply have no basis for concluding that state regulation frustrates federal law or policy as nothing in the present record shows that this state has or will impose more stringent antitrust requirements.

Although, "[in] the final analysis, there can be no crystal clear distinctly marked formula" (Hines v. Davidowitz, supra, 312 U.S. at p. 67 [85 L.Ed. at p. 587]), my review of the case law compels me to conclude -- notwithstanding the aberrant *Flood* decision -- that there is a [****77] heavy presumption against preemption where state regulation seeks to protect the vital interests [*411] of state citizens. By reversing the normal presumption against finding federal preemption, the majority ignore the fact that state enforcement here promotes the very policy goals underlying the enactment of the Sherman Act. Accordingly, under the factual circumstances before us, I cannot agree that the commerce clause precludes state antitrust regulation. I would hold that the trial court had jurisdiction to apply the Cartwright Act to professional football.

For the foregoing reasons I would affirm the judgment.

End of Document

²³ "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." (Florida Avocado Growers v. Paul, supra, 373 U.S. at p. 142 [10 L.Ed.2d at p. 257].)



Ellwood City v. Pennsylvania Power Co.

United States District Court for the Western District of Pennsylvania

August 31, 1983

Civil Action No. 77-1145

Reporter

570 F. Supp. 553 *; 1983 U.S. Dist. LEXIS 14190 **; 1983-2 Trade Cas. (CCH) P65,673

Borough of Ellwood City, Pennsylvania, and Borough of Grove City, Pennsylvania, Municipal Corporations, Plaintiffs, v. Pennsylvania Power Co., a Pennsylvania Corporation, Defendant

Core Terms

Boroughs, squeeze, wholesale, rates, proposed rate, retail rate, Sherman Act, customers, Robinson-Patman Act, electricity, discovery, anticompetitive, allegations, regulation, anti trust law, conspiracy, antitrust, parties, amend, summary judgment motion, summary judgment, Federal Power Act, industrial, commodity, municipal, subject to refund, suspension period, issue preclusion, electric power, disparity

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Electric Power Industry > Federal Power Act > Federal Rate Regulation

Energy & Utilities Law > Utility Companies > Rates > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

HN1 [down arrow] Federal Power Act, Federal Rate Regulation

All rates subject to the Federal Energy Regulatory Commission's jurisdiction are required to be just and reasonable and not unduly discriminatory or preferential. [16 U.S.C.S. § 824d\(a\), \(b\)](#).

Business & Corporate Compliance > ... > Electric Power Industry > Federal Power Act > Federal Rate Regulation

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

570 F. Supp. 553, *553L983 U.S. Dist. LEXIS 14190, **14190

HN2 **Federal Power Act, Federal Rate Regulation**

A utility company is required to file schedules with the Federal Energy Regulatory Commission listing all wholesale rates, the classifications, practices and regulations affecting the rates, and all contracts relating to the rates. [16 U.S.C.S. § 824d\(c\)](#).

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN3 **US Federal Energy Regulatory Commission, Authorities & Powers**

Pursuant to 16 U.S.C.S. (Supp. V) [§ 824d\(d\)](#), a utility company must give sixty days notice to the Federal Energy Commission and the public before modifying its wholesale rates.

Business & Corporate Compliance > ... > Electric Power Industry > Federal Power Act > Federal Rate Regulation

Energy & Utilities Law > Utility Companies > Rates > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

HN4 **Federal Power Act, Federal Rate Regulation**

The Federal Energy Regulatory Commission is empowered by [16 U.S.C.S. § 824d\(e\)](#) to order a hearing to consider the lawfulness of a filed rate change and authorized to suspend the proposed change for a period not to exceed five months beyond the time when the rate would otherwise go into effect. If a hearing is not ordered, the new rate takes effect at the end of the sixty-day notice period. Pursuant to [16 U.S.C.S. § 824d\(e\)](#), if a hearing is not concluded before the expiration of the suspension period, the proposed rate takes effect. Any portion of the increase subsequently determined to be unjustified is then subject to refund with interest.

Energy & Utilities Law > Utility Companies > Rates > General Overview

Energy & Utilities Law > Utility Companies > General Overview

HN5 **Utility Companies, Rates**

Pennsylvania law requires utilities to file all tariffs, defined by [66 Pa. Cons. Stat. § 1302](#) as all rules, regulations, practices or contracts involving any rates, with the Pennsylvania Public Utility Commission.

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN6 **Utility Companies, Rates**

Rates may not be preferential to any person, corporation or municipal corporation, nor may a public utility unreasonably discriminate between localities or classes of service. [66 Pa. Cons. Stat. § 1304](#). A retail rate may not go into effect until the Pennsylvania Public Utility Commission approves it.

Energy & Utilities Law > Utility Companies > Rates > General Overview

[**HN7**](#) Utility Companies, Rates

The code mandates, as does its federal counterpart, that the utility give sixty days notice to the Pennsylvania Public Utility Commission (PPUC) before changing any existing or established rate. [66 Pa. Cons. Stat. § 1308\(a\)](#). Upon complaint or upon its own motion, the PPUC may order a hearing to consider the lawfulness of a proposed rate change. Absent an order permitting a proposed tariff to become effective, the proposed rate is automatically suspended for up to seven months following the sixty-day notice period. [66 Pa. Cons. Stat. § 1308\(d\)](#). If an order has not been made prior to the expiration of the seven-month period, the proposed rate takes effect, subject to refund.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

[**HN8**](#) Amendment of Pleadings, Leave of Court

Leave to amend pleadings out of time under [Fed. R. Civ. P. 15\(a\)](#) is discretionary with the trial court. In exercising its discretion, the court may consider the following factors: undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party by virtue of the allowance of the amendment, and futility of the amendment.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

[**HN9**](#) Pleadings, Amendment of Pleadings

There are additional considerations when a plaintiff files a motion to amend after the defendant has moved for summary judgment. In such a case, the motion to amend will not be granted unless the party seeking amendment can show not only that the proposed amendment has "substantial merit," but also come forward with "substantial and convincing evidence" supporting the newly asserted claim.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

[**HN10**](#) Standards of Review, Abuse of Discretion

The trial court's decision on leave to amend the complaint is not subject to reversal except for an abuse of discretion.

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Antitrust Issues > Exclusionary Conduct

570 F. Supp. 553, *553L983 U.S. Dist. LEXIS 14190, **14190

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN11 [] US Federal Energy Regulatory Commission, Authorities & Powers

The Federal Energy Regulatory Commission has the authority and the duty under the Federal Power Act to consider allegations of price squeeze in a ratemaking proceeding.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Administrative Law > Judicial Review > Reviewability > Preclusion

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Governments > Agriculture & Food > General Overview

HN12 [] Decisions, Collateral Estoppel

Issue preclusion has not been restricted to final judgments of courts, but is applied, in appropriate circumstances to administrative agencies.

Administrative Law > Judicial Review > Reviewability > Preclusion

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Administrative Law > Agency Adjudication > Decisions > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN13 [] Reviewability, Preclusion

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts do not hesitate to apply res judicata to enforce repose.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > US Federal Energy Regulatory Commission

Energy & Utilities Law > Antitrust Issues > Administrative Considerations

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

570 F. Supp. 553, *553L983 U.S. Dist. LEXIS 14190, **14190

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

HN14 [blue document icon] Energy & Utilities, US Federal Energy Regulatory Commission

The mere fact that the Federal Energy Regulatory Commission (FERC) may consider arguments based on antitrust concepts does not preclude later antitrust review.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Discovery & Disclosure > General Overview

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

HN15 [blue document icon] Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate in those antitrust cases where plaintiffs, after having engaged in extensive discovery, fail to produce "significant probative evidence" in support of the allegations in their complaint.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

HN16 [blue document icon] Antitrust & Trade Law, Sherman Act

The core requirement of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), is that there be a contract, combination, or conspiracy--i.e., an agreement -- in restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

HN17 [blue document icon] Antitrust & Trade Law, Sherman Act

[§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), requires proof of concerted action.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

570 F. Supp. 553, *553A1983 U.S. Dist. LEXIS 14190, **14190

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

HN18 [] **Robinson-Patman Act, Coverage**

The Robinson-Patman Act prohibits discrimination in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN19 [] **Robinson-Patman Act, Claims**

Electricity is a commodity for purposes of the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#).

Governments > Legislation > Interpretation

HN20 [] **Legislation, Interpretation**

The antitrust laws should not be given a restrictive interpretation.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN21 [] **Robinson-Patman Act, Claims**

Intrastate sales are subject to the Robinson-Patman Act, [15 U.S.C.S. §13\(a\)](#), as long as the sales remain in the flow of the interstate commerce.

Counsel: [**1] For plaintiffs: Charles F. Wheatley, Jr., Don Charles Uthus, and Michael J. Morrissey, of Wheatley & Miller, Washington, District of Columbia, Edward Leymarie, Ellwood City, Pennsylvania, Marvin E. Luxemborg, of Keller, Luenburg & Garbett, Ellwood City, Pennsylvania, Nick A. Frisk, Jr., Ellwood City, Pennsylvania, Wherry, Ketler & Bonner, Grove City, Pennsylvania.

For defendant: Steven A. Berger, of Berger, Steingut, Weiner, Fox & Stern, New York, New York, Stephen Feld and James R. Edgerly, New Castle, Pennsylvania, Terence H. Benbow, of Winthrop, Stimson, Putnam & Roberts, New York, New York, Rose, Schmidt, Dixon & Hasley, Pittsburgh, Pennsylvania.

Judges: McCune, D.J.

Opinion by: McCUNE

Opinion

[*554] Memorandum

McCUNE, D.J.:

We consider Pennsylvania Power Company's second motion for summary judgment and plaintiff's motion for leave to amend the complaint. We previously considered defendant's motion to dismiss, which was treated, in part, as one for summary judgment pursuant to [Fed. R. Civ. P. 12\(b\)\(6\)](#), in [Borough of Ellwood City v. Pennsylvania Power Company, 462 F. Supp. 1343 \(W.D. Pa. 1979\)](#). We incorporate by reference our prior opinion in this matter. For the reasons stated [*2] below, defendant's present motion will be granted in part and denied in part, and plaintiff's motion to amend will be denied.

Plaintiffs, Boroughs of Ellwood City and Grove City (hereinafter Boroughs), are municipal corporations of Pennsylvania located within the service area of defendant, Pennsylvania Power Company (hereinafter Penn Power). Plaintiffs sell electric power at retail to consumers within their respective corporate boundaries. The power that plaintiffs sell is acquired through wholesale purchases from Penn Power, as neither borough has any generation or transmission facilities. Defendant Penn Power has been a wholly-owned subsidiary of Ohio Edison Company since 1944. Penn Power directly services consumers in 137 communities and also sells energy for resale to five municipalities, including plaintiffs.

Penn Power's wholesale rates are regulated by the Federal Energy Regulatory [*555] Commission (hereinafter FERC) ¹ pursuant to the Federal Power Act, [16 U.S.C. § 824 et seq.](#) (& Supp. V). Penn Power's retail rates are regulated by the Pennsylvania Public Utility Commission (hereinafter PPUC or Commission) pursuant to the Public Utility Code (hereinafter Code), [*3] [66 Pa. C.S. § 101 et seq.](#)

[HN1](#) All rates subject to FERC's jurisdiction are required to be just and reasonable and not unduly discriminatory or preferential. [16 U.S.C. § 824d\(a\)](#) and [\(b\)](#). [HN2](#) Penn Power is required to file schedules with FERC listing all wholesale rates, the classifications, practices and regulations affecting the rates, and all contracts relating to the rates. [16 U.S.C. § 824d\(c\)](#). [HN3](#) Pursuant to 16 U.S.C. (Supp. V) [§ 824d\(d\)](#), Penn Power must give sixty days notice to FERC and the public before modifying its wholesale rates. In response to a complaint, or on its own initiative, [HN4](#) FERC is empowered by [16 U.S.C. § 824d\(e\)](#) to order a hearing to consider the lawfulness of a filed rate change and authorized to suspend the proposed change for a period not to exceed five months beyond the [*4] time when the rate would otherwise go into effect. If a hearing is not ordered, the new rate takes effect at the end of the sixty-day notice period. Pursuant to [16 U.S.C. § 824d\(e\)](#), if a hearing is not concluded before the expiration of the suspension period, the proposed rate takes effect. Any portion of the increase subsequently determined to be unjustified is then subject to refund with interest.

[HN5](#) Pennsylvania law requires utilities to file all tariffs, defined by [66 Pa. C. S. § 1302](#) as all rules, regulations, practices or contracts involving any rates, with the PPUC. [66 Pa. C. S. § 1302](#). ² [HN6](#) Rates may not be preferential to any person, corporation or municipal corporation, nor may a public utility unreasonably discriminate between localities or classes of service. [66 Pa. C. S. § 1304](#). A retail rate may not go into effect until the PPUC approves it. [HN7](#) The Code mandates, as does its federal counterpart, that the utility give sixty days notice to the PPUC before changing any existing or established rate. [66 Pa. C. S. § 1308\(a\)](#). Upon complaint or upon its own motion, the PPUC may order a hearing to consider the lawfulness of a proposed rate change. Absent an order

¹ References to FERC during the time prior to October 1, 1977, should be construed as referring to the Federal Power Commission, which had essentially the same statutory authority as FERC prior to the above-noted date.

² At the time the instant complaint was filed, the predecessor statutes to the above-cited provisions were in effect and governed public utilities' retail rates. Except where specifically noted, the provisions of the Code are substantially identical to those of the prior act.

permitting [**5] a proposed tariff to become effective, the proposed rate is automatically suspended for up to seven months following the sixty-day notice period. [66 Pa. C. S. § 1308\(d\)](#). If an order has not been made prior to the expiration of the seven-month period, the proposed rate takes effect, subject to refund. *Id.*

Prior to October 7, 1977, the Pennsylvania Public Utility Code had no provision for giving effect to a proposed rate-change should the Commission fail to conclude its hearing and/or reach a decision within the suspension period. However, the PPUC was authorized to suspend rate increases for up to nine months. 66 P. S. § 1148(b). The rate in force at the time the proposed rate was filed remained in effect, unless the PPUC ordered [**6] that a temporary rate be collected, until the time that the Commission rendered a final decision. *Id.* The collection was subject to refund if it were greater than the subsequently approved rate. If it were less than the approved rate, a surcharge could be added. 66 P. S. §§ 1150(e) and 1153(a).

On October 4, 1977, plaintiffs filed a complaint alleging that Penn Power had violated the Sherman Act, [15 U.S.C. §§ 1](#) and [2](#), and the Robinson-Patman Act, [15 U.S.C. § 13\(a\)](#). The complaint alleges that Penn Power imposed an anticompetitive price squeeze upon Boroughs by manipulating the relationship between its wholesale rate to plaintiffs and its retail industrial rates. We stayed the rate-related aspects of Boroughs' claim until the determination of the rate [**556] proceedings then-pending before FERC. [Borough of Ellwood City v. Pennsylvania Power Co., supra](#). Boroughs also allege in their complaint that Penn Power prevented plaintiffs from gaining access to alternative sources of power, refused to deal with Boroughs, adopted a policy of denying access by municipal electric systems to nuclear generating facilities and refused to wheel service to Boroughs. These claims were [**7] dismissed by our prior opinion. *Id.*

We initially address Boroughs' motion for leave to amend the complaint. Plaintiffs wish to amend para. 14 to state (A) defendant's actions, as indicated in the 1977 and 1981 docket proceedings before FERC, constitute unlawful violations of the Federal Power Act and the Sherman Act, and (B) defendant's wheeling rate filed with FERC on November 1, 1982, in response to Grove City Borough's proposed Shenango River Hydroelectric Project, constitutes an unlawful constructive refusal to wheel and refusal to deal in violation of the Federal Power Act and the Sherman Act.

[HN8](#) [↑] Leave to amend pleadings out of time under [Fed. R. Civ. P. 15\(a\)](#) is discretionary with the trial court. [Foman v. Davis, 371 U.S. 178, 9 L. Ed. 2d 222, 83 S. Ct. 227 \(1962\)](#). In exercising its discretion, the court may consider the following factors: undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party by virtue of the allowance of the amendment, and futility of the amendment. [Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663 \(5th Cir. 1981\)](#). However, [HN9](#) [↑] there [**8] are additional considerations when a plaintiff files a motion to amend after the defendant has moved for summary judgment, as in the present case.³ In such a case, the motion to amend

will not be granted unless the party seeking amendment can show not only that the proposed amendment has "substantial merit," [Verhein v. South Bend Lathe, Inc., 598 F.2d 1061, 1063 \(7th Cir. 1979\)](#), but also come forward with "substantial and convincing evidence" supporting the newly asserted claim. [Artman v. International Harvester, Inc., 355 F. Supp. 476, 481 \(W.D. Pa. 1972\)](#). . . . This more demanding burden, which the party seeking amendment bears at this procedural juncture, evolves from the truism that "prejudice to the non-moving party is the touchstone for denial of the amendment." [Cornell & Co., Inc. v. Occupational Safety and Health Administration, 573 F.2d 820 \(3d Cir. 1978\)](#).

[Carey v. Beans, 500 F. Supp. 580, 582 \(E.D. Pa. 1980\)](#), aff'd mem., 659 F.2d 1065 (3d Cir. 1981). [HN10](#) [↑] The trial court's decision is not subject to reversal except for an abuse of discretion. [Heyl & Patterson International v. F.D. Rich Housing, 663 F.2d 419 \(3d Cir. 1981\)](#), cert. [**9] denied, 455 U.S. 1018, 102 S. Ct. 1714, 72 L. Ed. 2d 136 (1982).

³ Defendant's motion for summary judgment was filed February 14, 1983. Plaintiff's motion for leave to amend the complaint was filed February 18, 1983.

The proposed amendment alleging violations of the Sherman Act would cause defendant to suffer undue prejudice because it would cause discovery, now completed, to begin again. We note, *infra*, that discovery in this complex case has been extensive and lengthy. Plaintiffs note, at p. 38 of their brief in opposition to the motion for summary judgment, that should the amendment be permitted, they will begin discovery concerning Penn Power's actions regarding the Shenango hydro project. To require defendant, at this late date, to begin discovery anew is indefensible. See [*Roberts v. Arizona Bd. of Regents, 661 F.2d 796 \(9th Cir. 1981\)*](#) (Court of Appeals upheld district court's refusal to permit amendment of complaint, where the issue was raised at the "eleventh hour," after discovery was [**10] virtually complete, and the defendant's motion for summary judgment was pending before the court). See also [*Mende v. Dun & Bradstreet, Inc., 670 F.2d 129 \(9th Cir. 1982\)*](#). Accordingly, the motion for leave to amend the complaint is denied.

Turning to the motion for summary judgment, the allegations of the complaint pertinent to the claim of price squeeze accuse [*557] defendant of discriminating in price between rates applicable to municipal wholesale customers and those charged retail industrial customers. Boroughs allege that they pay more, as wholesale customers, than retail industrial customers pay for similar service. The effect of this rate differential is alleged, *inter alia*, to prevent plaintiffs from competing with Penn Power for industrial customers.

The proceedings before FERC required two separate opinions and orders because the administrative law judge had severed the price squeeze issue from the issues of cost of service, rate design and compliance. The latter were considered in Phase I, Opinion No. 89, 21 F. P. S. 5-37, issued July 18, 1980. The price squeeze claim was dealt with in Phase II, Opinion No. 157, 23 F. P. S. 5-928, issued December 21, [**11] 1982. FERC denied Penn Power's and Boroughs' requests for rehearing in Opinion No. 157-A, 24 F. P. S. 5-115, issued February 18, 1983. A petition for review has been filed. [*Boroughs of Ellwood City v. FERC, 701 F.2d 266 \(D.C. Cir. 1983\)*](#).

As noted above, FERC considered, in Opinion No. 157, whether Penn Power engaged in an anticompetitive price squeeze. Boroughs argued to FERC, and argue here, that the disparity between the wholesale rate they paid, and the retail rate charged to industrial customers, created a price squeeze. Its effect was to preclude competition between Boroughs and Penn Power. In resolving this claim, FERC compared the rates of return indicated by consistent cost of service analyses of the wholesale and relevant retail rates. FERC concluded that a disparity of rates of return, which was unexplained by differences in cost factors, existed during the period from September 11, 1977, to September 1, 1978. However, FERC also determined that factual circumstances existed that justified the tolerance of the price discrimination.

As noted previously, Penn Power's retail rates are governed by the PPUC, and wholesale rates are governed by FERC. Thus, different [**12] statutes and agencies govern the rates and the dates on which changes in the rates may be implemented. This dual utility rate regulation was a significant factor in FERC's determination that the price disparity should be tolerated in the instant case.

Defendant alleged that it needed rate relief immediately to maintain its construction program. Therefore, it filed a proposed wholesale rate increase in accordance with the Federal Power Act. However, Penn Power did not simultaneously file its proposed retail rate increase with the PPUC, so that it could take advantage of the newly enacted Public Utility Code. As we noted *supra*, a change in the Code provided that when the PPUC failed to reach a decision before the expiration of the suspension period, the utility's proposed rate would take effect, subject to refund. This is a departure from the prior statute which required that either the rate in force at the time the proposed rate was filed, or a temporary rate imposed by the Commission, remain in effect until the PPUC concluded its investigation and reached a decision.

Therefore, Penn Power's decision to delay its retail rate filing in 1977, provided it assurance of [**13] either a prompt Commission ruling on its rate application (within the seven month suspension period) or the right to implement its proposed rates in full, subject to refund, after the suspension period. Had Penn Power filed prior to October 7, 1977, it would have faced the possibility of an even longer suspension period and temporary rates thereafter that may have been substantially less than the proposed rate relief.

Opinion No. 157-A, *supra*, at 5-115-116 (footnote omitted).

FERC thus concluded that by waiting to file its retail tariff, so as to take advantage of the newly enacted Code, Penn Power actually mitigated the price squeeze. FERC reasoned that by delaying the state filing, Penn Power may have shortened the duration of the disparities in its wholesale and retail rates that would have resulted from earlier, simultaneous filings. FERC therefore held that although there was a [*558] price squeeze for eleven and one-half months, Penn Power demonstrated mitigating circumstances that rendered the price discrimination not undue.

We are now asked to give full effect to the decision of the Federal Energy Regulatory Commission in Opinions Nos. 157 and 157-A, and [**14] thereby grant Penn Power's motion for summary judgment. Following argument on the motion and extensive research, we conclude that the motion must be denied even though FERC has decided the main issue before the court.

Penn Power cites the Supreme Court's decision in *FPC v. Conway Corp.*, 426 U.S. 271, 96 S. Ct. 1999, 48 L. Ed. 2d 626 (1976), in which the Court concluded that [HN11](#)[¹⁴] FERC (then the Federal Power Commission) has the authority and the duty under the Federal Power Act to consider allegations of price squeeze in a ratemaking proceeding. The Supreme Court stated,

The Commission thus cannot so easily satisfy its obligation to eliminate unreasonable discriminations or put aside its duty to consider whether a proposed rate will have anticompetitive effects. . . . The Commission must arrive at a rate level deemed by it to be just and reasonable, but in doing so it must consider the tendered allegations that the proposed rates are discriminatory and anticompetitive in effect.

[FPC v. Conway, supra, at 278-79.](#)

The *Conway* Court made it clear that FERC is empowered to determine "whether a utility's wholesale rates [are] discriminatory and noncompetitive when [**15] compared with a utility's non-jurisdictional retail rates." Note, *The Applicability of Antitrust Laws to Price Squeezes in the Electric Utility Industry*, 54 St. John's L. Rev. 103, 110 (1979) (hereinafter Note, *The Applicability of Antitrust Laws*). This relationship between wholesale and retail rates and their potential for working an anticompetitive effect is the essence of the price squeeze issue presently before us.

FERC and the parties expended considerable time and expense developing and considering this case. Discovery commenced in September, 1977, producing thousands of pages of material. The hearing before FERC lasted over four weeks, producing thousands of pages of testimony and exhibits. FERC made a thorough analysis of the relationship between the rates and the dual regulation to which Penn Power is subject. Penn Power argues that the court should not second guess FERC's determination, especially in light of its particular expertise in the areas of rate-making and anti-competitive price squeezes. The Supreme Court's pronouncement in *Conway*, Penn argues, would be a hollow directive if this court should now undertake the identical analysis and consideration [**16] recently completed by FERC. Both parties, it is argued, will have the benefit of appellate review by virtue of the District of Columbia Circuit Court's consideration of FERC's decision on appeal.

FERC has determined that although there existed a price disparity for eleven and one-half months, it is explained and justified by the effects of dual regulation to which Penn Power is subject. Penn Power argues that the Boroughs should not be entitled to relitigate the factual or legal issues determined by FERC under the fundamental principles of issue preclusion expressed by the [*Restatement \(Second\) of Judgments* § 27](#) (1980):

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

See also [*Deaktor v. Henner*, 517 F. Supp. 26 \(N.D. Ill. 1980\)](#) (District court will regard as conclusive the determination of the Commodity Future Trading Commission that the Chicago Mercantile Exchange did not violate the Commodity Exchange Act. The court had granted a stay and retained [**17] jurisdiction to permit the administrative hearing before the Commission, and granted summary judgment based upon principles of issue preclusion). [HN12](#)[¹⁵] Issue preclusion has not been restricted to final judgments of courts, [*559] but has been

applied, in appropriate circumstances to administrative agencies. [United States v. Utah Construction Co., 384 U.S. 394, 86 S. Ct. 1545, 16 L. Ed. 2d 642 \(1966\)](#). There the Court stated,

HN13[] When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. . . .

In the present case the Board was acting in a judicial capacity . . . , the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved between these two parties.

Id., at 422 (footnote omitted).

An [**18] oft-repeated justification for the use of issue preclusion is that the interest of the state requires that there be an end to litigation, e.g., [Reed v. Allen, 286 U.S. 191, 76 L. Ed. 1054, 52 S. Ct. 532 \(1932\)](#). Related to this is the premise that matters once determined in an adversary action shall be deemed conclusive. The former is probably not of prime importance here. However, the latter is argued by Penn Power to be highly relevant. Defendant notes the extensiveness of discovery before FERC and the length and extent of the hearing before the federal Commission. In [Montana v. United States, 440 U.S. 147, 59 L. Ed. 2d 210, 99 S. Ct. 970 \(1979\)](#), the Court stated,

To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Id., at 153-54 (footnote omitted).

Penn Power is correct that in the proceeding before FERC, and in the present matter, the issue is identical: Whether Penn Power imposed an anti-competitive [**19] price squeeze upon Boroughs by manipulating the relationship between its wholesale rate to plaintiffs and its retail rates to industrial customers. However, applicable precedent compels our conclusion that the proceedings before FERC do not preclude our consideration of Boroughs' price squeeze claims under the antitrust laws. Initially, we rely upon our prior decision in this case. There we stated,

HN14[] The mere fact that FERC may consider arguments based on antitrust concepts does not preclude later antitrust review. There is no certainty that use of the limited powers of the FERC can fully remedy an antitrust violation. Mere consideration of a claim does not rise to the level of complete disposition of the underlying violation.

* * *

The actual determination of the legal structure of a price squeeze claim and its presence or absence here must remain in this court. (Citation omitted). Further, this court has remedial powers, in particular, injunctive and treble damage relief, which are not held by the FERC.

[Borough of Ellwood City v. Pennsylvania Power Co., supra, at 1349, 1351](#).

Although the Third Circuit Court of Appeals has not considered similar [**20] claims. In [City of Kirkwood v. Union Electric Co., 671 F.2d 1173 \(8th Cir. 1982\)](#), cert. denied, 459 U.S. 1170, 103 S. Ct. 814, 74 L. Ed. 2d 1013 (1983), the Eighth Circuit Court of Appeals reversed the district court holding, *inter alia*, that FERC did not have exclusive jurisdiction over the municipality's price squeeze claim. *Kirkwood* might be distinguished because the court did not have the benefit of FERC's ruling on the price squeeze issue and was not considering whether to accord it conclusive effect. Rather, the controversy centered over which forum had exclusive jurisdiction to hear the dispute. However, the case is [*560] sufficiently analogous to provide guidance in our disposition of the present motion.

Similarly, in [City of Mishawaka v. Indiana & Michigan Electric Co., 560 F.2d 1314 \(7th Cir. 1977\)](#), cert. denied, 436 U.S. 922, 56 L. Ed. 2d 765, 98 S. Ct. 2274 (1978), the Seventh Circuit Court of Appeals considered and rejected the argument that FERC had exclusive jurisdiction over a price-squeeze claim. *Mishawaka*, like *Kirkwood*,

determined that the federal courts should proceed with allegations of antitrust violations involving [**21] price-squeeze claims despite the pendency of the same allegations before FERC. Again, the *Mishawaka* court did not confront the precise issue in the present case, but it is sufficiently analogous to merit our consideration. See also *Cities of Batavia v. FERC*, 217 U.S. App. D.C. 211, 672 F.2d 64 (D.C. Cir. 1982); *City of Groton v. Connecticut Light & Power Co.*, 497 F. Supp. 1040 (D. Conn. 1980), aff'd in part, 662 F.2d 921 (2d Cir. 1981); Note, *The Applicability of Antitrust Laws*, *supra*.

We think it clear that jurisdiction over the price-squeeze claim must remain in this court. As one commentator stated,

While the considerations relevant to rate-making under the Federal Power Act may differ from those used to determine a violation of the Sherman Act, the prophylactic purposes of the schemes are the same: to curb discriminatory or anti-competitive business practices. The statutory frameworks, therefore, may complement each other. Yet, because the FERC cannot provide a remedy for injury due to the existence of a price squeeze and may be unable to prevent future occurrences, it is suggested that the sole effective means of redress available to municipally-owned [**22] utilities is under the antitrust laws.

Note, *The Applicability of Antitrust Laws*, *supra*, at 123 (footnotes omitted) (emphasis in original).

We conclude that issue preclusion or collateral estoppel does not apply conclusively because Congress has placed antitrust jurisdiction in the district courts and because the courts can afford relief that FERC cannot provide. Further, we are uncertain that the mitigation found by FERC is a defense to antitrust violations. The view of the D.C. Circuit would be helpful but it may be sometime before it is available. Thus, the price-squeeze issue remains viable in this court.

However, there are portions of Boroughs' claims which are no longer viable. The claim under § 1 of the Sherman Act which alleges a combination or conspiracy in restraint of trade, and the portion of the claim under § 2 of the Sherman Act which alleges that Penn Power conspired to monopolize have not been supported by the extensive discovery that has taken place. Summary judgment as to those claims must be granted, for "it is now settled that HN15[¹] summary judgment is appropriate in those antitrust cases where plaintiffs, after having engaged in extensive discovery, [**23] fail to produce 'significant probative evidence' in support of the allegations in their complaint. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90, 88 S. Ct. 1575, 1593, 20 L. Ed. 2d 569 (1968)." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.* 513 F. Supp. 1100, 1140 (E. D. Pa. 1981), appeal filed, August 24, 1981 (Nos. 81-2331, 81-2332, 81-2333), argued, October 22, 1982. See also *Mid-South Grizzlies v. National Football League*, 550 F. Supp. 558 (E. D. Pa. 1982).

"The HN16[¹] core requirement of § 1 of the Sherman Act . . . is that there be a 'contract, combination, or conspiracy' -- i.e., an agreement -- in restraint of trade." *Id.*, at 1145. Boroughs' sole evidence of conspiratorial action is based upon an inference they have drawn from the fact that Penn Power is owned by Ohio Edison and the fact that the two companies have certain common directors. This supposition is clearly inadequate to establish a conspiracy under the Sherman Act. Evidence of a conspiracy does not exist simply because Boroughs represent that it does.

Although not limited to situations involving a conspiracy, *Higbie v. Kopy-Kat Inc.*, 391 F. Supp. 808, [**24] 810 (1975), § HN17[¹] 1 of the [*561] Sherman Act requires proof of concerted action. *F.T.C. v. Lukens Steel Co.*, 454 F. Supp. 1182 (D. D.C. 1978). The mere fact that Penn Power and its parent corporation share some common directors, and that defendant is a member of CAPCO ⁴ is not sufficient evidence to show the necessary concerted action. "Unilateral action, no matter what its motivation, cannot violate § 1." *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980) (citations omitted). Plaintiffs' argument is akin to the argument that mere active membership in a trade association constitutes an agreement. In *Zenith Radio Corp. v. Matsushita Elec.*

⁴CAPCO consists of Ohio Edison, Penn Power, Duquesne Light, Toledo Edison and Cleveland Electric Illuminating Companies. "The group was formed in 1967 to enable the members to coordinate installation of generation and transmission in order to take advantage of economies of scale." Complaint, para. 5.

Indus. Co., supra, the plaintiffs intimated that the defendants' membership in the Electronic Industries Association of Japan, requiring as it did defendants' participation in meetings as conferees, gave rise to an inference of collusive activity. The court rejected such a claim, noting that mere membership, without more, is insufficient to give rise to an inference of conspiracy. *Id.* at 1149 and cases cited therein.

[**25] Similarly, in the present case, the mere assertion that Penn Power is a member of CAPCO, without more, is insufficient to give rise to an inference of conspiratorial conduct. "Opportunities to conspire are not probative of whether firms did in fact conspire; an opportunity to conspire will exist always." *Id.*, quoting, *Brown v. Cameron-Brown Co.*, 1980-2 TRADE CASES P 63,400 at p. 76,040 (E. D. Va. 1980). Therefore, the claims based upon a conspiracy or combination theory under [§§ 1](#) and [2](#) of the Sherman Act may not be maintained. We will grant Penn Power's motion for summary judgment as to these claims.

Finally, we deny Penn Power's motion for summary judgment concerning the Robinson-Patman Act claims as there exist disputes over material facts.

[HN18](#) [↑] The Robinson-Patman Act prohibits discrimination in price "between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." [15 U.S.C. § 13\(a\)](#). Defendant first argues that its motion must be granted because electricity is not a commodity within the jurisdictional reach of the Robinson-Patman [**26] Act. It relies upon [City of Newark v. Delmarva Power & Light Co.](#), 467 F. Supp. 763 (D. Del. 1979), wherein the District Court of Delaware determined that "the wording of the [Robinson-Patman Act], its legislative history, and the regulation of the electric utility industry which existed at the time of the adoption of the . . . Act, all suggest that 'commodity' was not intended to encompass electric power." [Id. at 773](#).

We, however, agree with the Eighth Circuit Court of Appeals in [City of Kirkwood v. Union Electric Co., supra](#). In *Kirkwood*, the court noted that although the Robinson-Patman Act does not cover real property, intangibles or services, electricity does not fall into any of the above classifications. "Electric power can be felt, if not touched. It is produced, sold, stored in small quantities, transmitted, and distributed in discrete quantities. We hold that [HN19](#) [↑] electricity is a commodity for purposes of the Robinson-Patman Act. [HN20](#) [↑] The antitrust laws should not be given a restrictive interpretation." [Id. at 1181-82](#) (footnote omitted). See also [City of Gainesville v. Florida Power & Light Co.](#), 488 F. Supp. 1258 (S. D. Fla. 1980). (The court analyzed the [**27] Robinson-Patman Act's legislative history, relevant case law and the nature of electricity, and concluded that electricity is a commodity entitled to the protection of the Robinson-Patman Act.)

Penn Power argues that plaintiffs' Robinson-Patman claim is barred by FERC's finding that defendant's customer classifications are appropriate, and Opinion No. 157's conclusion that the price discrimination alleged by plaintiffs is cost justified. We [*562] held, *supra*, that FERC's conclusions are not to be given preclusive effect.

Defendant also asserts that the sales of electric power about which plaintiffs complain were not made "in commerce" within the meaning of the Robinson-Patman Act. Penn Power bases its argument on the fact that it is located wholly within Pennsylvania and serves only Pennsylvania customers. Thus, it contends none of its sales to customers cross state lines. We reject this argument and agree with Boroughs that [HN21](#) [↑] intrastate sales are subject to the Robinson-Patman Act as long as the sales remain in the flow of the interstate commerce.

In a Seventh Circuit Court of Appeals case, [Dean Milk Co. v. FTC](#), 395 F.2d 696 (7th Cir. 1968), the court held that [**28] milk sold from processing plants located within the state, which had been mixed with milk purchased from out-of-state producers, was in commerce for purposes of the Robinson-Patman Act. Accord [Foremost Dairies, Inc. v. FTC](#), 348 F.2d 674 (5th Cir.), cert. denied, 382 U.S. 959, 15 L. Ed. 2d 362, 86 S. Ct. 435 (1965).

Penn Power, it is alleged, purchases electricity out-of-state which flows across state lines and is subsequently sold to plaintiffs and other customers of defendant. This is sufficient to show that Penn Power's sales of electric power cross state lines. [Gulf Oil Corp. v. Copp Paving Co.](#), 419 U.S. 186, 42 L. Ed. 2d 378, 95 S. Ct. 392 (1974).

570 F. Supp. 553, *562 (1983 U.S. Dist. LEXIS 14190, **28

We conclude, therefore, that Boroughs' Robinson-Patman claims withstand Penn Power's attack and we deny defendant's motion as it relates to these claims.

An order follows.

End of Document



Feinstein v. Nettleship Co. of Los Angeles

United States Court of Appeals for the Ninth Circuit

May 10, 1983, Argued; August 10, 1983, Submitted ; September 1, 1983

Nos. 77-3998, 82-5698

Reporter

714 F.2d 928 *; 1983 U.S. App. LEXIS 24342 **; 1983-2 Trade Cas. (CCH) P65,590; 1983 WL 1000068

WALTER FEINSTEIN, JACK KRIEGSMAN, LEO MILLER, MORTON H. PASTOR and JASON I. GREEN, Plaintiffs/Appellants, v. NETTLESHIP CO. OF LOS ANGELES, PACIFIC INDEMNITY COMPANY, INSURANCE COMPANY OF NORTH AMERICA, SENTRY INSURANCE, AMERICAN RE-INSURANCE COMPANY, and NORTH AMERICAN RE-INSURANCE CORPORATION, Defendants/Appellees

Prior History: [**1] Appeal from the United States District Court for the Central District of California. William M. Byrne, Jr., District Judge, Presiding.

Disposition: The judgment of the district court is affirmed.

Core Terms

insurance business, boycott, insured, McCarran-Ferguson Act, antitrust, regulated, intimidation, exemption, coercion, district court, Sherman Act, plaintiffs', medical association, defendants', spreading, medical malpractice insurance, anti trust law, monopolization, summary judgment, monopoly power, negotiated, monopoly

LexisNexis® Headnotes

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

Civil Procedure > Appeals > Standards of Review

HN1[] Tying Arrangements, Clayton Act

Where there is no factual dispute, the court reviews solely to determine whether defendants were entitled to judgment as a matter of law.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN2[] Antitrust & Trade Law, Exemptions & Immunities

See [15 U.S.C.S. § 1012](#).

714 F.2d 928, *928* 1983 U.S. App. LEXIS 24342, **1

Antitrust & Trade Law > Exemptions & Immunities > General Overview

[HN3](#) [down] Antitrust & Trade Law, Exemptions & Immunities

[15 U.S.C.S. § 1013\(b\).](#)

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

[HN4](#) [down] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The McCarran-Ferguson Act, [15 U.S.C.S. § 1012](#), creates an antitrust exemption for the business of insurance. It provides an exemption from the antitrust laws for the business of insurance, but only to the extent that such business is regulated by the state, and does not involve a boycott, coercion or intimidation.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

[HN5](#) [down] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The Supreme Court has set forth three factors to consider in determining whether a practice constitutes the business of insurance: (1) whether the practice has the effect of transferring or spreading the policyholders' risks; (2) whether the practice is an integral part of the policy relationship between the insurer and insured; and (3) whether the practice is limited to entities within the insurance industry.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

[HN6](#) [down] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The primary characteristic of the business of insurance is the transferring or spreading of risk. Provided that the risk spreading factor is present, the business of insurance is not limited to traditionally recognized areas of insurance. The practice of shifting the risk of pharmacy costs, as well as medical costs, qualifies as the business of insurance.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Insurance Law > Claim, Contract & Practice Issues > General Overview

[HN7](#) [down] Exemptions & Immunities, McCarran-Ferguson Act Exemption

Offering insurance through a state medical association is the business of insurance.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

714 F.2d 928, *928* 1983 U.S. App. LEXIS 24342, **1

Insurance Law > Claim, Contract & Practice Issues > Allocation

Insurance Law > Claim, Contract & Practice Issues > General Overview

HN8 Exemptions & Immunities, McCarran-Ferguson Act Exemption

Practices aimed solely at cutting insurer's costs and have nothing to do with the allocation of risk are not part of the business of insurance.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > General Overview

HN9 Exemptions & Immunities, McCarran-Ferguson Act Exemption

To be exempt under the McCarran-Ferguson Act, [15 U.S.C.S. § 1012](#), a practice must not only be the business of insurance, it must also be regulated by the state. It is not necessary to point to a state statute which gives express approval to a particular practice; rather, it is sufficient that a state regulatory scheme possess jurisdiction over the challenged practice.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

HN10 Exemptions & Immunities, McCarran-Ferguson Act Exemption

The McCarran-Ferguson Act, [15 U.S.C.S. § 1012](#), specifies that the antitrust exemption will not extend to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN11 Sherman Act, Claims

Whatever the precise reach of the terms boycott, coercion, and intimidation, the decisions of the Court do not support the suggestion that they are coextensive with the prohibitions of the Sherman Act, [15 U.S.C.S. §§ 1,2](#). Thus, some additional act or agreement constituting boycott, coercion or intimidation would have to be shown to establish violation of the Sherman Act, [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > General Overview

[**HN12**](#) [blue icon] Sherman Act, Claims

A Sherman Act, [15 U.S.C.S. § 2](#) monopolization claim requires two principal elements in addition to antitrust injury: (1) possession of monopoly power in the relevant market, and (2) willful acquisition or maintenance of that power.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

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

[**HN13**](#) [blue icon] Monopolies & Monopolization, Attempts to Monopolize

The conduct element distinguishes lawful possession of monopoly power from unlawful possession of monopoly power. The Sherman Act, [15 U.S.C.S. § 2](#) proscribes monopolization; it does not render unlawful all monopolies.

Counsel: Joseph M. Alioto, Esq., Lawrence John Appel, Esq., Alioto & Alioto, San Francisco, California, for Appellant/Petitioner.

John W. Stamper, Esq., Philip F. Westbrook, Jr., Esq., O'Melveny & Myers, Los Angeles, California, Frederick A. Clark, Esq., Carl J. Schrick, Esq., Overton, Lyman & Prince, Los Angeles, California, Gary H. Anderson, James Michael, Robert M. Westberg, Pillsbury, Madison & Sutro, San Francisco, California, John Michael McCormick, Esq., Kadison, Pfaelzer, Woodward, Quinn & Rossi, Los Angeles, California, Steven Lindsey, Myers & D'Angelo, Los Angeles, California, Peter Sullivan, Esq., Gibson, Dunn & Crutcher, Los Angeles, California, Douglas L. Thorpe, Los Angeles, California, for Appellee/Respondent.

Judges: Chambers, Anderson, and Schroeder, Circuit Judges.

Opinion by: SCHROEDER

Opinion

[*929] OPINION

SCHROEDER, Circuit Judge.

This is a protracted antitrust action by physicians against the insurance agent and carriers who provided medical malpractice insurance [^{**2}] to members of the Los Angeles County Medical Association. The question is whether the defendants' alleged domination of the medical malpractice insurance market in Southern California, through an agreement with the medical association, is immune from antitrust attack. The district court held that the defendants' conduct was the business of insurance and was regulated by the state. It therefore concluded that [*930] the antitrust claims were barred by the McCarran-Ferguson Act exemption to the antitrust laws, [15 U.S.C. § 1012](#). In addition, the court held that defendants' conduct did not fall within the boycott exception to that Act, [15 U.S.C. § 1013\(b\)](#). It granted summary judgment in favor of the defendants. We affirm for the reasons set forth below.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs-appellants Walter Feinstein, Jack Kriegsman, Leo Miller, Morton H. Pastor, and Jason I. Green, are doctors in Los Angeles County who at various times between 1963 and 1969 purchased medical malpractice insurance through defendant-appellee Nettleship Company. Nettleship was an underwriting manager for medical malpractice insurance, and was [**3] the approved agent for the Los Angeles County Medical Association (LACMA) throughout the relevant period. Defendant Pacific Indemnity was one of the insurance carriers. The other companies named in the complaint were reinsurers.

It is undisputed that at the time this lawsuit began, most professional medical liability insurance in California was written on a group basis. The doctors negotiated with the insurance company through local medical associations. The insurance company issued a master policy to the association, and the participating physicians, in turn, received certificates of insurance.

The facts in this case reflect that pattern. In a written agreement LACMA designated the Nettleship Company the "sole and exclusive agent approved by the association." Nettleship issued a master policy to LACMA and certificates of insurance to the covered doctors. In exchange for exclusive agency, Nettleship agreed not to limit coverage to low risk areas, but to include high risk specialties as required by the members. The agreement also addressed claims handling and provided for the revision of rates, pursuant to annual reports regarding Nettleship's net profits.

In order to buy insurance [**4] through Nettleship, a physician was required to be a member of LACMA, but LACMA members were free to purchase medical malpractice insurance elsewhere if they chose. For part of the period in issue, the "exclusivity" provision was not respected, for LACMA used an additional insurance agent. Nettleship, however, gained an increasing share of the medical malpractice insurance market in Southern California, and, during the late sixties it imposed substantial, successive rate increases. In 1969, plaintiffs filed their complaint in this case alleging conspiracy to monopolize and monopolization, price-fixing and tied sales, as well as boycott, fraud and coercion.

In 1971, the district court granted the defendants summary judgment on price-fixing and related claims, on the ground that insurance rate-setting was regulated by state law and thus fell within the exemption of the McCarran-Ferguson Act. [15 U.S.C. §§ 1011-15](#). In 1977, the district court granted summary judgment on the remaining antitrust claims, holding that the entire action was barred by the McCarran-Ferguson Act and that the plaintiff-physicians, as policyholders, lacked standing to raise the boycott [**5] exception in [15 U.S.C. § 1013\(b\)](#). The district court's holding on standing was dictated by our decision in [Addrisi v. Equitable Life Assurance Society of the United States, 503 F.2d 725 \(9th Cir. 1974\)](#), cert. denied, 420 U.S. 929, 43 L. Ed. 2d 400, 95 S. Ct. 1129 (1975). After the 1977 district court decision in this case, however, that aspect of *Addrisi* was overruled by [St. Paul & Marine Insurance Co. v. Barry, 438 U.S. 531, 98 S. Ct. 2923, 57 L. Ed. 2d 932 \(1978\)](#) which held that policyholders may invoke the boycott exception. In 1979, this court therefore remanded for reconsideration in light of *Barry*.

Following remand the district court in 1980 granted partial summary judgment for the defendants on plaintiffs' tying claims. In 1982, the district court granted summary judgment to defendants on all remaining issues on the ground that the action was barred by the McCarran-Ferguson Act and that the defendants' conduct did not constitute [**931] a boycott under [15 U.S.C. § 1013\(b\)](#). [HN1\[\]](#) [**6] There is no factual dispute and we review solely to determine whether defendants were entitled to judgment as a matter of law. [Clipper Express v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240, 1250 \(9th Cir. 1982\)](#), cert. denied, 459 U.S. 1227, 103 S. Ct. 1234, 75 L. Ed. 2d 468 (1983).

II DISCUSSION

The McCarran-Ferguson Act provides that:

- (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
- (b) 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. . . . *Provided*, that . . . the Sherman Act, and . . . the

Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

[HN2](#) [15 U.S.C. § 1012.](#)

Section [HN3](#) [\[**7\]](#) 1013(b) of the McCarran-Ferguson Act provides that

Nothing contained in this act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

[HN4](#) [\[**8\]](#) The McCarran-Ferguson Act creates an antitrust exemption for the business of insurance which was prompted by the Supreme Court's departure in [United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 \(1944\)](#) from prior holdings that insurance is not a transaction in interstate commerce. See *Barry*, 438 U.S. at 538-39, 98 S. Ct. at 928-29. The Act was passed in response to widespread concern that the states should be permitted to continue regulating and taxing the insurance industry. It provides an exemption from the antitrust laws for the business of insurance, but only to the extent that such business is regulated by the state, and does not involve a boycott, coercion or intimidation. *Id. at 539-40, 98 S. Ct. at 2929; Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau, 701 F.2d 1276, 1284 (9th Cir. 1983),* [\[**8\]](#) cert. denied, 464 U.S. 822, 104 S. Ct. 88, 78 L. Ed. 2d 96 (1983).

Plaintiffs in this appeal contend both that the defendants' agreement with LACMA was not exempt as the business of insurance, and that even if it otherwise qualifies for exemption, it falls within the boycott-coercion exception. We address these contentions in turn.

A. The Business of Insurance and State Regulation

[HN5](#) [\[**9\]](#) The Supreme Court has set forth three factors to consider in determining whether a practice constitutes the business of insurance: (1) whether the practice has the effect of transferring or spreading the policyholders' risks; (2) whether the practice is an integral part of the policy relationship between the insurer and insured; and (3) whether the practice is limited to entities within the insurance industry. [Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 102 S. Ct. 3002, 3009, 73 L. Ed. 2d 647 \(1982\)](#). This court has discussed these factors in two recent decisions, both of which emphasize that [HN6](#) [\[**9\]](#) the primary characteristic of the business of insurance is the transferring or spreading of risk. [Klamath-Lake, 701 F.2d at 1285; United States v. Title Insurance Rating Bureau of Arizona, 700 F.2d 1247, 1251 \(9th Cir. 1983\)](#). Provided the risk spreading factor is present, the business of insurance is not limited to traditionally recognized areas of insurance. See [Klamath-Lake, 701 F.2d at 1286-87](#). In *Klamath-Lake*, we held that the practice of shifting the risk of pharmacy costs, as well as medical costs, qualified as the business of insurance. *Id. at 1287*.

In this case, which involves a conventional field of insurance, plaintiffs offer no very clear articulation of the practice which they seek to challenge as violative of the antitrust laws and outside the business of insurance. It appears, however, that for purposes [\[*932\]](#) of bringing this suit outside the scope of the McCarran-Ferguson Act, plaintiffs have focused their ire upon the agreement between the medical association and the insurers to offer the malpractice insurance only to members of LACMA.

That practice is, however, demonstrably related [\[**10\]](#) to the allocation and spreading of risk, for, as the district court pointed out, it defines a pool of insureds over which risk is spread. The medical association sought to provide a single insurance broker for all of its members in order to assure coverage for certain high-risk specialties, thereby distributing risk across the membership. The effect is to spread risk across a wide area, and that is precisely what the Supreme Court described when it formulated the risk spreading criterion. See [Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 212-13, 99 S. Ct. 1067, 1073-74, 59 L. Ed. 2d 261 \(1979\)](#).

The Third Circuit identified the risk spreading characteristic of this practice when it recently held that [HN7](#) offering insurance through a state medical association is the business of insurance. [Owens v. Aetna Life & Casualty Co., 654 F.2d 218](#) (3d Cir.), cert. denied, 454 U.S. 1092, 70 L. Ed. 2d 631, 102 S. Ct. 657 (1981). The Third Circuit underlined the fact that mass marketing of malpractice insurance through an association is [\[**11\]](#) one way of

maximizing the risk pool of medical specialties. [*Id. at 223*](#). The Owens court was further influenced by the fact that cooperative rate-making schemes have long been recognized as the business of insurance, and were clearly contemplated by the proponents of the McCarran-Ferguson Act. [*Id. at 225*](#); accord [*Royal Drug, 440 U.S. at 222-24, 99 S. Ct. at 1078-80*](#). These considerations apply with equal force here.

Contrary to the plaintiffs' contention, the agreement in this case is wholly unlike the agreement providing peer review of chiropractors' fees in *Pireno*, or the agreement between the insurer and pharmacists to offer low cost drugs to policyholders in *Royal Drug*. The Supreme Court held those [**HN8**](#)[↑] practices were not part of the business of insurance because they were aimed solely at cutting insurers' costs and had nothing to do with the allocation of risk. *Pireno*, U.S. at , 102 S. Ct. at 3010; [*Royal Drug, 440 U.S. at 216-17, 99 S. Ct. at 1075-76*](#). The practice here is related to risk allocation, [**\[**12\]**](#) and is not a cost-cutting device.

Despite these distinctions, plaintiffs attempt to bring their claims under the Supreme Court precedents by focusing upon the fact that this arrangement was negotiated by the medical association on behalf of its members. Their argument seems to be that since the association is neither the insured nor the insurer, the arrangement is not "limited to entities within the insurance industry" and therefore does not meet the third prong of the *Pireno* test. See

U.S. at , 102 S. Ct. at 3009. Plaintiffs describe LACMA, the entity which negotiated the terms of the insurance on behalf of the insureds, as "strangers" to the insurer-insured relationship. *Pireno*, however, suggests that a non-insurer (or non-insured) party's involvement does not necessarily defeat antitrust exemption, but is of concern where the agreement has the potential to restrain competition in non-insurance markets. *Id. at* , 102 S. Ct. at 3010-11. Thus *Pireno* appears to be satisfied where, as here, the only role of the non-insurer is in negotiating the terms of the policy relationship between insurer and insured, and the gravamen of the complaint is lack [**\[**13\]**](#) of competition in the insurance market itself.

Offering insurance to members of a group through an association or employer which is not the insured is a practice common to all group insurance plans. R. Keeton, *Insurance Law* § 2.8(a)(1971). These occupy an increasingly larger share of the overall insurance market in the United States. See W. Meyer, *Life and Health Insurance Law* § 19:1 (1972); W. Vance, *Law of Insurance* § 203 (3d ed. 1951). The law generally views the intermediary who negotiates the insurance contract as the agent either of the insured or the insurer, not as a party pursuing its own objectives. See W. Meyer, *supra*, § 23. Plaintiffs do not offer any reason why the intermediary [**\[*933\]**](#) should be treated differently for antitrust purposes, or why group insurance should be treated any differently from insurance obtained directly by the insured. Nor do they contend that there is any authority either in the McCarran-Ferguson Act, its history, or in any judicial interpretation, that group insurance is not "the business of insurance." Indeed, the proposition is directly contrary to the Third Circuit's decision in *Owens*. We therefore conclude [**\[**14\]**](#) that the agreement between LACMA and defendants is the "business of insurance" within the meaning of the McCarran-Ferguson Act.

[**HN9**](#)[↑] To be exempt under that Act, however, a practice must not only be "the business of insurance," it must also be regulated by the state. [*Royal Drug, 440 U.S. at 219, 99 S. Ct. at 1077*](#). It is not necessary to point to a state statute which gives express approval to a particular practice; rather, it is sufficient that a state regulatory scheme possess jurisdiction over the challenged practice. See [*Klamath-Lake, 701 F.2d at 1287*](#) & n.10; [*Addisi, 503 F.2d at 728*](#), overruled on other grounds, [*438 U.S. 531, 98 S. Ct. 2923, 57 L. Ed. 2d 932 \(1978\)*](#); accord, P. Areeda, *Antitrust Law* para. 210.1b (Supp. 1982). California has an extensive regulatory scheme with jurisdiction over all rating practices of insurers, and which grants the insurance commissioner broad investigatory and enforcement powers. See, e.g., [*Calif. Ins. Code §§ 1852-1853.9, 12919-12931*](#). The state regulation requirement clearly is [**\[**15\]**](#) satisfied in this case.

B. The Boycott-Coercion-Intimidation Exception to the McCarran-Ferguson Act

Since we have determined that the object of plaintiffs' challenge is within the business of insurance and regulated by California, we must now consider the plaintiffs' contention that even if their suit is otherwise barred by the McCarran-Ferguson Act exemption from antitrust liability, it falls within the exception to that Act.

HN10[] The McCarran-Ferguson Act specifies that antitrust exemption will not extend to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." [15 U.S.C. § 1013\(b\)](#). Plaintiffs do not contend that the agreement itself forced them to buy the LACMA sponsored insurance from the defendants, or that it prevented them from dealing with other insurers. The only limitation in the agreement, and of which they complain, is the requirement that doctors join LACMA as a prerequisite to being insured by defendants. Indeed, not only were doctors free to purchase insurance elsewhere, whether or not they joined LACMA, [**16] but several doctors in this case were covered by other companies at times during the relevant period. Because it in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott or coerce the plaintiffs to purchase the defendants' insurance. See [Barry, 438 U.S. at 553, 98 S. Ct. at 2935-36; Klamath-Lake, 701 F.2d at 1287-88; Proctor v. State Farm Mutual Automobile Insurance Co., 182 U.S. App. D.C. 264, 561 F.2d 262, 275 \(D.C. Cir. 1977\), vacated on other grounds, 440 U.S. 942, 99 S. Ct. 1417, 59 L. Ed. 2d 631 \(1979\); Travelers Insurance Co. v. Blue Cross of West Pennsylvania, 481 F.2d 80, 84 \(3d Cir.\), cert. denied, 414 U.S. 1093, 38 L. Ed. 2d 550, 94 S. Ct. 724 \(1973\); cf. Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 876-77 \(1955\) \(quoted in \[Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 77 \\(9th Cir. 1969\\)\]\(#\), cert. denied, 396 U.S. 1062, 24 L. Ed. 2d 755, 90 S. Ct. 752 \(1970\)\).](#) There is no "agreement to [**17] boycott, coerce or intimidate" within [section 1013\(b\)](#).

Plaintiffs do not contend otherwise, but stress instead that because as a practical matter, the defendants' plan became the only medical malpractice plan available to doctors in the Los Angeles area, they were forced to buy this insurance. They argue that the existence of defendants' monopoly power was inherently coercive, and is therefore within the boycott-coercion exception. Plaintiffs' theory thus rests squarely upon an attempt to equate [section 2](#) monopolization claims with the McCarran-Ferguson Act exceptions; for several reasons, it must fail.

First, the Supreme Court expressly stated in *Barry* that the boycott and coercion exceptions [*934] are not as broad as the Sherman Act itself.

We note our disagreement with Mr. Justice STEWART's expression of alarm that a reading of the operative terms of § 3(b), consistent with traditional Sherman Act usage, "would plainly devour the broad antitrust immunity bestowed by [§ 2\(b\)](#)." Post, at 2938. **HN11**[] Whatever the precise reach of the terms "boycott," "coercion," and "intimidation," [**18] the decisions of this Court do not support the dissent's suggestion that they are coextensive with the prohibitions of the Sherman Act. See, e.g., [Eastern States Lumber Ass'n v. United States, 234 U.S. 600, 611, 34 S. Ct. 951, 954, 58 L. Ed. 1490 \(1914\)](#), quoting [Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 438, 31 S. Ct. 492, 496, 55 L. Ed. 797 \(1911\)](#).

438 U.S. at 545 n.18, 98 S. Ct. at 293 n.18.

Thus even if plaintiffs could establish a violation of [section 2](#) of the Sherman Act in this case, some additional act or agreement constituting boycott, coercion or intimidation would have to be shown. None is alleged.

The legislative history of the McCarran-Ferguson Act further repudiates plaintiffs' position. During the debate on the proposed bill, Senator Ferguson clearly distinguished between monopolistic practices on the one hand and boycott, coercion or intimidation on the other. He explained that monopolistic practices, within the business of insurance and regulated by the state, would be permitted under the statute, while boycotts, coercion or intimidation would not. 91 Cong. Rec. 480-81 (1945) (statement of Sen. Ferguson). [**19] ¹ Monopoly alone is therefore not within any exception to the McCarran-Ferguson Act.

¹ Relevant portions of the Senate debate on the proposed bill are set forth below.

Mr. FERGUSON. * * * By no means does the bill *anticipate* that any act would or should be passed which would create monopoly.

Mr. O'MAHONEY. Then, does the Senator believe that the bill as it now stands *permits* that interpretation?

Mr. FERGUSON. *It would permit it.* * * * I think the bill is broad enough to allow a state to pass a law allowing any agreement or contract other than those inhibited in paragraph (b) of section 4. But it is not the purpose of the bill at all to

[**20] There is still an additional flaw in plaintiffs' argument. To recover, they must show not only that they have in some sense suffered the effects of boycott, coercion or intimidation, but that there has been some violation of the antitrust laws. See *Pireno*, U.S. at , 102 S. Ct. at 3007. Thus in order to succeed, they cannot rest solely upon the position that a monopoly is "coercive" within the meaning of the McCarran-Ferguson Act exception. They must also persuade the court to hold that the existence of monopoly power alone is a [section 2](#) violation of the Sherman Act.

Although such an approach to monopolization liability has been discussed approvingly, see L. Sullivan, *Law of Antitrust* § 38 at 104 & n.6 (1977), it is not accepted in this circuit. Our cases hold that [HN12](#)[↑] a [section 2](#) monopolization claim requires two principal elements in addition to antitrust injury: (1) possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power. [Betaseed, Inc. v. U and I, Inc.](#), 681 F.2d 1203, 1230 (9th Cir. 1982); [**21 Phonetele, Inc. v. American Telephone and Telegraph Co.](#), 664 F.2d 716, 739 (9th Cir. 1981), cert. denied , 459 U.S. 1145, 103 S. Ct. 785, 74 L. Ed. 2d 992 (1983); [Greyhound Computer Corp., Inc. v. International Business Machines Corp.](#), 559 F.2d 488, 492 (9th Cir. 1977), cert. denied, 434 U.S. 1040, 98 S. Ct. 782, 54 L. Ed. 2d 790 (1978). [*935] Plaintiffs insist that it is sufficient to allege that defendants had a "mere" monopoly. We require more from a [section 2](#) claimant for, as we recently stated,

it is the second element, [HN13](#)[↑] the conduct element, which distinguishes lawful possession of monopoly power from unlawful possession of monopoly power. [Section 2](#) of the Sherman Act proscribes "monopolization"; it does not render unlawful all monopolies.

[Foremost Pro Color, Inc. v. Eastman Kodak Co.](#), 703 F.2d 534, 543 (9th Cir. 1983). Thus plaintiffs' theory of recovery, which is bottomed solely upon their view of the oppressive nature of monopoly, would not constitute a claim of antitrust [**22](#) violation. We plainly cannot hold that the exception to the McCarran-Ferguson Act is a broader ground for liability than the Sherman Act itself, a conclusion which is the inevitable result of plaintiffs' logic.

Plaintiffs raise additional arguments on appeal in this thirteen-year-old lawsuit which, as we observed in addressing like arguments in a similarly protracted antitrust suit, seek only to sustain this action's "flickering life." [Klamath-Lake](#), 701 F.2d at 1292. We are persuaded upon reviewing the record that the district court considered the facts which plaintiffs alleged as true, and complied fully with the dictates of [Fed. R. Civ. P. 56](#). See [Clipper Express](#), 690 F.2d at 1250. The plaintiffs claim for the first time on appeal that there is a triable issue of fact with respect to their tying claims, but we decline to address that issue for the first time at this stage. See [Scott v. Pacific Maritime Ass'n](#), 695 F.2d 1199, 1203 (9th Cir. 1983); [Fitzgerald v. Century Park, Inc.](#), 642 F.2d 356, 359 (9th Cir. 1981).

The judgment of the district court is affirmed.

End of Document

foster monopoly, or to anticipate that any act will be passed permitting or even encouraging monopoly. A state law *** relating to regulation, for instance, the fixing of rates, or the fixing of the terms of a contract of insurance, *which might under some definitions of monopoly be monopolistic, would be permitted under the pending bill*; but if the state law undertook to authorize a boycott, a coercion, or an intimidation, or an agreement to do any one of those three things, then it would be clearly void because Congress would have already spoken, and once Congress speaks on interstate commerce, no state can speak contrary to the congressional declaration. 91 Cong. Rec. 480-81 (1945) (emphasis added).



Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors

United States District Court, Central District of California.

September 1, 1983

Case No. CV 80-1888

Reporter

1983 U.S. Dist. LEXIS 14113 *; 1983-2 Trade Cas. (CCH) P65,718

Supermarket of Homes, Inc., The Original Supermarket of Homes, Inc., Plaintiffs v. San Fernando Valley Board of Realtors, California Assn. of Realtors, National Assn. of Realtors, Defendants.

Core Terms

brokers, anti trust law, properties, steering, commission rate, listing, sellers, buyers, commissions, access rule, summary judgment, listing broker, brokerage services, advertising, discount, competitors, antitrust, effects, cases, cooperating broker, group boycott, discriminatory, conspiracy, anticompetitive, contends, copies, price fixing, brokerage, subagency, licensed

LexisNexis® Headnotes

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

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

HN1[] Summary Judgment, Entitlement as Matter of Law

Summary judgment is disfavored in complex antitrust cases. This principle is not absolute, however. In order to successfully oppose summary judgment, a party must present some significant probative evidence tending to support the complaint.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

1983 U.S. Dist. LEXIS 14113, *14113

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN2 Standing, Clayton Act

Sections 4 and 16 of the Clayton Act require actual or threatened injury by reason of an **antitrust law** violation as a prerequisite to private suits for damages or injunctive relief. [15 U.S.C.S. §§ 15, 26](#).

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

HN3 Private Actions, Standing

An argument can be made that a plaintiff's injury is too remote or incidental to confer standing under the antitrust laws. Two factors to be considered in evaluating such an argument are: (1) the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4. The first factor has been interpreted quite liberally, and would appear to be satisfied in any case, where the plaintiff is within that area of the economy endangered by the alleged breakdown in competitive conditions. Analysis of the second factor, however, is inextricably intertwined with consideration of the merits of the alleged violations.

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

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

HN4 Regulated Practices, Price Fixing & Restraints of Trade

Absent an agreement to adhere to particular price schedules, the exchange of price information among competitors is not a per se violation of the antitrust laws, but should be judged under the rule of reason.

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

HN5 Regulated Practices, Price Fixing & Restraints of Trade

The allegation that a jointly agreed upon rule has an indirect or incidental effect on prices, without more, does not state a claim for a conspiracy to fix prices.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

HN6 Summary Judgment, Opposing Materials

Declarations of expert opinion which are composed solely of speculations and hypotheses and which do not set forth specific facts underlying their conclusions cannot be relied upon to avoid summary judgment.

Opinion by: [*1] PFAELZER

Opinion

Memorandum and Order

PFAELZER, D.J.: Defendants' motion for summary judgment came on regularly for hearing on April 12, 1982 before the Honorable Mariana R. Pfaelzer. The Court, having considered the papers filed and oral arguments made, and having taken the matter under submission, now files this Memorandum, which shall constitute its Findings of Fact and Conclusions of Law.

I. Background

This action alleging violations of federal **antitrust law** arises out of the structure of the real estate industry in the San Fernando Valley ("the Valley"). Plaintiff is a real estate brokerage firm operating in the Valley.¹ While most, if not all, real estate brokerage firms in the Valley charge a commission of about six percent, plaintiff's announced practice is to charge commissions averaging about two and one-half percent on sales which it effects.² Defendants National Association of Realtors ("NAR"), California Association of Realtors ("CAR"), and San Fernando Valley Board of Realtors ("the Board") are national, regional, and local associations of Realtors which promulgate Codes of Ethics for their members, and establish various standards and policies to which their [*2] members are expected to adhere.³ In addition, the Board publishes the Multiple Listing Service ("MLS"), a joint informational service which is the central focus of this litigation.

The MLS is a booklet published twice weekly which lists residential properties on the market in order of their price. The booklet is organized by regions within the Valley. The listings include the specifications of the property, the price, the commission to be earned on its sale,⁴ and other information used by a broker in showing the property. Generally, the broker whom the prospective seller first approaches lists the property in the MLS. If this broker ("listing broker") is able to procure a buyer for the property without the aid of another broker, he will receive the whole of the commission on the sale. Oftentimes, however, [*3] the listing broker will be able to sell the property only by accepting the aid of another broker in finding a buyer. In that event, the listing broker will receive a portion of the commission, usually one-half, as compensation for obtaining the original listing. The broker who brings the buyer to the property (the "cooperating broker" or "selling broker") will receive the remaining portion of the commission.⁵

The need for more than one broker on a sale provides the basic rationale for the maintenance of the MLS. The publication of a listing in the MLS is a unilateral offer of a subagency to other brokers, and the ability to create subagencies is an essential part of the real estate [*4] brokerage business. Indeed, since it is virtually impossible

¹ The first amended complaint lists two plaintiffs: Supermarket of Homes, Inc., and the Original Supermarket of Homes, Inc. The former is the predecessor corporation of the latter.

² At the time this suit was filed, plaintiff's practice was to charge a fixed commission of \$1,995 per house.

³ Other individual defendants have been dismissed from the suit.

⁴ Since 1980, the MLS has disclosed only the commission to be paid to the selling or cooperating broker, and not the full commission payable to the listing broker.

⁵ As a technical matter, both the amount of the overall commission, which is paid by the seller, and the amount of the "split" between the listing and cooperating brokers are negotiable. The prevailing industry practice, however, appears to be to charge a six percent commission which is then split evenly between the two brokers.

for one broker to have sufficient contracts to find enough matching sellers and buyers to earn adequate commissions, some brokers contend that they could not make a living without the MLS.⁶

[Public Access]

The Board has enacted rules which regulate the use of the MLS. Of particular significance in this litigation is the Board's rule restricting public access to the MLS ("the access rule"). This restriction takes two forms. First, the privilege of listing properties for sale in the MLS is limited to licensed brokers. Individual members of the public may have their properties listed only through a broker. Second, the rule prohibits brokers from selling or distributing copies of the MLS to the public. Individual members of the public may look at the MLS only in the presence of a broker.

Plaintiff's amended complaint advances four separate theories of antitrust liability against defendants: price fixing, group boycott, restraint [*5] of trade, and monopolization.⁷ Factually, however, plaintiff's allegations come down to two basic contentions. The first is that the Board's operation of a "closed" MLS (that is, an MLS to which the public is denied access) both enables brokers to maintain commissions at artificially high levels and discourages entry into the market by discount brokers such as plaintiff. The second is that the defendants have engaged in a number of discriminatory or otherwise unlawful practices designed to harass plaintiff and drive it out of business. After consideration of the arguments and evidence presented by both parties, the Court concludes that both of these contentions are without merit and that defendants' motion for summary judgment should be granted.

[*6] II. Discussion

A. Standards for Summary Judgment

It has frequently been noted that [HN1](#) summary judgment is disfavored in complex antitrust cases. See [Poller v. Columbia Broadcasting System](#) 368 U.S. 464, 473 (1962). This principle is not absolute, however. In order to successfully oppose summary judgment, a party must present some "significant probative evidence tending to support the complaint." [First National Bank v. Cities Service Co.](#) 391 U.S. 253, 290 (1968). As the Ninth Circuit has recently stated, "[a] lawfully displaced competitor cannot construct a justiciable controversy from artful pleading alone. The courts should not serve as a refuge from the give and take of a properly functioning marketplace." [General Business Systems v. North American Phillips Corp.](#), 699 F. 2d 965, 971 (9th Cir. 1983). See also [Ron Tonkin Gran Turismo v. Fiat Distributors, Inc.](#), 637 F. 2d 1376, 1381 (9th Cir. 1981); [Mutual Fund Investors v. Putnam Management Co.](#), 553 F. 2d 620, 624 (9th Cir. 1977). For the reasons discussed below, the Court concludes that plaintiff's showing here falls short of that required to avoid summary judgment.

B. Operation of a "Closed" MLS

1. Plaintiff's Theory [*7] of Antitrust Liability

In considering the contention that the Board's operation of a "closed" MLS violates the antitrust laws, it is particularly significant that plaintiff does not claim that it has been excluded from the benefits of the MLS, but rather that the public has been excluded. Plaintiff's president is a licensed broker and Board member with full access to the MLS, both for listing properties for sale and learning of properties listed by other brokers. This being so, the

⁶ Plaintiff estimates that over seventy-five percent of the home sales in the San Fernando Valley are effectuated by means of a subagency relationship entered into through the MLS.

⁷ Plaintiff's original complaint, to which the present motion for summary judgment was directed, contained six causes of action. The first of these was disposed of on prior motion for summary judgment. The first amended complaint basically restates the allegations of the remaining five causes of action, adding the Original Supermarket of Homes as a plaintiff and consolidating two of the original price fixing claims into one. The Court therefore treats defendants' motion as directed toward the present first amended complaint.

manner in which the operation of the MLS injures the plaintiff's is not apparent. Thus, the plaintiff's theory as to how there can be antitrust liability as to it requires analysis before turning to an examination of other issues in the case.

Plaintiff's injury, as alleged in the complaint, stems from a practice engaged in by other brokers which plaintiff terms "steering." Steering occurs when cooperating brokers acting on behalf of buyers direct their clients toward properties listed by brokers offering high commissions and away from those listed by discount brokers such as plaintiff. Specifically, plaintiff contends that steering has hampered its ability to sell the numerous listings it has obtained [⁸] as a result of its discounting policies, and that this in turn has discouraged potential sellers from listing their properties with it. As a result, plaintiff claims that it has suffered severe business losses.

Plaintiff candidly concedes that steering results not from any conspiracy among brokers, but rather from the unilateral acts of individual brokers motivated by the desire to earn higher commission.⁸ Nonetheless, plaintiff contends that steering violates the antitrust laws because "all agents are aware that if they charge less than 6% to list a property, then other agents will steer away from those properties and the properties will not sell." Thus, any broker who actually attempts to charge lower rates will be driven out of business.⁹

[⁹] Plaintiff points to two features of the MLS which have the effect of stabilizing commission rates at high levels, thereby "facilitating" the practice of steering. Were it not for these allegedly anticompetitive features of the MLS, plaintiff contends, commission rates would be lower (i.e. closer to those offered by plaintiff) and individual brokers would therefore be deprived of the existing incentive to steer their clients away from properties listed by plaintiff.

The first of these features, to which plaintiff devotes scant attention in both its complaint and its opposition papers, is the inclusion of commission rates in the individual MLS listings. Plaintiff characterizes the MLS as a "secret price list," and argues that the circulation of such information among brokers helps to stabilize commission rates at artificially high levels.

The second feature, which is the crux of the complaint, is the access rule described above. Plaintiff's theory as to how this rule contributes to high commission rates is somewhat complex.¹⁰ According to plaintiff, the MLS is a far more effective and far less costly means of circulating information about properties for sale than conventional [¹⁰] advertising (e.g., in a local newspaper). Thus, plaintiff argues, if individual members of the public were allowed direct access to the MLS for both listing and learning of properties, many more sellers would attempt to sell their properties without engaging a listing broker. For a fee based on the cost of the service, sellers would simply list their properties in the MLS, along with the amount of the commission to be paid to the broker who found a buyer. Then, any attempts by brokers to steer buyers away from properties offered without listing brokers or from properties listed by discount commission brokers such as plaintiff would be unsuccessful, as buyers would be free to consult the MLS directly and to decide for themselves what properties they wanted to see.¹¹ Plaintiff further contends that

⁸ See First Amended Complaint P11 at 5. In addition, the Proposed Joint Pretrial Conference Order, signed by counsel for all parties, contains the following stipulation:

"A Matter Which All Parties Agree is Not in the Case: As part of its proof, plaintiff does not intend to show that the Board, NAR, or CAR was party to any agreements with real estate agents by which the agents agreed with each other or with the Board, NAR or CAR not to show plaintiff's properties, and the parties agree that there is no such issue in the case."

Proposed Pretrial Conference Order at 11.

⁹ See First Amended Complaint, P11 at 5.

¹⁰ This theory is set forth in greatest detail in the declarations of plaintiff's expert, Dr. Conley.

¹¹ The Court must note at the outset that it has some difficulty understanding this aspect of plaintiff's theory. In particular, it is not altogether clear why a buyer would be significantly concerned with the level of the commission paid by the seller to the listing and cooperating brokers. While some portion of the commission may be passed on to the buyer in the form of a higher purchase price, any such amount seems unlikely to be significant in comparison to the overall price. At most, therefore, a buyer might attempt to use the fact that a seller will be paying little or no commission as a bargaining point in negotiations over the purchase price. In comparison to the numerous other variables that a buyer must consider in selecting a home for purchase, the level of

the corresponding decrease in the number of sellers who would be motivated to employ listing brokers would spur increased price competition among brokers seeking to represent sellers. This would allegedly cause the commission rates for listing brokers to drop to levels closer to those now charged by discount brokers such as plaintiff, thereby diminishing or eliminating the incentive [*11] for cooperating brokers to steer buyers away from plaintiff's listings. Put simply, plaintiff's argument is that competition in the market for listing brokerage services would be enhanced if the MLS were operated as a public clearinghouse for buyers and sellers of property rather than as an information exchange for brokers.¹²

[*12] 2. Standing

HN2 Sections 4 and 16 of the Clayton Act require actual or threatened injury by reason of an antitrust law violation as a prerequisite to private suits for damages or injunctive relief. 15 U.S.C. §§ 15, 26. Defendants argue that plaintiff lacks standing to complain of the allegedly anticompetitive effects of the closed MLS because plaintiff, as a broker, is not injured by the higher commissions that allegedly result from its operation. The argument is that plaintiff can only benefit from higher commissions as it then has a competitive advantage over those who charge more. This argument, however, fails to apprehend the full play of plaintiff's theory as summarized above. Here, plaintiff complains of injury, albeit indirect injury, as a result of the practice of steering, which allegedly will have an injurious effect on it as long as it continues to operate on a discount basis.

HN3 An argument can still be made that plaintiff's injury is too remote or incidental to confer standing under the antitrust laws. In Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982), the Supreme Court listed two factors to be considered in evaluating such an argument: (1) "the physical and [*13] economic nexus between the alleged violation and the harm to the plaintiff," and (2) "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4." Id. at 478. The first factor has been interpreted quite liberally, and would appear to be satisfied in any case, where, as here, the plaintiff is ""within that area of the economy . . . endangered by [the alleged] breakdown in competitive conditions". . ." Id. at 480 (quoting In re Multidistrict Air Pollution M.D.L. No. 31, 481 F. 2d 122, 129 (9th Cir. 1973)). Analysis of the second factor, however, is inextricably intertwined with consideration of the merits of the alleged violations. As noted above, plaintiff seeks to condemn the closed MLS under four alternative antitrust theories: price fixing, group boycott, restraint of trade, and monopolization. The question of whether plaintiff's injury "flows from that which makes defendant's acts unlawful," Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, (1977), requires as a threshold matter inquiry into which of the theories asserted, if [*14] any, are applicable to the challenged conduct.¹³ It is to this inquiry that the Court now turns.

the commission payable by the seller would appear to be of doubtful importance to a buyer in deciding which homes he wishes to be shown.

¹² That this contention is the centerpiece of the complaint is borne out by plaintiff's prayer for relief, which requests:

1. A declaration that the rules and agreements of defendants prohibiting public access to the MLS violate sections 1 and 2 of the Sherman Act,
2. An injunction that defendants shall not create or enforce any rule which prohibits any person from placing a property listing in the Board's MLS for a price equal to the cost of processing such listing, including reasonable overhead and reserves,
3. An injunction that the Board shall print sufficient quantities of MLS materials to sell to the public for a price equal to the cost of processing such listing, including reasonable overhead and reserves,
4. An injunction that the Board shall not create or enforce any rule which prohibits real estate agents from giving access to the MLS to any member of the public,
5. Damages. . . ."

First Amended Complaint at 10.

¹³ Obviously, if none of plaintiff's theories of antitrust liability is applicable, plaintiff's alleged injury at the hands of defendants will be immaterial, as any such injury would not be "by reason of" an antitrust violation, and plaintiff would lack standing under section 4.

3. Steering by Individual Brokers

The allegation that individual brokers engage in the practice of steering prospective buyers away from properties listed by plaintiff clearly does not, in and of itself, state a claim under the antitrust laws. Plaintiff has expressly conceded that there exists no conspiracy among the defendants or brokers not to deal with plaintiff. The concerted activity necessary to establish a violation of section 1 of the Sherman Act is therefore absent. See *Rickards v. Canine Eye Registration Foundation* [1983-1 TRADE CASES P65,355], 704 F. 2d 1449, 1453-54 (9th Cir. 1983). As plaintiff readily admits, the alleged steering reflects nothing more than unilateral refusals to deal by individual brokers motivated by the desire to earn higher commissions. Such conduct might conceivably [*15] raise an issue under the code of ethics governing brokers, but it is not proscribed by the antitrust laws. Absent all allegation of concerted activity, the fact that all brokers may be "aware" that steering occurs is immaterial.

Plaintiff's reliance on section 2 of the Sherman Act is similarly misplaced. Defendants are trade associations. The unilateral acts of defendants' members, none of whom is individually a monopolist, cannot be cumulatively attributed to defendants so as to make defendants monopolists within the meaning of section 2.

Finally, plaintiff's suggestion that defendants are guilty of **antitrust law** violations because they "encourage" or otherwise promote the practice of steering is contradicted by plaintiff's admission that no conspiracy regarding steering exists. Moreover, there is no evidence of the existence of a conspiracy in the record. It is true that plaintiff has proffered a single piece of evidence in the form of an article on the perils of price fixing in which the president of CAR admits that individual brokers are not legally required to show properties listed by other brokers offering lower than acceptable commission splits.¹⁴ However, this is [*16] hardly sufficient to establish a policy of encouraging steering on the part of any of the defendants.

4. Circulation of Commission Rates in the MLS

Plaintiff's contention that the inclusion of commission rates in the MLS listings constitutes unlawful price fixing is also without merit. Plaintiff does not allege any underlying agreement among brokers to adhere to any particular price schedule, and defendants specifically deny that they have been parties to any such agreement.¹⁵ Nor is there any evidence in the record that defendants recommend that their members adhere to any price schedule or to the commission rates listed in the MLS. Plaintiff argues that defendants have indirectly done so by publicizing "studies" which purportedly show that individual brokers must maintain commission rates of about six percent in order to remain profitable. Plaintiffs have offered no evidence of any such studies, however, and defendants specifically deny their existence.¹⁶ The only evidence offered to support this theory consists of two isolated statements made by the president of CAR, one in a speech [*17] and one in the aforementioned article on price fixing, suggesting that "[i]nvestigation would probably reveal that because of the fragmented nature of the real estate brokerage industry most real estate firms must charge somewhere in the range of 5-7 percent in order to make a reasonable return and be competitive."¹⁷ These statements are not a sufficient basis on which to predicate a claim of a conspiracy to fix commission rates.

Absent an agreement to adhere to particular price schedules, the exchange of price information among competitors is not a per se violation of the antitrust laws, but should be judged under the rule of reason. See *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975); *Maple Flooring Assn. v. United States*, 268 U.S. 563, 578-86 (1925). Applying the rule of reason, a number of courts have considered the [*18] antitrust implications of the exchange of commission rates among real estate brokers in an MLS, and have found the practice to be lawful. See, e.g., *Murphy v. Alpha Realty*, 1978-2 TRADE CASES (CCH) P62,388 (N.D. Ill. 1978); *Derish v. San Mateo-*

¹⁴ See Declaration of Gina Williams, Exh. F at 127 (Article by Clark E. Wallace).

¹⁵ See Declaration of Robert G. Adamson at 12; Declaration of William D. North at 4; Declaration of William M. Pfeiffer at 2.

¹⁶ See Declarations of Adamson, North and Pfeiffer, supra n. 14.

¹⁷ See Declaration of Gina Williams, Exh. F at 126; Plaintiff's Brief in Opposition to Motion for Summary Judgment at 17-19. **HN4[]**

Burlingame Board of Realtors, 136 Cal. App. 3d 534, 186 Cal. Rptr. 390 (1982). This Court agrees with that conclusion.

The procompetitive benefits of the information exchange conducted through the MLS have been widely noted. See, e.g., id. at 538, 186 Cal. Rptr. at 392; United States v. Realty Multi-List, 629 F. 2d 1351, 1368 (5th Cir. 1980). The centralized dissemination of information contributes to the efficiency of geographically fragmented markets for housing and for brokerage services. The allegedly anticompetitive effects of the disclosure of commission rates, on the other hand, are difficult to discern. Plaintiff's characterization of the MLS as a "secret price list" is simply inapposite. Brokers can and do publicly advertise their commission rates, as plaintiff itself has done. Moreover, since April of 1980, the MLS has revealed only the commission payable to cooperating brokers, and not the commission retained by the listing [*19] broker. Thus, it can no longer be argued that the MLS hinders competition in commission rates among listing brokers. As to the continued disclosure by listing brokers of the commissions payable to cooperating brokers, it has been rightfully observed that the listing and cooperating brokers are not truly competitors with respect to this use of the MLS. "[J]ust as the seller and the listing broker are entitled to know the rate of commission involved in order to decide if they will enter into an agency relationship, potential cooperating brokers are similarly entitled to information concerning the rate of commission . . . in order to decide whether a subagency relationship should be established." Murphy v. Alpha Realty, 1978-2 TRADE CASES P62,388 at 76,311.

The Court therefore concludes that the circulation of commission rates in the MLS does not violate the antitrust laws. Plaintiff's reliance on Penne v. Greater Minneapolis Area Board of Realtors, 604 F. 2d 1143 (8th Cir. 1979), which declined to grant summary judgment on a similar issue, is misplaced. In Penne, the plaintiff alleged that the circulation of commission rates in the MLS had played a significant role in the enforcement [*20] of an underlying conspiracy among brokers to fix prices by "punishing" competitors who charged lower rates. No material issue regarding the existence of such a conspiracy has been raised here.

5. The Access Rule

The Court now turns to plaintiff's central contention that the Board's access rule, which limits use of the MLS to licensed brokers, violates the antitrust laws.

Plaintiff first attacks the access rule as an unlawful price fixing agreement. Clearly, however, the rule cannot be so characterized, as it has no direct bearing on commission rates. Plaintiff does not allege, and defendants specifically deny, that the access rule is part of an underlying agreement to fix commission rates. As noted above, plaintiff's contention is merely that the rule has the effect of stabilizing commission rates, thereby facilitating the practice of steering. HN5 [↑] The allegation that a jointly agreed upon rule has an indirect or incidental effect on prices, without more, does not state a claim for a conspiracy to fix prices. Cf. Betaseed, Inc. v. U and I Inc., 681 F. 2d 1203, 1233-35 (9th Cir. 1982).

Plaintiff next argues that the access rule should be condemned as an unlawful group boycott [*21] of the public. This argument is also without merit. Group boycotts of competitors or would be competitors have long been held to be per se violations of the antitrust laws. See Eastern States Retail Lumber Dealer's Association v. United States, 234 U.S. 600 (1914). The public does not compete in the ordinary sense with defendants in the market for brokerage services, however. Indeed, such competition would be illegal without a broker's license. For the same reason, the cases cited by plaintiff which condemn group efforts to deny competitors a valuable business service are also inapplicable. See e.g., Silver v. New York Stock Exchange, 373 U.S. 341 (1963). Plaintiff appears to contend that individual members of the public who choose to sell their homes without the aid of a broker compete with brokers in the same sense that "do-it-yourselfers" compete with plumbers, electricians and providers of like services. This analogy does not find support in the cases cited by plaintiff pertaining to group boycotts, however. The primary concern in such cases is with the preservation of competition in the markets for the supply of the services in question. See id.

Plaintiff also cites [*22] two cases for the proposition that group boycotts of noncompetitors may nonetheless violate the antitrust laws. The Court does not disagree with this proposition as a general statement of law, but finds both cases to be inapposite. In St. Paul Fire & Marine Insurance v. Barry, 438 U.S. 531 (1978), The Supreme Court

condemned a group of malpractice insurers' collective refusal to deal with physicians who would not agree with the new terms required by one of the insurers. The Court found that "'a valuable service germane to [the physicians'] business and important to their effective competition with others was withheld from them by collective action.'" *Id. at 553-54* (quoting *Silver v. New York Stock Exchange*, 373 U.S. at 348-49, n. 5). No analogous situation is presented here. *Williams v. St. Joseph Hospital*, 629 F. 2d 448 (7th Cir. 1980), held unlawful an agreement among all of the doctors in an area to refuse to treat any person or member of the family of a person who had instituted a malpractice action against one of their number. The court found that the agreement violated the antitrust laws because it "preclud[ed] . . . [the plaintiff patients] from a free market for [*23] the purchase of medical care." *Id. at 453*. Again, no such situation is presented here. Individual members of the public who wish to publicize the availability of their homes for sale are free to do so by any number of methods other than MLS, such as advertising in the newspaper or in other media.

Moreover, the access rule does not completely exclude the public from the informational advantages of the MLS. Strictly speaking, the rule only requires that individual buyers and sellers who wish to use the MLS do so through a broker.¹⁸ This is the principal difficulty with plaintiff's attempt to bring the rule within the ambit of the cases condemning group boycotts. The real issue here is whether the antitrust laws confer upon the public (and plaintiff) the right to convert an informational service compiled and maintained by brokers for their own benefit into what would amount to little more than another advertising medium. The Court concludes that the antitrust laws confer no such right.

[*24] The related, but distinct, group of cases applying the "essential facility" doctrine provides a more apt analogy. The MLS is a cooperative facility operated by and for real estate brokers which is designed to pool resources so as to enhance the value of brokerage services to the public. Because it increases the efficiency of those services, the MLS has a significant procompetitive effect as well. The membership restrictions of such cooperative facilities have often been scrutinized under the antitrust laws, and held unlawful to the extent that they constitute unreasonable restraints of trade. See *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Realty Multi-List*, 629 F. 2d 1351 (reversing summary judgment in favor of defendant MLS); *Marin County Board of Realtors v. Palsson*, 16 Cal. 3d 920, 130 Cal. Rptr. I (1976). The rationale for condemnation of unreasonably exclusive membership requirements is to prevent the members of the facility from employing the fruits of their joint efforts to secure an unfair advantage over their competitors. The right to exclude noncompetitors, on the other hand, has rarely been questioned. Cf. *United States v. Realty Multi-List*, [*25] 629 F. 2d at 1369 (noting government's unwillingness to challenge MLS requirement limiting membership to licensed brokers). As noted above, members of the public who wish to sell their own homes without employing a broker can be considered competitors of brokers only in the most limited sense. This consideration alone is probably sufficient to preclude application of the essential facility doctrine.

Moreover, there exist legitimate reasons for limiting access to the MLS to licensed professionals. The Board's stated justification for maintaining the confidentiality of the MLS is twofold: (1) to protect the interest of the listing broker in ensuring that the information furnished by him to the MLS is used only for the stated purpose of entering into a subagency agreement, and (2) to protect the interests of individual sellers in ensuring that the information provided to listing brokers is not improperly disseminated so as to intrude on the seller's privacy and endanger the security of this property.¹⁹ The interest of the brokers who use the MLS in ensuring that the other participants who will enter into subagency agreements are licensed professionals who are bound by the legal [*26] and ethical obligations of the profession are obvious. As suggested by the court in *Derish v. Sam Mateo-Burlingame Board of Realtors*, 136 Cal. App. 3d at 541, 186 Cal. Rptr. at 394, a case which held that the access rule did not violate state

¹⁸ The Court notes that under the present access rule, individuals who are bona fide prospective buyers of property may consult the MLS at no cost simply by going to a broker's office and asking to see it. Such an individual incurs no cost in so doing, as the commission payable on any property listed in the MLS is independently set by the seller and the listing broker. If a cooperative broker does not wish to then take the individual to see a particular listed property, there is nothing to prevent the individual from approaching the listing broker directly.

¹⁹ See Declaration of Robert G. Adamson, Exh. C, Part V (MLS Rules, as revised July 31, 1980).

antitrust law, "[w]ithout some assurance that those who list properties in a MLS and perform the vital functions of subagents [will do so] in accordance with exacting professional standards, neither [the listing nor the cooperating] broker would be encouraged to use the service and the procompetitive benefits of the MLS would be lost." See also [United States v. Realty Multi-List, 629 F. 2d at 1369](#) (suggesting that standards of competence, professionalism, and mode of operation for admission to membership may be necessary to the success of a MLS). In addition, the court in Derish noted that permitting individual sellers direct access to the MLS would threaten to seriously undermine the state legislature's attempt to assure standards of competence in the brokerage profession through licensing requirements.²⁰ Finally, it cannot be doubted that one of the principal benefits to the public of the MLS is the opportunity it provides sellers [*27] to publicize the availability of properties for sale while compromising their privacy and security only to the extent necessary to permit approaches by bona fide prospective buyers through licensed professionals. Accordingly, for all the reasons given above, the Court declines to hold that the Board's refusal to allow the public direct access to the MLS is, in and of itself, a violation of the antitrust laws.

Plaintiff next contends that the access rule may nonetheless be held unlawful as an unreasonable restraint of trade because of its purported indirect effect on the ability of discount brokers such as plaintiff to compete in the market for brokerage services. This contention, which would appear to provide the appropriate mode of analysis of the legality of the access rule under the antitrust laws, requires consideration of two factors: (1) whether the intent of the [*28] rule is anticompetitive, and (2) whether the rule has significant anticompetitive effects. See [Kaplan v. Burroughs Corp., 611 F. 2d 286, 290-91 \(9th Cir. 1980\)](#).

The stated justifications for the access rule have been described above. Plaintiff has neither alleged nor presented any evidence that the intent of the Board's rule is anticompetitive. In particular, there is no indication in the record that the rule is intended to injure discount brokers in the manner described by plaintiff.²¹ These alleged anticompetitive effects, if they exist at all, are merely incidental to legitimate purposes of the rule. It is thus incumbent upon plaintiff to demonstrate that the anticompetitive effects of the rule are substantial. Cf. [Las Vegas Sun, Inc. v. Summa Corp., 610 F. 2d 614, 619-20 \(9th Cir. 1979\)](#). The Court finds, however, that plaintiff has failed to present any "significantly probative evidence" in support of its contention that the access rule injures competition in the market for brokerage services. Plaintiff has therefore failed to raise an issue of material fact sufficient to avoid summary judgment on its rule of reason claim. See [Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, I^{*291} 637 F. 2d at 1388](#) (approving granting of summary judgment on rule of reason claim).

As noted above, plaintiff's theory of competitive injury is that allowing prospective buyers unlimited access to the MLS would alleviate the practice of steering which is injurious to discount brokers,²² and that allowing direct listings by sellers would cause a significant reduction in the size of the market for brokerage services, thereby spurring price competition and diminishing the incentive for steering. The Court finds this theory to be little more than speculation. With respect to the practice of steering, plaintiff has presented no evidence to document the extent of this practice other than the unsupported allegation that it is "widespread." It has not been explained why buyers who consult the MLS in the presence of other brokers may not approach plaintiff directly if their broker refuses [*30] to show them properties listed by plaintiff. Nor has it been explained how the rule forecloses plaintiff's ability to engage in direct efforts to attract buyers for the properties it has listed through advertising in other media such as newspapers. The mere fact that advertising in such other media may be more costly than listing properties in the MLS does not make the restriction to public access to the latter unreasonable under the antitrust laws.

Plaintiff's assertion that permitting sellers to themselves list properties in the MLS without paying commissions to listing brokers would cause a reduction in commission rates is equally speculative. It is possible, for example, that

²⁰ The California Legislature has also recently enacted a statute which expressly contemplates the MLS as a cooperative facility of licensed professionals. See [Cal. Civ. Code §§ 1086-1090](#) (West Supp. 1983).

²¹ See also the Proposed Pretrial Order at 8, which states that "Supermarket has no evidence which supports the averments of P36 of the [original] complaint that "[t]he Board has enacted rules designed only to thwart Supermarket's efforts to compete effectively in the San Fernando Valley."

²² The Court's initial doubts with respect to this aspect of plaintiff's theory have been set forth at note 11, *supra*.

many sellers would choose not to list their properties if there were no restrictions on who had access to the information. Moreover, even if permitting direct access to sellers would cause a reduction in the demand for brokerage services, it by no means necessarily follows that commission rates would then fall. Such a reduction in demand might just as easily lead to a decline [*31] in the number of brokers able to stay in business, with no corresponding decline in commissions.

The only evidence in the record which purportedly supports plaintiff's economic scenario is the declaration of plaintiff's expert, Dr. Conley. [HN6](#) Declarations of expert opinion which are composed solely of speculations and hypotheses and which do not set forth specific facts underlying their conclusions cannot be relied upon to avoid summary judgment, however. See [United States v. Various Slot Machines on Guam, 658 F. 2d 697, 700-01 \(9th Cir. 1981\)](#); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F. 2d 666, 670-74 (D.C. Cir. 1977) (applying rule to declaration of economist in antitrust action).²³ Dr. Conley's declaration does not refer to any statistical studies or other factual evidence which supports his conclusions. Indeed, the declaration appears to be little more than theoretical speculation. It therefore fails to raise a genuine issue of material fact with respect to the allegedly anticompetitive effect of the access rule. See *id.*

[*32] Finally, the Court must emphasize that the effects of the access rule on competition in the brokerage market cannot and should not be considered in isolation from the clearly procompetitive features of the MLS.²⁴ The courts should not lightly reach an interpretation of the antitrust laws which would restrict the operation of a procompetitive mechanism such as the MLS to the point where its attractiveness is diminished sufficiently to result in a negative net effect on competition. Cf. [United States v. Citizens & Southern National Bank, 422 U.S. at 117-20](#). This is particularly true in cases where the alleged injury to competition caused by the challenged practice is an indirect and attenuated as it is here.

Plaintiff's final challenge to the closed MLS falls within the rubric of monopolization. It is far from clear, however, how defendant's conduct can be said to possess the necessary characteristics for that offense. Plaintiff appears to argue that the Board has [*33] unlawfully employed its monopoly power in the "market for housing information in the San Fernando Valley" in order to establish a monopoly in the market for brokerage services. In the Court's view, the allegation that the Board has monopolized the market for housing information in the Valley, which is served by numerous other media including major newspapers, is frivolous. Moreover, there is no evidence in the record that any of the defendant's practices are intended to restrict the entry of licensed brokers into the market for brokerage services. The Court therefore concludes that summary judgment must be granted with respect to plaintiff's monopolization claim.

C. Alleged Discriminatory Actions

Plaintiff's remaining contentions concern allegedly discriminatory actions taken by defendants with the intent of harassing plaintiff and driving it out of business. Plaintiff appears to argue that these actions taken together should be regarded as evidence of a group boycott. The undisputed evidence in the record, however, makes clear that in each of the instances complained of, the defendants' actions were reasonable and not in violation of the antitrust laws.

Plaintiff first [*34] charges that the Board refused to list plaintiff's discount commission in the MLS in the same manner as the commissions charged by other brokers. As the record shows, however, plaintiff's commissions were in fact listed in the MLS. They were not initially listed in the small box reserved for that purpose because the MLS computer was programmed only to print commissions stated in terms of percentages, and not commissions stated as fixed dollar amounts, such as that charged by plaintiff. This was corrected as soon as the computer program

²³ These cases hold in addition that the fact that such a declaration of expert opinion may be admissible under [Rule 703 of the Federal Rules of Evidence](#) does not, absent the presentation of a factual basis for the opinion, preclude the granting of summary judgment against the party relying on the expert.

²⁴ Even plaintiff's expert appears willing to concede that commission rates would likely be higher in the absence of the MLS. See Additional Declaration of John E. Munter, Exh. 2 (Deposition of Bryan Conley).

was altered.²⁵ Clearly, there was nothing improper in the Board's conduct with respect to the listing of plaintiff's commissions in the MLS.

Plaintiff next charges that the Board has initiated discriminatory disciplinary and judicial proceedings against it for violation of the Board's rule forbidding dissemination to the public of confidential information contained in the MLS. Plaintiff contends that this rule is violated routinely with impunity by other brokers. Again, however, the record fails to bear out plaintiff's contention. Plaintiff's allegation of discriminatory disciplinary action stems [*35] from a complaint filed with the Board by a member of the public who charged that plaintiff disclosed the address of her residence to a buyer who subsequently attempted to see the house without being accompanied by one of plaintiff's agents.²⁶ The Board's action in investigating a complaint made by a member of the public charging a clear violation of Board rules does not run afoul of the antitrust laws. Nor can its action be characterized as discriminatory, as there is no allegation that the Board does not investigate all such complaints.²⁷

Plaintiff's charge of allegedly discriminatory initiation of judicial proceedings is a reference to the Board's efforts to curb plaintiff's announced practice of distributing the MLS materials to the public. The Board initially obtained a temporary restraining order from a state court. After the Board's application [*36] for a preliminary injunction was subsequently denied, plaintiff demanded a license to sell copies of the MLS to the public, and asked that the Board supply extra copies for this purpose. The Board refused, and indicated that it would supply plaintiff with copies of the MLS only as authorized by the longstanding Board policy permitting brokers to obtain limited numbers of copies for their own use.²⁸ When plaintiff persisted in selling copies to the public, the Board filed a counterclaim for copyright infringement in this action. This Court granted the Board's motion for summary judgment on the counterclaim, specifically concluding that the Board had not misused its copyright.²⁹ On reexamining the issue, the Court reaches the same conclusion regarding the alleged copyright misuse, and further finds nothing in the record indicating that any of the proceedings initiated by the Board were "sham" proceedings which could give rise to antitrust liability. Cf. *Forro Precision, Inc. v. IBM*, 673 F. 2d 1045 (9th Cir. 1982).

[*37] Plaintiff claims to have evidence that other brokers routinely "bend the rules" regarding disclosure of information contained in the MLS to prospective buyers. It is undisputed, however, that plaintiff is the only broker which has embarked on a publicized program of selling copies of the MLS to the public. Thus, the Board's initiation of judicial proceedings against plaintiff cannot be characterized as discriminatory.

Plaintiff further contends that the Board wrongfully refused to run an advertisement promoting plaintiff's low commissions in a newspaper which the Board publishes and distributes free to the public. The record, however, reveals only that the Board refused to publish one of two advertisements submitted by plaintiff because the advertisement misleadingly implied that the commissions charged by other brokers were fixed at a certain level. The Board invited plaintiff to revise the offending language, but plaintiff declined to do so.³⁰ The Court finds nothing in the Board's actions that would raise an issue of fact material to any alleged antitrust violation.

Plaintiff also makes reference in its opposition [*38] papers, though not in the complaint, to two occasions on which it is claimed that the Los Angeles Times and the Los Angeles Herald Examiner rejected certain of plaintiff's

²⁵ See Declaration of William G. Watt.

²⁶ See Declaration of Gina Williams at 142-43.

²⁷ In addition, contrary to plaintiff's allegations, the record indicates that no formal disciplinary proceedings have been initiated against plaintiff as a result of complaints filed with the Board, and that no such proceedings are planned pending the outcome of this litigation.

²⁸ See Declaration of Robert G. Adamson at 8-9.

²⁹ Findings of Fact and Conclusions of Law and Order for Summary Judgment on the Amended Counterclaim and Cross-claim at 10 (filed March 17, 1982).

³⁰ See Declaration of John E. Munter, Exhs. 3, 6-7.

advertisements. Plaintiff has submitted no evidence, however, indicating that these rejections were instigated by any of the defendants.³¹ The alleged incidents are therefore not relevant to this motion for summary judgment.

[*39] D. Liability of NAR and CAR

Finally, the Court observes that although it has concluded that none of the defendants has committed a violation of the antitrust laws, its conclusion with respect to NAR and CAR would remain the same independently of its conclusions with respect to the Board. As defendants correctly point out, neither NAR nor CAR is a party to the challenged access rule. Plaintiff's contention that the rule is required under the professional code of ethics promulgated by NAR is without merit,³² as are the contentions discussed above with respect to the alleged publication of studies and encouragement of steering. Plaintiff's remaining contentions, which have also been rejected by the Court, are pertinent only to its claim against the Board.

For the reasons stated herein,

It Is Ordered that the defendant's motion for summary judgment is granted, and that judgment be entered in favor of each of the defendants.

End of Document

³¹ Plaintiff's evidence regarding this matter consists of transcripts of telephone conversations with officials of the two newspapers. See Declaration of Gina Williams, Exhs. Q-R.

The transcript of the conversation with the Los Angeles Times indicates that the newspaper refused to continue running a nonspecific advertisement promoting plaintiff's low commissions in a space reserved for advertisements offering specific properties for sale after receiving some complaints from "other brokers." The transcript also indicates that the newspaper offered to continue running the advertisement if plaintiff would agree to revise it to include specific properties, or to move it to another space reserved for nonspecific advertisement of real estate services.

The transcript of the conversation with the Los Angeles Herald Examiner indicates that the newspaper delayed approval of one of plaintiff's advertisements, apparently for fear of becoming embroiled in a legal controversy. The record does not indicate whether the advertisement was eventually approved.

³² See Declaration of William D. North, Exh. C.



Mid-West Underground Storage, Inc. v. Porter

United States Court of Appeals for the Tenth Circuit

September 6, 1983

Nos. 81-1034, 81-1049

Reporter

717 F.2d 493 *; 1983 U.S. App. LEXIS 24246 **; 1983-2 Trade Cas. (CCH) P65,598; 1983 WL 1000910

MID-WEST UNDERGROUND STORAGE, INC., Plaintiff-Appellee Cross-Appellant, v. LOUIS PORTER, HILLSIDE UNDERGROUND STORAGE INC., HILLSIDE, LTD., and DALCO PETROLEUM, INC., Defendants-Appellants Cross-Appellees; M-P PETROLEUM, LTD., Defendant Cross-Appellee, v. BILL P. MOON and WALTER E. SCOTT, Counterclaim Defendants Appellees

Prior History: Appeal from the United States District Court For the District of Kansas.

Disposition: The case is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Core Terms

conspiracy, competitor, unfair competition, shortage, new trial, counterclaim, damages, Sherman Act, storage, per se violation, state law claim, Petroleum, district court, antitrust, jury verdict, unfair means, per se rule, defendants', fiduciary, underground storage, antitrust claim, coconspirator, facilities, appears, argues

LexisNexis® Headnotes

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN1 [down arrow] Per Se Rule & Rule of Reason, Per Se Violations

Generally, conduct alleged to violate the Sherman Act is scrutinized under the rule of reason rather than the per se rule, and departure from the rule-of-reason standard must be based upon demonstrable economic effect. It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act. Per se rules are fashioned to promote litigation efficiency and business certainty by prohibiting conduct that is characterized by a pernicious effect on competition and lack of any redeeming virtue. However, despite the ominous tenor of the phrase conspiracy to eliminate a competitor by unfair means, such conspiracies

have not been shown to be consistently anticompetitive; they may actually have a beneficial effect on competition by facilitating new entry or otherwise decreasing concentration.

Antitrust & Trade Law > Sherman Act > General Overview

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

[HN2](#) [] Antitrust & Trade Law, Sherman Act

The difficulty with the per se approach is that the alleged conspiracy tends to be a spurious one, often between the defendant and parts of his own enterprise. Given, moreover, that the hiring of a rival's employees is not ordinarily exclusionary, even when done by a monopolist, characterizing the employment as a conspiracy seems little more than a semantic trick that is inconsistent with employee mobility. Many courts have wisely stepped back from the per se holdings of the earlier cases, recognizing that such conduct is not always exclusionary.

Antitrust & Trade Law > Sherman Act > General Overview

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

[HN3](#) [] Antitrust & Trade Law, Sherman Act

The Sherman Act is intended to prevent restraints on competition, whereas unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition. There is, therefore, fundamental conflict between antitrust and unfair competition law; this counsels against basing per se illegality under the Sherman Act on the violation of unfair competition laws. A related difficulty is isolating the impermissible intent to eliminate a competitor from the permissible intent to engage in cutthroat competition. Because intent is nearly always determined by inference, and because the same conduct could support the inference of both a permissible and an impermissible intention, a per se rule prohibiting conspiracies to eliminate competition by unfair means would sweep too broadly.

Antitrust & Trade Law > Sherman Act > Claims

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

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 > Sherman Act > Remedies > General Overview

[HN4](#) [] Sherman Act, Claims

There is no indication that Congress intended to balkanize antitrust law by permitting antitrust illegality to turn on the unfair competition law of the various states; making unfair means an element of the violation would cause the content of the Sherman Act to vary from state to state. The Sherman Act was not enacted to police interstate

transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity.

[Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview](#)

[Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices](#)

[Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[HN5](#)[] Public Enforcement, US Federal Trade Commission Actions

Congress has repeatedly refused to enact a federal cause of action for unfair competition, and instead has given the Federal Trade Commission the exclusive authority to police unfair practices. This cautions against using the Sherman Act as a mandate to regulate unfair competition.

[Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[HN6](#)[] Regulated Industries, Higher Education & Professional Associations

Unfair competition law is grounded in ethical considerations that are irrelevant to, or even inconsistent with, the economic considerations on which the antitrust laws are based.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation](#)

[HN7](#)[] Antitrust & Trade Law, Sherman Act

The essence of a market allocation violation is that competitors apportion the market among themselves and cease competing in another's territory or for another's customers.

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[HN8](#)[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Concerted refusals to deal are generally characterized by conduct inducing a competitor's suppliers or customers to refuse to deal with that competitor.

Governments > Fiduciaries

Torts > Business Torts > Unfair Business Practices > General Overview

HN9 **Governments, Fiduciaries**

Kansas imposes very strict fiduciary responsibilities upon its directors and officers, and a coconspirator in a breach of fiduciary duty is liable for damages.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN10 **Jury Trials, Province of Court & Jury**

It is well settled that a verdict will not be upset on the basis of speculation as to the manner in which the jurors arrived at it.

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN11 **Judicial Officers, Judges**

A trial judge may not have the same jury reconsider what appears to him (or what he might determine upon general inquiry) to be a miscalculation of general damages. Appearances do not always ring true, and possible prejudice by the court's inquiry may easily take place. To allow a judge to question a jury's process of deliberate decision, even though done in good faith to avoid an apparent miscarriage of justice, could result in abuses far outweighing the infrequent inability to correct what may appear to be or is erroneous or a misunderstanding.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN12 **Jury Trials, Province of Court & Jury**

If the court's interrogation of the jury as to the amount of the verdict could be condoned, then it would logically follow that the court or counsel could seek to correct a verdict on matters that are traditionally considered inherent in the verdict. If a verdict for a certain amount had been received, counsel could not have later shown by affidavit that the amount was erroneously computed. Such a rule may seem harsh, but it is premised upon sound reasons of public policy. It is well settled that a jury's misunderstanding of testimony, misapprehension of law, errors in computation or improper methods of computation, unsound reasoning, or other improper motives cannot be used to impeach a verdict. These matters all inhere in the verdict itself.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN13 **Relief From Judgments, Motions for New Trials**

The decision whether to grant a new trial is committed to the informed discretion of the district court, which is generally in a better position to evaluate claims of jury confusion or other error in the verdict.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Appeals > Standards of Review > General Overview

HN14 [blue icon] **Standards of Review, Abuse of Discretion**

An appellate court's standard of review of a trial court's refusal to grant a new trial is whether the court abused its discretion.

Counsel: John T. Conlee, Wichita, Kansas, and Floyd L. Walker, Tulsa, Oklahoma, (Thomas D. Kitch, Wichita, Kansas), for Defendants-Appellants, Cross-Appellees.

Gerald Sawatzky, (Dwayne C. Pollard of Blackstock, Joyce, Pollard, Blackstone & Montgomery, Tulsa, Oklahoma), of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, for Plaintiff-Appellee, Cross-Appellant.

Judges: Holloway, McKay, and Logan, Circuit Judges.

Opinion by: LOGAN

Opinion

[*495] LOGAN, Circuit Judge.

The plaintiff, Midwest Underground Storage, Inc., brought an action against its former president Francis G. Melland, a former stockholder Louis Porter, and various entities controlled by Melland or Porter, alleging that the defendants violated § 1 of the Sherman Act by conspiring to engage in unfair competition for the purpose of eliminating Midwest as a competitor. Midwest also alleged that the defendants' conduct constituted business torts under state law. Porter counterclaimed against Midwest and stockholders [***2] Bill Moon and Walter Scott. Prior to trial, defendants Melland and M-P Petroleum, Inc. settled with Midwest and were dismissed from the action. The case was submitted to the jury on special interrogatories. The jury found in favor of Midwest on the antitrust claim in the amount of \$ 250,000 and on the other claims in the amount of \$ 3,911,637; the jury denied Porter's counterclaim. After various motions and orders the court entered final judgment on the verdict, trebling the antitrust award to \$ 750,000 and awarding Midwest the \$ 3,911,637 on the other claims but refusing to treble it. Prior to entering final judgment the court concluded that it lacked in personam jurisdiction over M-P Petroleum, Ltd. and dismissed M-P from the action. Both Midwest and the defendants appealed. The issues on appeal are (1) whether the district court erred in denying the defendants' motion for directed verdict on the antitrust claim, (2) whether the court erred in refusing to order a new trial on the state law claims, and (3) whether the court erred in refusing to enter judgment on the state law claims against defendants other than Porter and in holding that it lacked in personam jurisdiction over [***3] M-P Petroleum, Ltd.

Midwest was formed in 1969 to develop underground facilities for the storage of liquid petroleum gas (LPG) products. Fifty percent of the stock was originally controlled by Moon, Scott, and Porter, who held equal numbers of shares. The remaining stock was held by Melland and three others, each of whom owned 1/8 of the corporation's outstanding shares. Melland became president of Midwest and directed the construction and the operation of the facilities. In 1973, after Scott, Moon, and Porter had a falling-out, Porter transferred his ownership interest in Midwest to Scott and Moon. Thereafter, Melland and Porter jointly engaged in various business activities, ultimately

forming a corporation to operate competing underground storage facilities. When certain of Melland's activities were challenged as being in derogation of his fiduciary duties as president of Midwest at a stockholders meeting in May 1974, he resigned the presidency of Midwest. Moon became president of Midwest, and Midwest argues that only then did it become aware of the extent to which Melland had violated his fiduciary duties. Midwest's complaint alleged that the defendants conspired to use [**4] Melland's position as president of Midwest to eliminate Midwest as a competitor by diverting corporate opportunities, by failing to expand Midwest, and by otherwise using Midwest for personal gain.

I

The defendants contend that the district court erred in refusing to direct a verdict against Midwest on the antitrust claim. They argue that the complaint does not state a per se violation and that Midwest failed to prove injury to competition as required under rule of reason analysis. Asserting that a per se violation was alleged and proven and that the record reflects injury to competition, Midwest argues that [*496] the record adequately supports the jury's finding of liability under § 1 of the Sherman Act. We turn first to whether the conspiracy alleged constitutes a per se violation.

A

The per se instruction Midwest sought and the court refused was:

"In this case, if you find that one or more defendants combined or conspired with another, such as Francis G. Melland, to use Melland's position as president and manager of plaintiff to cripple plaintiff's operations with the intent to eliminate plaintiff as a viable competitor, then such defendant or defendants are guilty [**5] of a per se violation of the federal statute, and are liable for the damages caused to plaintiff."

App. I, 92. Midwest argues that such a conspiracy is a per se violation because it is "horizontal in nature for the purpose of excluding plaintiff from competition." Brief of Plaintiff-Appellee and Cross-Appellant at 46. The contention that a horizontal conspiracy to suppress competition through the elimination of a competitor by unfair means constitutes a per se violation is derived from [Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F.2d 96 \(1st Cir. 1932\)](#), cert. denied, 286 U.S. 552, 76 L. Ed. 1288, 52 S. Ct. 503 (1932).¹ Some courts have viewed this Court's decision in [Perryton Wholesale, Inc. v. Pioneer Distributing Co., 353 F.2d 618 \(10th Cir. 1965\)](#), cert. denied, 383 U.S. 945, 16 L. Ed. 2d 208, 86 S. Ct. 1202 (1966), as adopting the *Pick-Barth* per se rule. See, e.g., [Havco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 555 \(7th Cir. 1980\)](#); [Northwest Power Products, Inc. v. Omak Industries, Inc., 576 F.2d 83, 86 \(5th Cir. 1978\)](#), cert. denied, 439 U.S. 1116, 59 L. Ed. 2d 75, 99 S. Ct. 1021 (1979). [**6] But in [Craig v. Sun Oil Co., 515 F.2d 221, 224 \(10th Cir. 1975\)](#), cert. denied, 429 U.S. 829, 50 L. Ed. 2d 92, 97 S. Ct. 88 (1976), we said *Perryton Wholesale* "is not necessarily a per se case despite the citation of the First Circuit cases." This Circuit has not held that a conspiracy to eliminate a competitor by unfair means constitutes a per se violation, and we decline to do so now.

HN1 [↑] Generally, conduct alleged to violate the Sherman Act is scrutinized under the rule of reason rather than the per se rule, and "departure from the rule-of-reason standard must be based upon demonstrable economic [**7] effect." [Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#). "It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act." [United States v. Topco Associates, Inc., 405 U.S. 596, 607-08, 31 L. Ed. 2d 515, 92 S. Ct. 1126 \(1972\)](#). Per se rules are fashioned to promote litigation efficiency and business certainty by prohibiting conduct that is characterized by a "pernicious effect on competition and lack of any redeeming virtue." [Northern Pacific Railway v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). However, despite the ominous tenor of the phrase "conspiracy to eliminate a competitor by unfair means," such conspiracies have not been shown to be consistently anticompetitive; they may actually have a beneficial effect on competition by

¹ The First Circuit later severely limited the scope of the rule of *Pick-Barth*. See [George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 561-62 \(1st Cir. 1974\)](#), cert. denied, 421 U.S. 1004, 44 L. Ed. 2d 673, 95 S. Ct. 2407 (1975).

facilitating new entry or otherwise decreasing concentration. See, e.g., [Northwest Power Products, Inc. v. Omak Industries, Inc.](#), 576 F.2d at 90-91.

"The [HN2](#) [**8] difficulty with [the per se] approach is that the alleged conspiracy tends to be a spurious one, often between the defendant and parts of his own enterprise. Given, moreover, that the hiring of a rival's employees is not ordinarily exclusionary, even when done by a monopolist, characterizing the employment as a conspiracy seems little more than a semantic trick that is inconsistent with employee mobility. Many courts have wisely stepped back from the per se holdings [[*497](#)] of the earlier cases, recognizing that such conduct is not always exclusionary."

3 P. Areeda & D. Turner, [**Antitrust Law**](#) § 828b, at 323 (1978) (footnotes omitted). The conspiracy alleged here appears to be of the "spurious" type: the actors are Porter, Melland, and corporations they jointly control. The conspiracy is not one of erstwhile competitors combining to supplant competition with cooperation. Some of the defendants are not in the relevant geographic market. Others did not exist prior to Melland's resignation. None competes with other defendants. Conspiracies of the type alleged here are not consistently exclusionary and do not carry the same trappings that characterize conduct treated [[**9](#)] under the per se rule.

Other considerations also militate against applying per se analysis to a conspiracy to eliminate a competitor by unfair means. First, "the definition of 'unfair means' is so vague that the *Pick-Barth* cases fail to draw the bright line of illegality which is essential if a *per se* rule is to achieve its purpose as a guide to business planning." [Northwest Power Products](#), 576 F.2d at 90. Second, as noted in *Northwest Power Products*, [HN3](#) [**9] the Sherman Act is intended to prevent restraints on competition, whereas "unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition." [Id. at 88](#). There is, therefore, fundamental conflict between antitrust and unfair competition law; this counsels against basing per se illegality under the Sherman Act on the violation of unfair competition laws. A related difficulty is isolating the impermissible "intent to eliminate a competitor" from the permissible "intent to engage in cutthroat competition." Because intent is nearly [[**10](#)] always determined by inference, and because the same conduct could support the inference of both a permissible and an impermissible intention, a *per se* rule prohibiting conspiracies to eliminate competition by unfair means would sweep too broadly. Third, [HN4](#) [**10] there is no indication that Congress intended to balkanize [**antitrust law**](#) by permitting antitrust illegality to turn on the unfair competition law of the various states; making "unfair means" an element of the violation would cause the content of the Sherman Act to vary from state to state.

"The Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity"

[Apex Hosiery Co. v. Leader](#), 310 U.S. 469, 512, 84 L. Ed. 1311, 60 S. Ct. 982 (1940). Fourth, [HN5](#) [**11] Congress has repeatedly refused to enact a [[**11](#)] federal cause of action for unfair competition, 1 E. Callman, *Unfair Competition, Trademarks & Monopolies* para. 4.3, at 137-42 (3d ed. 1967 & Supp. 1976 at 35), and instead has given the Federal Trade Commission the exclusive authority to police unfair practices. See [15 U.S.C. § 45](#). This cautions against using the Sherman Act as a mandate to regulate unfair competition. Finally, [HN6](#) [**12] unfair competition law is grounded in ethical considerations that are irrelevant to, or even inconsistent with, the economic considerations on which the antitrust laws are based. See [National Society of Professional Engineers v. United States](#), 435 U.S. 679, 687-92, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978). We conclude, therefore, that conspiracies of the type alleged herein should be assessed under the rule of reason. Accord [Havco of America, Ltd. v. Shell Oil Co.](#), 626 F.2d 549, 555-56 (7th Cir. 1980); [Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc.](#), 578 F.2d 1256, 1260-61 (8th Cir. 1978); [Northwest Power Products](#), 576 F.2d at 90. [[**12](#)] ²

² Midwest also argues that a conspiracy to eliminate a competitor by unfair means is a *per se* violation because the conspiracy constitutes something akin to a market allocation agreement, a concerted refusal to deal, and a price fixing arrangement. Brief of Plaintiff-Appellee and Cross-Appellant at 35-42. Midwest contends that Melland's diversion of its corporate opportunities constituted a market allocation agreement because it diverted what would otherwise have been Midwest's share of the market. [HN7](#) [**13] The essence of a market allocation violation, however, is that competitors apportion the market among themselves and cease competing in another's territory or for another's customers. There is no evidence of any market division here, either

[**13] [*498] B

We turn next to the defendants' contention that Midwest failed to prove injury to competition, necessary under rule of reason analysis, and that therefore the district court erred in refusing to direct a verdict against the Sherman Act § 1 claim. Midwest argues that sufficient evidence of injury to competition was adduced through the testimony of Dr. Randall Haydon, David Onsgard, Bill Moon, and Walter Scott. We are very reluctant to overturn a jury verdict on the basis of insufficiency of the evidence. But after review of the record, we agree with the defendants that the evidence does not support the verdict. The evidence could support a finding of injury to a competitor, but not a finding of injury to competition in the sense contemplated by the antitrust laws. See generally *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 5621 (1st Cir. 1974), cert. denied, 421 U.S. 1004, 44 L. Ed. 2d 673, 95 S. Ct. 2407 (1975). The defendants' motion for directed verdict, therefore, should have been granted.

Dr. Haydon's testimony regarding injury to competition came in response to hypothetical questions put to [**14] him by counsel for Midwest.

"Q. Now, further assume that the demand for underground storage in late 1973 and 1974 exceeded the supply for storage in the State of Kansas and elsewhere, that two or three relatively new companies have started and are able to meet the excess demand, and further assume that two of the new companies have the same President, who owns a much greater interest in one company than the other and gives preference in major business decisions for expansion to the company he has greatest ownership in, do you have an opinion as to whether those facts would affect competition in that market?

A. I do.

Q. And what is that opinion?

A. Well, no man can serve two masters. No man is going to compete with himself on price; therefore, in fact if you had two or three firms, you would really only have two competing, therefore, they would not be as effective competition for that demand as there would have been with three firms competing.

Q. And would that have an effect generally on consumers of the product for which there is that competition?

A. Yes, it would.

Q. Would it have a detrimental effect, or a good effect so far as competition? [**15]

[*499] A. It would cost the consumer a higher price for the purchase of that service.

Q. So there would be an injury to competition?

A. Yes."

App. I, 415-16. Dr. Haydon's testimony does not establish injury to competition. His opinion did not explicitly treat, nor was it grounded upon, any discussion of the structural characteristics of the market that actually existed -- the number of competing firms, the relative market share of each, or the potential of new entry into the market --

among the defendants or between Midwest and the defendants. Instead, the defendants attempted to control Midwest's share of the market by excluding Midwest. This does not constitute the type of anticompetitive conduct condemned as a per se unlawful market allocation.

Neither does the alleged conspiracy constitute a concerted refusal to deal. [HN8](#) Concerted refusals to deal are generally characterized by conduct inducing a competitor's suppliers or customers to refuse to deal with that competitor. See, e.g., *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); *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941). Here, there is no allegation or evidence that Midwest's suppliers or customers have refused to deal with Midwest; nor is there evidence that the defendants have conspired to boycott those suppliers or customers to coerce such a refusal.

Midwest's attempt to characterize the conspiracy as price fixing is also unconvincing. The foreclosure of price rivalry between Midwest and the defendants does not, by itself, constitute price fixing, and there is no evidence of an agreement between Midwest and the defendants or of an agreement among the defendants to fix or manipulate the price of storage. That the defendants were able to charge more than Midwest would have charged does not compel the conclusion that they engaged in supracompetitive pricing.

evidence that could support a conclusion that the elimination of price competition between Midwest and the defendants would lead to monopoly pricing. Also absent from Dr. Haydon's testimony and the record is any indication of an increase in concentration or other evidence from which an anticompetitive aggregation of market power could be inferred. Instead, the record appears to contradict the assumptions of fact implicit or explicit in the questions put to Dr. Haydon. The record demonstrates that the 1973-1974 period was a peculiarly advantageous time for those in the LPG underground storage business because of the OPEC oil embargo. The demand for storage space exceeded [**16] the supply and prices rose rapidly. At least two new competitors to Midwest in addition to the Melland-Porter company entered the market about that time. Midwest was able to lease all of its storage space at relatively high prices. The assumption that Melland was a principal in Midwest and in a competing company (although in fact Melland's competing company was formed after he resigned as Midwest's president), and that instead of devoting his time to expanding the storage capacity of Midwest Melland devoted that time to building the competitor in which he had a greater economic interest, may give rise to the inference that Midwest was injured as a competitor but falls short of providing a basis for the conclusion that competition in the geographic market in which both operated was reduced. Thus, Dr. Haydon's responses to the questions did not establish injury to competition. Melland's failure to expand Midwest so that it could absorb the increased demand and prevent entry of the Melland-Porter company into the marketplace does not demonstrate that Melland's actions increased the price of LPG storage in the market; nor does it reflect injury to the competitive market. This is [**17] like the situation presented in *Northwest Power Products*, in which the unfair competition of the conspiracy enhanced rivalry in the market rather than reduced it.

The evidence adduced through Moon, Scott, and Onsgard neither cures the deficiencies in Dr. Haydon's testimony nor itself shows injury to competition. Moon's testimony related to establishing the Conway-Hutchinson area as the relevant geographic market, but did not reflect injury to competition in that market. Scott's testimony related almost exclusively to how Melland's conduct injured Midwest. He made no statements regarding injury to competition in the relevant market. Onsgard offered testimony relating to the geographic market and concerning the relative size of the various storage facilities in the market. His testimony, however, was not sufficiently detailed to support inferences regarding the effect of the conspiracy on competition.

The evidence, taken as a whole, fails to show that the defendants injured competition. There is no showing that their conduct raised entry barriers, increased concentration, or otherwise led to the acquisition or exercise of market power. Even if we were willing to infer injury [**18] to competition if Midwest had been eliminated from the market or severely injured as a viable competitor, the record does not reflect such injury. During the time in question, Midwest expanded its capacity; it fully rented its existing capacity; it could and did increase its storage fees. It had lower incremental costs for storage expansion than most of its rivals, especially new entrants, because its rail and other facilities were in place. Although Midwest made a jury case that it lost opportunities to increase profits and to strengthen its position in the market, it did not establish injury to competition as [*500] opposed to injury to a competitor. Consequently, the district court erred in refusing to direct a verdict against Midwest on its antitrust claim.

II

We turn now to the pendent state law claims for unfair competition, loss of corporate opportunities, self-dealing, and other fiduciary breaches. Even though we have concluded that the court should have directed a verdict for the defendants on Midwest's federal claim, that claim, measured at the outset of the litigation, was substantial, especially in light of *Perryton Wholesale*. Because the federal claim was [**19] substantial, and because the state claims arose from a common nucleus of operative facts, pendent jurisdiction was proper. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 721-19, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966).

Although the evidence is conflicting, the record supports the jury's verdict holding Porter liable as a coconspirator with Melland for Melland's actions in violation of his fiduciary duties. HNG[ Kansas imposes very strict fiduciary responsibilities upon its directors and officers, see *Delano v. Kitch*, 663 F.2d 990 (10th Cir. 1981), cert. denied, 456 U.S. 946, 72 L. Ed. 2d 468, 102 S. Ct. 2012 (1982); *Newton v. Hornblower, Inc.*, 224 Kan. 506, 582 P.2d 1136 (1978), and a coconspirator in a breach of fiduciary duty is liable for damages. See generally *International Union, UAW v. Cardwell Manufacturing Co.*, 416 F. Supp. 1267, 1290 (D. Kan. 1976). Furthermore, we have examined the

court's instructions of which the defendants complain and find the instructions sufficient not to mislead the jury [**20] on the law.

Had the jury returned a verdict for \$ 4,000,000, or almost any figure even slightly different from the \$ 3,911,637 total it did return, we would have little trouble affirming the judgment. The difficulty is that the \$ 3,911,637 judgment is the exact amount claimed by Midwest in exhibits and arguments it presented before the jury ³ for LPG product

³The figure \$ 3,911,637 was listed on plaintiff's exhibit 100, which set forth the manner in which Midwest's damage claim for LPG product shortage was calculated, and on plaintiff's exhibit 104, which summarized the various damage claims and is reconstructed as follows:

SUMMARY OF DAMAGES

Deal #1 - El Paso - Hutchinson Storage

\$ 3,686,500

Deals #2, 3 & 4 - El Paso - Canadian

transactions

\$ 5,628,250

Empire Gas Underground Storage

\$ 400,000

Loss of value because additional 1,000,000

BBLS. of storage not developed in

1973-74

\$ 1,150,000

Unpaid charges - Midwest Underground

Storage

\$ 173,400

PRODUCT SHORTAGE:

LPG's Mid-West Underground Storage

\$ 3,911,637

No. 2 fuel oil - TWC - Potwin

\$ 101,549

Dalco negative at M.W.U.S.

\$ 739,169

shortage -- a damage item that was contingent upon a finding that Midwest was liable on Porter's counterclaim. However, the jury exonerated Midwest from liability for LPG shortage by denying the counterclaim, even though it found for Midwest in the total amount of \$ 3,911,637. There was, of course, no explanation of how the jury arrived at its verdict.

[**21] The defendants requested a new trial. The district court initially agreed that the amount of the verdict was improper and awarded a new trial on damages only. Midwest then argued for reconsideration, urging that the award was within the range of the evidence, that the jury clearly intended to find the defendants liable on all state law claims, and that the mere coincidence of the award with the amount claimed for LPG product shortage did not justify setting aside the verdict. It also argued that because the jury found against Porter on the counterclaim, it could not have intended the amount awarded to represent damages for product shortage. On reconsideration the district judge reinstated the jury verdict and reversed his earlier new trial ruling. He recognized, as do we, that in this case it is logically impossible to award a new trial on damages only.

"We have been unable to construct any logic which would permit us to vacate the award as we did without also being compelled by defendant's argument that the award evidences the finding of the jury [*501] that defendant Porter was liable to plaintiff only for product shortages; as to all the other claims, the jury [**22] found against plaintiff. In other words, if the amount of the jury award is sufficient of itself to cause us to conclude that it was derived from one improper source, namely the product shortages, it is no less sufficient for the conclusion that the jury found plaintiff was entitled to recover only on the product shortages claim, and not on any other state law claims."

App. I, 196.

The only amount (other than the \$ 250,000 antitrust damages) that the jury awarded was the exact total -- to the dollar -- claimed for the product shortage, which Midwest would have suffered only if Porter had won his counterclaim. Yet by denying Porter's counterclaim, the jury essentially found that there was no product shortage for which Midwest could recover. We can conceive of two plausible explanations for this apparent contradiction. One is that the jury intended to find for Midwest on the state claims (understanding that the product shortage claim was not an element of the damages) and either coincidentally arrived at the \$ 3,911,637 figure or deliberately picked it because it was within the range of the evidence and the jury was somehow attracted to it regardless of the claim to which [**23] it was associated on the exhibits. While the likelihood of a coincidence in numbers may be very small, the possibility of the special attractiveness of \$ 3,911,637 as a consciously selected damage award appears to us to be a distinct possibility. The jury had before it exhibit 104, which displayed a variety of numbers, including the \$ 3,911,637 figure. Exhibit 104 also contained a damage figure for some of the state law claims which, when added with other figures of damage the jury could award, would come close to the \$ 3,911,637 figure. The second plausible explanation is that the jury was confused and that its answers to special interrogatories do contradict its damage award. If so, perhaps the jury intended to award Midwest this amount for product shortage regardless of the decision on the counterclaim and to deny damages for the other claims despite the finding of liability on those claims.

The first explanation would require that we uphold the award, the second that we reverse and remand for a new trial on both liability and damages. Given this choice between a possible proper determination of a figure and a possible

instance of jury confusion, we cannot freely exercise [**24] our own judgment as to the most plausible. We face two barriers to reversing the verdict.

The first barrier is the traditional sanctity of jury verdicts. [HN10](#)[] It is well settled that a verdict will not be upset on the basis of speculation as to the manner in which the jurors arrived at it. [Howard D. Jury, Inc. v. R & G Sloane Manufacturing Co.](#), [666 F.2d 1348, 1349-52 \(10th Cir. 1981\)](#); see [Air-Exec, Inc. v. Two Jacks, Inc.](#), [584 F.2d 942, 945 \(10th Cir. 1978\)](#). In deciding not to award a new trial, the trial court relied upon [Chicago, Rock Island and Pacific Railroad v. Speth](#), [404 F.2d 291 \(8th Cir. 1968\)](#), which states:

"[[HN11](#)[] A] trial judge may not have the same jury reconsider what appears to him (or what he might determine upon general inquiry) to be a miscalculation of general damages. Appearances do not always ring true, and possible prejudice by the court's inquiry may easily take place. To allow a judge to question a jury's process [**25] of deliberate decision, even though done in good faith to avoid an apparent miscarriage of justice, could result in abuses far outweighing the infrequent inability to correct what may appear to be or is erroneous or a misunderstanding"

[HN12](#)[] If the court's interrogation of the jury as to the amount of the verdict could be condoned in the instant case, then it would logically follow that the court or counsel could seek to correct a verdict on matters that are traditionally considered inherent in the verdict. If the verdict for \$ 16,000.00 had been received, counsel could not have later shown by affidavit that the \$ 16,000.00 was erroneously computed. Such a rule may seem harsh, but it is premised upon sound reasons of public [[*502](#)] policy. It is well settled that a jury's misunderstanding of testimony, misapprehension of law, errors in computation or improper methods of computation, unsound reasoning or other improper motives cannot be used to impeach a verdict. These matters all inhere in the verdict itself."

Id. at 295 (footnote omitted). The \$ [**26] 3,911,637 figure is well within the range of the evidence.

The second barrier to reversal inheres in our position as an appellate court. [HN13](#)[] The decision whether to grant a new trial is committed to the informed discretion of the district court, which is generally in a better position to evaluate claims of jury confusion or other error in the verdict. *E.g.*, [Thompson v. Kerr-McGee Refining Corp.](#), [660 F.2d 1380, 1388 \(10th Cir. 1981\)](#), cert. denied, [455 U.S. 1019, 72 L. Ed. 2d 137, 102 S. Ct. 1716 \(1982\)](#). [HN14](#)[] Our standard of review of a trial court's refusal to grant a new trial is whether the court abused its discretion. *Id.* After careful review of the record we are unwilling to hold that the trial court abused its discretion when it denied a new trial in this case. Courts have refused to find error in other jury verdicts with coincidences of figures almost as compelling as this one. See, e.g., [Estes v. Southern Pacific Transportation Co.](#), [598 F.2d 1195, 1199-1200 \(10th Cir. 1979\)](#); [**27] [George v. Bolen](#), [2 Kan. App. 2d 385, 580 P.2d 1357 \(1978\)](#). We therefore affirm the jury verdict on the state law claims in the amount of \$ 3,911,637.

We uphold the jury verdict denying the counterclaim as adequately supported by evidence in the record. The defendants' argument that the court erred in dismissing portions of Porter's counterclaim is without merit.⁴

III

The trial court dismissed M-P Petroleum, Ltd. from the case after trial for lack of in personam jurisdiction. The court explained the dismissal of M-P on the ground that Midwest failed to establish that M-P performed any act that would bring it within the jurisdiction of the court. The court recited that M-P was formed approximately seven weeks prior to Melland's resignation as Midwest's president. It cited no authority, [**28] declaring only, "After review of trial notes and consideration of defendants' argument, the Court is of the opinion, and must conclude, that plaintiff's evidence failed to establish that M-P Petroleum, Limited performed any act which would bring that corporation within the jurisdiction of this Court, pursuant to the Kansas 'long-arm' statute, [K.S.A. 60-308](#)." App. I, 183. Citing [Ammon v. Kaplow](#), [468 F. Supp. 1304, 1312 \(D. Kan. 1979\)](#), and [Professional Investors Life Insurance Co. v.](#)

⁴ Because we have held there was no antitrust violation proved, we need not consider Midwest's arguments that the total award should be trebled or that the court erred in the amount awarded as attorney's fees.

Roussel, 445 F. Supp. 687, 696 (D. Kan. 1978), Midwest argues that because M-P participated in a conspiracy to commit a business tort in Kansas, the actions of the coconspirators bring M-P within the reach of the Kansas long-arm statute. *Kaplow* and *Roussel* represent the general rule regarding long-arm jurisdiction over out-of-state coconspirators. See R. Casad, *Jurisdiction in Civil Actions* §§ 403[1][b], 7.09[3] (1983). We are not told the basis for the court's ruling. The court may have found that M-P was not a coconspirator and consequently that it had no contacts with the state. However, without a more detailed explanation of the basis for [**29] the dismissal of M-P, we cannot review that determination. Consequently, the order dismissing M-P is vacated. The court on remand should issue a new ruling setting forth the factual and legal conclusions underlying the ruling.

The trial court entered the judgment for \$ 3,911,637 only against defendant Porter. No explanation was given for limiting the entry of judgment to Porter alone. On remand the court should address this issue and set forth the factual and legal bases for its conclusion.

[*503] IV

On remand, the district court is directed to enter judgment n.o.v. for the defendants on the antitrust claim and to vacate its judgment awarding attorney's fees on that claim. The court's judgment against defendant Porter on the state law claim is affirmed in the amount of \$ 3,911,637, although the court should consider whether Hillsdale, Ltd., Hillsdale Underground Storage, Inc., Dalco Petroleum, Inc., and M-P Petroleum, Ltd. should also be liable for that judgment.

The case is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

End of Document



Zoecon Industries, Div. of Zoecon Corp. v. American Stockman Tag Co.

United States Court of Appeals for the Fifth Circuit

September 9, 1983

No. 82-1463

Reporter

713 F.2d 1174 *; 1983 U.S. App. LEXIS 24110 **

ZOECON INDUSTRIES, a DIVISION OF ZOECON CORPORATION, Plaintiff-Appellee, v. The AMERICAN STOCKMAN TAG CO., Carolyn Reed and Nelda Poncik, Defendants-Appellants

Subsequent History: [**1] As Amended.

Prior History: Appeal from the United States District Court for the Northern District of Texas.

Disposition: AFFIRMED.

Core Terms

Tag, customers, trade secret, confidential relationship, district court, ear, non-competition, memorandum, disclose, damages, breached, feeder, readily ascertainable, injunction, soliciting, feedlots

LexisNexis® Headnotes

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Employee Duties & Obligations > Employee Nondisclosure

Labor & Employment Law > Employment Relationships > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > General Overview

Trade Secrets Law > Breach of Confidence > Confidential Relationships

Trade Secrets Law > Breach of Contract > Implied Contracts

Trade Secrets Law > Ownership Rights > General Overview

HN1 [down arrow] Trade Secrets & Unfair Competition, Trade Secrets

To maintain a cause of action for the disclosure of a trade secret against an employee, the employee must have a duty not to disclose. A confidential relationship gives rise to an employee's duty not to use or disclose the employer's trade secrets. A confidential employment relationship can be established expressly by contract or can

be implied from the nature of the relationship. When an employee has an intimate knowledge of the employer's business, a confidential relationship will be implied.

Trade Secrets Law > Employee Duties & Obligations > Employee Nondisclosure

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Federal Versus State Law > **Antitrust Law**

Trade Secrets Law > Protection of Secrecy > General Overview

HN2 [] **Employee Duties & Obligations, Employee Nondisclosure**

When a confidential employment relationship is established, the employer has a qualified right to secrecy that arises from the relationship and is required by principles of good faith. The employee has a concomitant duty not to use or disclose the employer's trade secrets, if he knows or should have known that the employer desired secrecy.

Trade Secrets Law > Trade Secret Determination Factors > Business Use

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Common Law

Trade Secrets Law > Protected Information > Customer Lists

HN3 [] **Trade Secret Determination Factors, Business Use**

The duty not to disclose is breached only when the information disclosed can be properly classified as a trade secret. A trade secret is defined as 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 list of customers. The Texas courts, however, have added a criterion to the traditional definition: a trade secret must be "secret." Thus, to qualify as a trade secret the information cannot be generally known by others in the same business nor readily ascertainable by an independent investigation. Thus, a customer list of readily ascertainable names and addresses will not be protected as a trade secret.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Protected Information > Customer Lists

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Common Law

HN4 [] **Trade Secrets & Unfair Competition, Trade Secrets**

The Texas courts have added a criterion to the traditional definition: a trade secret must be "secret". Thus, to qualify as a trade secret the information cannot be generally known by others in the same business nor readily ascertainable by an independent investigation. Thus, a customer list of readily ascertainable names and addresses will not be protected as a trade secret.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Civil Actions > Questions of Fact

HN5 Jury Trials, Province of Court & Jury

Whether customer information is generally known or readily ascertainable is a question of fact in an employer's action against an employee for use of trade secrets.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN6 Injunctions, Permanent Injunctions

Equitable relief in the form of a permanent injunction is a proper remedy for the breach of a confidential relationship.

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Trade Secrets Law > Civil Actions > Remedies > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > ... > Remedies > Damages > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview

HN7 Punitive Damages, Aggravating Circumstances

If the use of trade secrets results in economic injury to the employer, an award of actual damages is a proper remedy. Punitive damages are available as well if defendant's actions are fraudulent or malicious.

Counsel: Palmer, Palmer & Coffee, Dallas, Texas, Philip I. Palmer, Jr., Dallas, Texas, for Appellant.

Thompson & Knight, Dallas, Texas, Schuyler B. Marshall, IV, Dallas, Texas, Louise Ellen Teitz, Dallas, Texas, for Appellee.

Judges: Wisdom, Tate and Garwood, Circuit Judges.

Opinion by: WISDOM

Opinion

[*1176] WISDOM, Circuit Judge:

In this diversity case the issue the appeal raises is whether a memorandum containing the names, addresses, and purchasing characteristics of a business's customers is a trade secret under Texas law. The defendants, Carolyn Reed, Nelda Poncik, and the American Stockman Tag Company, appeal from a judgment permanently enjoining them from (1) using certain stamping equipment identical with that used by Temple Tag Company, (2) disclosing the modifications made to that type of equipment by Temple Tag, and (3) using or disclosing the contents of a customer list obtained from Temple Tag. The court also awarded actual and exemplary damages to the plaintiff, Zoecon Industries. The district court found that Reed and Poncik breached a confidential [**2] relationship by misappropriating the trade secrets of their former employer, Temple Tag Company, a Zoecon subsidiary. The district court also found that Reed, assisted by Poncik, breached a non-competition agreement she had entered into with Zoecon by forming American Stockman, a competing business.

On appeal, Reed and Poncik make three contentions. First, they contend that the district court erred in finding that they had breached a confidential relationship because Temple Tag's customer list, the basis for the court's determination that there had been a breach, is not a trade secret under Texas law. Second, Reed contends that the non-competition agreement is invalid and nonenforceable under Texas law because it does not state a reasonable territorial limitation. Finally, Reed and Poncik contend that the evidence presented at trial does not support the court's finding of fact that they used the list to solicit customers for American Stockman.

We hold that the customer list is a trade secret under Texas law. The district court's finding that the defendants used the memorandum in soliciting customers is not clearly erroneous. Reed and Poncik, therefore, breached a confidential relationship [**3] with their former employer by using the list in soliciting customers and by disclosing the information contained in it. Because of this holding, it is unnecessary to address the validity of the non-competition agreement under Texas law. We affirm.

I.

Before February 1977, Temple Tag Company was an independent company that manufactured various types of plastic ear tags, including tags used by feedlots to identify cattle. Temple Tag sold these ear tags directly to the cattle feedlots. Reed [*1177] was the assistant general manager and a ten percent stockholder of Temple Tag. Temple Tag also employed Poncik.

In February 1977, Zoecon Industries purchased Temple Tag. Reed sold her Temple Tag stock to Zoecon for \$270,000. At the time of the sale, she executed a non-competition agreement with Zoecon.¹ Zoecon Industries later merged with Zoecon Corporation, which Hooker Chemical Corporation later acquired.

[**4] Reed and Poncik, while employed at Temple Tag, executed employee agreements with Hooker.² They agreed not to disclose any information, inventions, or discoveries without the consent of the company. In 1978,

¹ "For and in consideration of the terms, covenants, and conditions contained in the aforementioned Agreement, the undersigned Shareholders agree as follows: 1. From the date hereof, for a period of five (5) calendar years, Shareholders shall refrain from engaging in any business activity . . . which directly or indirectly competes with the business activities of [Temple Tag] . . . as of the date hereof. Such prohibited activities shall specifically include, but are not limited to, the activities of the production, manufacture or sale of livestock identification materials and products. 2. Subsequent to the date hereof, Shareholders shall not disclose or dispose of, in any matter whatsoever, facts or information concerning any formulas, methods, inventories, methods of operation, customer lists or any other matters related to the operations of the Company."

² The Agreement provides in part:

2. With respect to any such information, inventions and discoveries. . . and to all other information, whatever its nature and form and whether obtained orally, by observation, from written materials or otherwise, . . . , obtained by me during or as a

Reed became general manager of Temple Tag. One year later, Poncik became assistant general manager. During this time, feeder ear tags were an important and growing part of Temple Tag's business. The company began selling to distributors, rather than directly to cattle feedlots as it had done previously. In the summer of 1979, Reed and Poncik begin planning to form their own company to manufacture feeder ear tags and to sell them directly to ultimate users. American Stockman was formed in August 1979, and Poncik became its president.

[**5] Reed and Poncik, however, worked for Temple Tag until late October 1979. Between August 1979 and October 1979, they engaged in various activities at Temple Tag that would benefit American Stockman. They obtained a molding machine and other equipment used to make feeder ear tags. At their request, other Temple Tag employees provided an operating manual for the molding machine and a description of the modifications that Temple Tag made to the equipment it used.³ Reed directed another Temple Tag employee to prepare a memorandum listing ear tag customers and distributors. This list contained names and addresses, as well as information on the type of ear tag purchased by each customer, the amount purchased, the dates of purchases, and other information about the customers. The district court found that this information, which was not known to the general public, was used by Temple Tag to project future sales and to service its customers.

[**6] In early 1980, Reed and Poncik made telephone calls to Temple Tag's feedlot customers soliciting sales of ear tags manufactured by American Stockman. The record showed that 94 percent of American Stockman's sales were made to former customers [*1178] of Temple Tag. Temple Tag had only seven percent of the feeder ear tag market. From this information, the trial judge inferred that Reed and Poncik used the memorandum of Temple Tag customers to obtain customers for American Stockman. In response to American Stockman's entry into the market, Temple Tag established a promotional program: "Buy 5 Tags, Get 2 Tags Free".

Zoecon Industries sought a preliminary injunction against American Stockman, Reed, and Poncik contending that they were using its trade secrets, infringing its trademark, and violating a non-competition agreement. On August 19, 1980, the district court entered a preliminary injunction, enjoining the continued use of certain machinery not at issue here, the continued use or disclosure of the information contained in the memorandum of Temple Tag's cattle feed tag customers, and Reed's participation in American Stockman's business activities. The district court refused [**7] injunctive relief for the use of the list of Temple Tag's suppliers and the list of feedlots showing the location of Temple Tag's hot stamping machines, because these lists were not trade secrets. On June 23, 1982, the district court issued a permanent injunction⁴ and awarded damages against the defendants, jointly and severally, in the amount of \$457,590.66, against Reed, individually, the sum of \$53,705.60, and against Poncik, individually, the sum of \$51,834.20. The court also awarded attorney's fees and costs to Zoecon Industries.

result of my employment . . . relating to any products, apparatus or processes, to any uses thereof or therefor, to raw materials or product prices or costs . . . or to any research, technical, manufacturing or commercial activities or plans of Hooker . . . , I agree:

a. To hold such information, . . . in *strict confidence*, and not publish or otherwise disclose . . . except to or with the prior consent . . . of the Company.

....

c. To make no use of such information, invention or discovery except such use as is required in the performance of my duties for the company.

....

6. I agree to perform and carry out diligently, faithfully and to the best of my ability all duties assigned . . . , and to act and comport myself at all times in the best interests of the Company.

(Emphasis added)

³The defendants have not appealed the district court's permanent injunction on the use of this equipment.

⁴On August 16, 1982, the district court modified its judgment to specify that the permanent injunction enjoined the defendants from soliciting or making sales to any party listed on the memorandum of Temple Tag's feeder tag customers prepared by Reed and from using or disclosing the contents of the memorandum to any other party.

II.

HN1[] To maintain a cause of action for the disclosure [**8] of a trade secret against an employee, the employee must have a duty not to disclose. Our initial inquiry is whether a confidential relationship existed between the employer, Temple Tag, and the employees, Reed and Poncik. A confidential relationship gives rise to an employee's duty not to use or disclose the employer's trade secrets. *E.I. duPont de Nemours Powder Co. v. Masland*, 1917, 244 U.S. 100, 102, 37 S. Ct. 575, 577, 61 L. Ed. 1016, 1019; see also *Mercer v. C.A. Roberts Co.*, 5 Cir.1978, 570 F.2d 1232, 1238 (applying Texas law); Comment, *Trade Secrets in Texas -- The Employer's Rights in the Absence of Contractual Protection*, 17 S.Tex.L.J. 132, 138 (1975). Not all employment relationships are confidential ones. *Mercer v. C.A. Roberts Co.*, 5 Cir.1978, 570 F.2d 1232, 1238. A confidential employment relationship can be established expressly by contract or can be implied from the nature of the relationship. When an employee has an intimate knowledge of the employer's business, a confidential relationship will be implied. *Id.* In this case, Reed and Poncik were the key management personnel at Temple Tag; they [**9] necessarily had an intimate knowledge of the business. They also had signed employee agreements containing non-disclosure provisions.⁵ Thus, we find that under either test a confidential relationship existed between the defendants, Reed and Poncik, and Zoecon Industries, the parent corporation of Temple Tag.

HN2[] When a confidential employment relationship is established, the employer has a qualified right to secrecy that arises from the relationship and is required by principles of good faith. R. Callman, *The Law of Unfair Competition, Trademarks, and Monopolies* § 14.03 (4th ed. 1982). The employee has a concomitant duty not to use or disclose the employer's trade secrets, if he knows or should have known that the employer desired secrecy. *Mercer v. C.A. Roberts Co.*, 5 Cir.1978, 570 F.2d 1232, 1238. Based upon the facts of this case, there is no doubt that [**10] Reed and Poncik knew that Temple Tag intended its customer information to remain secret. Both Reed and Poncik executed employee agreements expressly providing that they were to hold all information obtained from their employment in strict confidence. The evidence [*1179] also shows that when questioned about the list Reed denied having it, allowing the factfinder to infer her knowledge that Temple Tag intended this information to remain secret.

HN3[] The duty not to disclose, however, is breached only when the information disclosed can be properly classified as a trade secret.⁶ *Mercer v. C.A. Roberts Co.*, 5 Cir.1978, 570 F.2d 1232, 1238-39 (alternative holding). The Texas Supreme Court, following the *Restatement of Torts* § 757, comment b (1939), defines a trade secret as "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 list of customers." *Hyde Corp. v. Huffines*, 1958, 158 Tex. 566, 314 S.W.2d 763, [**11] cert. denied, 358 U.S. 898, 79 S. Ct. 223, 3 L. Ed. 2d 148; *Elcor Chemical Corp. v. Agri-Sul Inc.*, Tex.Civ.App.1973, 494 S.W.2d 204. The memorandum at issue in this case falls within this definition because it is a list of customers. The type of customer information contained in the memorandum also gave Reed and Poncik an advantage over competitors who did not have the information. See *Collins v. Ryon's Saddle & Ranch Supplies, Inc.*, Tex.Civ.App.1979, 576 S.W.2d 914, 915.

HN4[] The Texas courts, however, have added a criterion to the traditional definition: a trade secret must be "secret". Thus, to qualify as a trade secret the information cannot be generally known by others in the same business nor readily ascertainable [**12] by an independent investigation. *Mercer v. C.A. Roberts Co.*, 5 Cir. 1978, 570 F.2d 1232, 1239; *Gaal v. BASF Wyandotte Corp.*, Tex.Civ.App.1976, 533 S.W.2d 152; *Brooks v. American Biomedical Corp.*, Tex.Civ.App.1973, 503 S.W.2d 683. Thus, a customer list of readily ascertainable names and

⁵ For the text of this agreement, see note 2.

⁶ The subject matter of trade secrets falls into two categories, technological and internal operating information. R. Callman, *The Law of Unfair Competition, Trademarks, and Monopolies* § 14.06 (4th Ed.1982). Customer lists fall into the latter category.

addresses will not be protected as a trade secret.⁷ *Gaal v. BASF Wyandotte Corp.*, Tex.Civ.App. 1976, [533 S.W.2d 152, 155](#).

[**13] [HN5](#) Whether customer information is generally known or readily ascertainable is a question of fact.⁸ [**14] In the instant case, the district court found that the information contained in the memorandum of Temple Tag's feeder ear tag customers was not known or available to the public. The memorandum contained information concerning the type and color of ear tags purchased, the date of purchase, and the amount purchased, in addition to the names and addresses of Temple Tag's customers. Even if the names and addresses were readily ascertainable through trade journals as the defendants allege, the other information could be compiled only at considerable expense. Cf. [SCM Corporation v. Triplett Company](#), Tex.Civ.App.1966, [399 S.W.2d 583, 587](#). Based on the record, we cannot [[*1180](#)] say that the district court's conclusion that this type of customer information is not generally known nor readily ascertainable is clearly erroneous.⁹ [Bryan v. Kershaw](#), [5 Cir.1966, 366 F.2d 497, 499](#); See also R. Callman, The Law of Unfair Competition, Trademarks, and Monopolies § 14.31 at 109.

Nor can we say on the basis of this record that the district court's finding that Reed and Poncik used the list is clearly erroneous. The majority of American Stockman's customers had been customers of Temple Tag. Since Temple Tag controlled only seven percent of the market for feeder ear tags, the trial judge could have inferred that Poncik and Reed used the list to solicit customers for American Stockman.

III.

[HN6](#) Equitable relief in the form of a permanent injunction is a proper remedy for the breach of a confidential relationship. *Hyde Corp. v. Huffines*, 1958, 158 Tex. 566, 314 S.W.2d 763, 778, [**15] cert. denied, 358 U.S. 898, 79 S. Ct. 223, 3 L. Ed. 2d 148; see also Comment, *Trade Secrets in Texas -- The Employer's Rights in the Absence of Contractual Protection*, 17 S.Tex.L.J. 132, 144-45 (1975). Thus, the equitable relief awarded by the district court was proper. [HN7](#) If the use of trade secrets results in economic injury to the employer, an award of actual damages is also a proper remedy. *K & G Oil Tool & Service Co. v. G & G Fishing Tool Service*, 1958, 158 Tex. 594, 314 S.W.2d 782. Punitive damages are available as well if the defendant's actions are fraudulent or malicious. R. Callman, The Law of Unfair Competition, Trademarks, and Monopolies § 14.45 (4th Ed.1982). Here the defendants were key employees who violated the employer's trust. The district court properly awarded exemplary damages. Reed, Poncik, and American Stockman argue that part of the award for actual damages should be disallowed because it is based on an allegedly invalid non-competition agreement. We do not find it necessary to reach the validity of that [[**16](#)] agreement because we find that the total award is supported by the breach of the confidential relationship.

⁷ At least one Texas appeals court case has suggested that the use of business information obtained by an employee in an unlawful manner from his employer will give rise to liability, though the information is not technically a trade secret. [Jeter v. Associated Rack Corp.](#), Tex.Civ.App.1980, [607 S.W.2d 272, 275-76](#). The Jeter court held that the key inquiry is whether the employee obtains access to confidential business information to facilitate the formation of a new corporation without the permission of the employer. The availability of a lawful means to acquire the information is not dispositive of the issue of a breach of confidentiality. *Id. at 275*. See also Comment, *Misappropriation of Trade Secrets*, [53 Tul.L.Rev. 215, 226-27](#); R. Callman, The Law of Unfair Competition, Trademarks, and Monopolies § 14.03 at 21. Reed and Poncik acquired the business information at issue here during work hours, with the aid of other employees, and without Temple Tag's knowledge or permission. Because we find that the customer information constituted a trade secret, we do not reach the issue of liability under this theory.

⁸ Because the classification of information as a trade secret depends on the facts of each case, this area of the law is unsettled, resulting in seemingly conflicting opinions. The classification of customers lists is particularly confused. See [Crouch v. Swing Machinery Co.](#), Tex.Civ.App.1971, [468 S.W.2d 604](#) (Cadena, J., stating that "the customer list cases stand on the periphery of that area of the law which can best be described as the 'trade secret quagmire !'") *Id. at 607*.

⁹ Our decision is not inconsistent with [Mercer v. C.A. Roberts Co.](#), [5 Cir.1978, 570 F.2d 1232](#). In Mercer, the district court found that the information at issue could be obtained from other sources, and, therefore, did not constitute a trade secret. *Id. at 1239*. As in the case at bar, we concluded that the district court's finding of fact was not clearly erroneous.

The district court awarded Zoecon Industries \$305,148 for lost sales resulting from the breach of the confidential relationship. According to the district court's conclusions of law, this amount was based only on the breach of the confidential relationship. The punitive damages and attorneys' fees and costs were also awarded solely on the theory of the breach of confidential relationship. We sustain this portion of the district court's damage award.

The district court also awarded \$99,908 for expenses associated with the promotional campaign. This award was supported by two theories, breach of the confidential relationship and breach of the non-competition agreement. The district court, however, did not apportion the damages between the two violations; instead, it noted that the "Buy 5 Tags, Get 2 Tags Free" promotional campaign could have been avoided only if neither the confidential relationship nor the non-competition agreement had been breached. The district court found that the use of Temple Tag's trade secrets enabled American Stockman to compete with Zoecon, necessitating **[**17]** the promotional campaign. The promotional expenses, therefore, were properly awarded for a breach of the confidential relationship. Similarly, the award for salary expense was based on either theory, and is fully supported by the breach of confidential relationship. We do not have to reach the issue of the validity of the non-competition agreement under Texas law because no part of the damage award rested solely on that theory.

The judgment of the district court is AFFIRMED.

End of Document



In re Department of Energy Stripper Well Exemption Litig.

United States District Court for the District of Kansas

September 13, 1983

MDL No. 378

Reporter

578 F. Supp. 586 *; 1983 U.S. Dist. LEXIS 13823 **

In re The DEPARTMENT OF ENERGY STRIPPER WELL EXEMPTION LITIGATION

Subsequent History: [**1] On Motion to Certify Constitutional Issues January 25, 1984.

Core Terms

overcharges, parties, purchasers, Energy, restitution, referral, funds, Petroleum, refund, Shoe, constitutional issue, escrow fund, escrowed, refiners, equitable, progress, cases, retain jurisdiction, Entitlements, factfinding, consumers, Appeals, pass-on, vetoes, regulations, antitrust, claimants, expertise, questions, costs

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Oil & Petroleum Products > General Overview

HN1 **Regulated Industries, Energy & Utilities**

The objectives of § 209 of the Economic Stabilization Act differ significantly from those of § 210. Section 210 provides for private suits seeking damages. Section 209 provides for government action in which the court may order restitution. In § 209, congress gave the courts equitable power to set things right and order restitution. S. Rep. No. 92-507, 92nd Cong., 1st Sess. reprinted in 2, 1971 U.S.C.C.A.N. 2283, 2291. The Temporary Emergency Court of Appeals has made it clear that restitution, as provided in § 209, is fundamentally an equitable concept.

Contracts Law > Remedies > Restitution

HN2 **Remedies, Restitution**

In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge ill gotten gains or to restore the status quo or to accomplish both objectives.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Oil & Petroleum Products > General Overview

HN3 Regulated Industries, Energy & Utilities

The Temporary Emergency Court of Appeals (TECA) approves an action which does not seek damages, which may or may not be the amount of the overcharge, but sought restitution. TECA also made it clear that the court's equitable power is broad, noting that there is no indication that § 209 of the Economic Stabilization Act attempts to limit the power of the courts or the agency to restitution or to a particularly strict interpretation of restitution. Restitution seeks to restore the status quo but, if that is not possible because the status quo has been permanently altered, restitution seeks to provide other kinds of compensation.

Tax Law > ... > Deductions > Charitable Deductions > General Overview

HN4 Deductions, Charitable Deductions

The cy pres doctrine in the legal field of charitable trusts states that, when it is impossible to carry out the specific intent of the testator, courts may dispose of the funds in the "next best" manner. Such a doctrine is extended to the distribution of funds in class action and overcharge cases and, where it is impossible to specifically identify the proper claimants, allows the funds to be used in a manner designed to benefit the claimants as a class.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Administrative Law > Separation of Powers > Primary Jurisdiction

HN5 Reviewability, Jurisdiction & Venue

Where the claim before the court requires the resolution of issues which, under a regulatory scheme, are placed within the purview of an administrative agency, the doctrine of primary jurisdiction may be applied to suspend the judicial process pending referral of such an issue to the administrative agency. In cases raising issues of fact not within the conventional expertise of judges or cases requiring the exercise of administrative discretion, agencies created by congress for regulating the subject matter should not be passed over.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN6 Reviewability, Jurisdiction & Venue

Referral is useful when uniformity and consistency is important and where technical questions of fact within the expertise and the experience of the agency exist. Referral is also desirable when one compares the flexibility or agency procedures with the rigidity too often characteristic of court procedures. It is a discretionary tool of the courts, a flexible concept to integrate the regulatory functions of agencies into the judicial decision making process by having agencies pass in the first instance on technical questions of fact uniquely within the agency's expertise and experience, or in cases where referral is necessary to secure uniformity and consistency in the regulation of business, such as issues requiring the exercise of administrative discretion.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN7 Reviewability, Jurisdiction & Venue

The court can retain jurisdiction of a matter while referring only limited factual questions to an agency.

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

Civil Procedure > Judgments > Entry of Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN8 Pleadings, Counterclaims

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties. [Fed. R. Civ. P. 54\(b\)](#).

Counsel: Joseph W. Kennedy, Morris, Laing, Evans, Brock & Kennedy, Chartered, Wichita, Kansas, for plaintiff.

Larry P. Ellsworth, Marcia K. Sowles, Samuel Soopper, Dept. of Energy, Office of Gen. Counsel, Washington, District of Columbia, for Dept. of Energy.

Brian G. Grace, Curfman, Harris, Stallings, Grace & Snow, Wichita, Kansas, for Tenneco Oil, Pennzoil, Tosco, Ashland Oil, Texas City Refining.

Alexander B. Mitchell, Wichita, Kansas, Harold E. Kohn, Michael D. Hausfeld, Joseph C. Kohn, Kohn, Savett, Marion & Graf, Philadelphia, Pennsylvania, for Nat. Freight, Inc. and Philadelphia Elec. Co.

George G. Olsen, Williams & Jensen, Washington, District of Columbia, for IU Intern. Oil & Gas Inc.

John F. Hayes, Hutchinson, Kansas, William G. Riddoch, Houston, Texas, for Shell Oil Co.

James F. Flug, Washington, District of Columbia, for State of Alabama, Michigan, California.

Wayne Hundley, Deputy Atty. Gen., Topeka, Kansas, Arthur J. Galligan, Washington, District of Columbia, E. Dwight Taylor, Wichita, Kansas, for States of Kansas, Delaware, Rhode Island, North Dakota, Iowa, Louisiana, and Alabama, Mich and California, **[**2]** West Virginia.

Alexander B. Mitchell, Wichita, Kansas, Jerry S. Cohen, Michael D. Hausfeld, Patricia F. Bak, Washington, District of Columbia, for Independent Motor Gasoline Retailers, see dkt 279 for names of intervenors.

John A. Gibney, Jr., Richmond, Virginia, for intervenor Commonwealth of Virginia.

John R. Tarpley, Asst. Atty. Gen., Nashville, Tennessee, for State of Tennessee.

Richard P. Wilson, Asst. Atty. Gen., Columbia, South Carolina, for Georgia and South Carolina.

J. Wallace Malley, Jr., Jane Hart Marter, Asst. Attys. Gen., Montpelier, Vermont, for State of Vermont.

Claude E. Salomon, Deputy Atty. Gen., Div. of Law, Newark, New Jersey, for State of New Jersey.

Bernard Nash, Edward G. Modell, Blum & Nash, Washington, District of Columbia, for States of Pennsylvania, Nevada, Hawaii and Guam.

Jo Anne Sanford, Sp. Deputy Atty. Gen., Steven Bryant, Asst. Atty. Gen., Raleigh, North Carolina, for North Carolina.

Brad P. Engdahl, St. Paul, Minnesota, for Minnesota.

Frank J. Huftless, Asst. Atty. Gen., Lincoln, Nebraska, for Nebraska.

Frank W. Ostrander, Asst. Atty. Gen., Portland, Oregon, for Oregon.

Eduardo L. Buso, Asst. Atty. Gen., San Juan, Puerto Rico, for Puerto [**3] Rico.

Richard R. Knoepfel, Chief, Law Div., St. Thomas, U.S. Virgin Islands, for Virgin Islands.

William C. Primm, Paul Bardacke, Sante Fe, New Mexico, for New Mexico.

Inez Smith Reid, Corp. Counsel, Doreen E. Thompson, Stuart Cameron, Washington, District of Columbia, for District of Columbia.

Richard L. Griffith, Asst. Atty. Gen., Denver, Colorado, for Colorado.

Dennis M. Ryan, Asst. Atty. Gen., Boston, Massachusetts, for Massachusetts.

Richard F. Webb, Asst. Atty. Gen., Hartford, Connecticut, for Connecticut.

Bruce E. Mohl, Asst. Atty. Gen., Concord, New Hampshire, for New Hampshire.

Robert Frank, Asst. Atty. Gen., Augusta, Maine, for Maine.

Stanley B. Klimberg, Gen. Counsel, New York, State Energy Office, Albany, New York, Robert Abrams, Atty. Gen. of the St. of New York, New York, New York, for New York.

L. C. Ross, Denver, Colorado, James W. Collier, Detroit, Michigan, Robert Martin, Paul Swartz, Martin Bauer, Wichita, Kansas, for Total Petroleum Inc.

Brian Grace, Wichita, Kansas, Ralph J. Maynard, Houston, Texas, for Tenneco Oil Co.

John P. Mathis, Catherine C. Wakelyn, Washington, District of Columbia, for Tenneco Oil Co. and Pennzoil Co.

Perry O. Barber, Houston, [**4] Texas, for Pennzoil Co.

Kenneth L. Bachman, Jr., Eugene M. Goott, Washington, District of Columbia, Jeanette M. Thomas, Los Angeles, California, for Tosco Corp.

Thomas A. Donovan, Pittsburgh, Pennsylvania, Robert H. Compton, Kathleen C. Gillmore, Ashland, Kentucky, for Ashland Oil Inc.

Richard P. Noland, Robert R. Morrow, Monica A. Otte, Washington, District of Columbia, for Texas City Refining Inc.

Brian Grace, Wichita, Kansas, Van R. Boyette, Joseph C. Bell, Washington, District of Columbia, for American Petroleum Refiners Ass'n.

Thomas D. Kitch, Wichita, Kansas, Pillsbury, Madison & Sutro, San Francisco, California, for Chevron U.S.A. Inc.

James P. Zakoura, Kansas City, Kansas, Robert L. Gowdy, Kansas City, Missouri, for Farmland Industries, Inc.

Alphonse M. Alfano, Robert S. Bassman, Douglas B. Mitchell, Washington, District of Columbia, Will Marson, Topeka, Kansas, for Nat. Oil Jobbers Council.

Walter Davis, Asst. Atty. Gen., Energy Div., Austin, Texas, for Texas.

Marian Yoder, Asst. Atty. Gen., Cheyenne, Wyoming, for State of Wyoming.

David G. High, Deputy Atty. Gen., Boise, Idaho, for State of Idaho.

James F. Flug, Lee Ellen Helfrich, Lobel, Novins & Lamont, Washington, [**5] District of Columbia, for State of Wyoming, Idaho and Indiana.

Frank Baldwin, Deputy Atty. Gen., Indianapolis, Indiana, for State of Indiana.

E. Dwight Taylor, Hulnick & Taylor, Wichita, Kansas, Andrew P. Miller, Arthur J. Galligan, Peter J. Kadzik, Washington, District of Columbia, for State of Utah.

Judges: Theis, District Judge.

Opinion by: THEIS

Opinion

[*589] MEMORANDUM AND ORDER OF REFERRAL FOR FACT FINDING TO ADMINISTRATIVE AGENCY

THEIS, District Judge.

Like flies to honey, claimants are quickly drawn by a fund containing over one billion dollars. These claimants have radically differing notions as to how the fund should be distributed, with one factor common to all suggested approaches: each claimant, unsurprisingly, desires a methodology of distribution likely to result in a large percentage of the fund being deposited into said claimant's pockets. Now before the Court is a motion to refer the question of fund distribution to the Department of Energy's Office of Hearing and Appeals (OHA). Some of the parties wholeheartedly endorse this approach, others wholeheartedly oppose it, and others embrace it only as a fall-back position should the Court reject their contentions that [*6] the money should go immediately to them. Needless to say, all parties view this motion as extremely important, if the immense effort funneled into the voluminous briefs on this issue are an accurate gauge of the parties' perception of the importance of this motion.

This action is a consolidation of a number of cases brought by oil producers to enjoin the Federal Energy Administration (FEA), now the Department of Energy (DOE), from enforcing Ruling 1974-29, concerning low production oil wells, commonly called "stripper wells." The Court enjoined enforcement of the regulations in question, but ordered the oil producers to deposit into escrow the difference between the stripper well price and the controlled price of crude oil affected by the injunction. As of October 31, 1982, the escrow fund, including interest, contained over one billion dollars.

The issue of the validity of the regulations and Ruling was finally settled in *In Re The Department of Energy Stripper Well Exemption Litigation*, 690 F.2d 1375 (Em.App. 1982), cert. denied, 459 U.S. 1127, 103 S. Ct. 763, 74 L. Ed. 2d 978 (1983), in which the Temporary Emergency Court of Appeals (TECA) reversed this Court's decision [*7] and upheld the rulings and regulations as valid. TECA remanded this action to this Court with instructions to enter judgment for DOE, which judgment has been entered. The effect of TECA's decision is to declare the funds deposited in escrow to be overcharges received due to violations of the petroleum pricing regulations. The remaining task is the appropriate dispensation of the escrowed funds -- in effect a monumental interpleader action with potential classes and sub-classes.

The DOE has moved the Court to refer the issue of remedy to DOE pursuant to the doctrine of primary jurisdiction. DOE contends that the remedy issues are complex and are within the special competence of the agency. DOE states that the distribution of the various claims will require analysis of the ability of the claimant to pass through increasing costs and the extent to which such costs were actually passed through. DOE also notes that an analysis of the impact of the complex Entitlements Program and of the system of "banks" of increased costs will be required. DOE points out that it has already established a procedural mechanism for considering refund applications and that issues similar to those before [*8] the court are presently being considered in refund actions before OHA. DOE contends that initial consideration by the agency, subject to review by the Court, will be more efficient than the Court conducting the entire factual inquiry itself.

[*590] Nearly every premise underlying the DOE's motion to refer has come under attack by other parties, which challenge both DOE's characterization of the remaining inquiry and DOE's competence and fairness to conduct it.

Plaintiff oil producers vigorously oppose the motion to refer. From their perspective, the remaining questions are mostly legal, not factual. They contend referral would, by implication, decide these legal issues and that the result would be contrary to what they view as controlling legal precedent. The principal legal contention advanced by producers is that it is improper to attempt to determine the actual damages beyond the refiner stage of distribution. In other words, the Court should not consider whether any overcharges were passed through by refiners to marketers and consumers. The basis of this contention is a line of precedent in **antitrust law** rejecting pass through theories and limiting recovery to first **[**9]** purchasers, with certain limited exceptions. [Hanover Shoe, Inc. v. United Shoe Machine Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 \(1968\)](#); and [Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 \(1977\)](#). This approach has been applied to private enforcement actions brought under Section 210 of the Economic Stabilization Act. [Eastern Airlines, Inc. v. Atlantic Richfield Co., 609 F.2d 497 \(Em.App.1979\)](#). Producers also contend that the OHA has failed to demonstrate either expertise or efficiency in its handling of refund claims. Producers further claim that OHA is not autonomous and has prejudged the issues in this case.

Finally, producers claim that referral is not appropriate because the pending issues are of the type within the Court's competence to address. Producers state that DOE can give the Court the benefit of its expertise by making recommendations to the Court by way of briefs.

Essentially similar positions are held by the first purchasers, refiners that actually purchased the petroleum in question. As presented in the brief filed by Total Petroleum, the first purchasers' position embraces the theory that *Hanover Shoe* **[**10]** and *Illinois Brick* preclude examination of passed through costs, and that the first purchasers are entitled to the entire amount of overcharges. The first purchasers contend that allowance of passed through recovery would subject the first purchasers to double liability if private parties sue them pursuant to Section 210 for the overcharges. The first purchasers argue that this is not a Section 209 action and is not a Section 210 action, but is analogous to a Section 210 action.

Not dissimilar contentions are advanced by the indicated refiners, who also oppose referral, reject pass through recovery by marketers and consumers, and question DOE's objectivity and competence. The key thrust of the indicated refiners' approach is that all refiners who participated in the Entitlements Program are eligible for recovery, and not just those who actually purchased the oil in question. This is required, contend the indicated refiners, because the Entitlements Program served to spread the overcharges equally among all participants in the Entitlements Program. In addition to opposing consideration of passed through overcharges on *Illinois Brick* grounds, the indicated refiners contend **[**11]** that overcharges were not passed on, because market conditions restricted what refiners could charge and thus the refiners bore the burden of the overcharges. The indicated refiners also contend that the forces of the market will force them to pass through the refunds they receive from the escrow fund in the form of reduced prices to ultimate consumers.

The intervening States argue that referral is unnecessary and contend that this Court should order distribution to the States as representatives of the ultimate consumers of petroleum products. The States rely on the recent opinion of Judge Flannery in [United States v. Exxon, 561 F. Supp. 816 \(D.D.C.1983\)](#), in which the Court ordered distribution to the States for use in programs designed to benefit petroleum consumers. The States argue that **[*591]** review of the regulatory statutes shows that overcharges were passed along to the ultimate consumers and that it would be impossible to ascertain the precise damage borne by the ultimate victim. Thus, since DOE could not precisely determine losses suffered by particular claimants, the Court should, in the interests of restitution and equity, distribute the fund to the States, **[**12]** in proportion to their citizen's use of petroleum products during the controls period, for use in energy-related programs. To refer the case would, in the States' view, plunge the agency, the Court, and the escrow fund into an administrative quagmire.

The States argue, however, that if their proposal for immediate payout to the States is not endorsed by the Court, the motion to refer should then be granted. They argue that if the quagmire must be entered, DOE has the expertise and procedures to best accommodate the expedition. The States also contend that the Court can exercise supervisory control over the DOE to allay fears of bias and to insure prompt attention to the case.

Intervening purchasers have split on the issue of referral. The National Oil Jobbers Council (NOJC), a federation of 42 trade associations representing thousands of small petroleum marketers, favors referral. The NOJC contends that the Government has the duty to at least try to ascertain the identity of overcharge victims, and cites [Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F.2d 717 \(Em.App.1982\)](#) in support of this contention. The NOJC contends that there is no factual basis, in the absence [**13] of such an attempt, to conclude that none of the overcharge victims can be identified.

A number of other intervening purchasers, seeking to represent classes of gasoline retailers, trucking companies and electric utilities, oppose referral. They raise questions of agency bias and assert the Government is or may be trying to appropriate the funds for itself. They challenge DOE's competence and expertise and claim that referral will merely cause further delay in resolving this case. They raise the possibility of the Court appointing a special master and generally contend that the distribution issue is within the Court's competence and province to resolve.

Consideration of the above questions leads the Court to conclude that two basic questions must be resolved before a decision on referral can be made:

1. Are any parties other than the first purchasers or participants in the Entitlements Program entitled to refunds?
2. Is it clearly impossible to ascertain particular harms suffered by particular parties by virtue of the overcharges?

If the first question is answered in the negative, then it must be asked: why refer? If the answer to the first question is affirmative, [**14] however, the second question becomes decisive. If it is clearly impossible to ascertain the impact of overcharges with particularity, does equity require that the fund be distributed in the public interest to the States, or to the Government standing in place of the ultimate consumers? The Court will now examine these questions in detail.

The key legal issue in deciding whether any parties other than first purchasers or participants in the Entitlements Program can recover is the applicability of *Hanover Shoe* and *Illinois Brick* to this case.

In [Hanover Shoe, supra](#), the Supreme Court held that defendant in a private antitrust action could not assert the "passing on" defense that plaintiff shoe manufacturer suffered no legally cognizable injury because it increased the prices it charged its customers (i.e., it "passed on" the overcharges caused by defendant's illegal actions). The Court's reasoning on this issue is as follows:

"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 [**15] of demonstrating that the particular plaintiff [*592] 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 unascertainable figures, the task would normally prove insurmountable. 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."

"In 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* consumers. These ultimate consumers, in today's case the buyer 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 [**16] 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."

In *Illinois Brick, supra*, the Court concluded that the pass-on rule must be applied equally to plaintiffs and defendants, and held that only the direct purchasers, and not others in the chain of manufacture or distribution could recover for overcharges. As in *Hanover Shoe*, the Court emphasized both the complexity that pass-on theories entail and the resultant impairment of private antitrust enforcement. The Court noted:

"Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge -- from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness."

Illinois [**17] [*Brick, 97 S. Ct. at 2070.*](#)

The Court also noted:

"The concern in *Hanover Shoe* for the complexity that would be introduced into treble-damages suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits if brought by indirect purchasers suing for the full amount of the overcharge. The apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery by injecting extremely complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group. Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement."

[*Illinois Brick, 97 S. Ct. at 2074.*](#)

Based on *Hanover Shoe* and *Illinois* [**18] *Brick*, TECA has held that the passing on defense cannot be used in a private enforcement action under Section 210 of the Economic Stabilization Act. [*Eastern Air Lines, Inc. v. Atlantic Richfield, supra.*](#)

This Court does not believe the rationale of *Hanover Shoe* and *Illinois Brick* is applicable, however, in this action. This action is fundamentally different from a private enforcement action under the Antitrust Laws or under Section 210 of the [*593] Economic Stabilization Act. In this action, oil producers sought declaratory judgments to forestall government enforcement of overcharge violations under Section 209. Preliminary injunctive relief was granted, conditioned on the oil producers paying the alleged overcharges into escrow. The Court now considers this action to be, in effect, a Government enforcement action in which the fact of overcharge has been determined and the Court is now faced with effecting restitution.

In the Court's view, the difficulty in computing passed on costs and the subsequent adverse effect on antitrust enforcement were inextricably bound together in *Hanover Shoe*. In that case the Court found that addition of pass-on issues to [**19] already protracted private antitrust suits would seriously hamper the scheme of private enforcement of the antitrust laws. In *Illinois Brick*, the Court was faced with the problem of whether to permit offensive use of pass-on theories after defensive use had been barred by *Hanover Shoe*. The Court declined to allow offensive use, repeatedly emphasizing the adverse impact on private antitrust enforcement that pass-on theories would entail. As one commentator noted:

"The *Illinois Brick* result apparently rests on the proposition that a rule allowing all purchasers to recover would so reduce the incentives for direct purchasers to bring suit that while there might be some enforcement gains at the indirect purchaser level, the total number of suits would decline."

The Supreme Court, 1976 Term, 81 Harv.L.Rev. 72, 226 (1977).

In this case no such fears are applicable. There is no private enforcement involved, and thus, no incentive to encourage private suits by disallowing pass-on theories. On that ground alone, the *Hanover Shoe -- Illinois Brick* doctrine is inapplicable to an action under Section 209 or an action, such as this one, closely analogous [**20] to a Section 209 action. While *Hanover Shoe* and *Illinois Brick* may be suitable for Section 210 actions, it must be noted that [HN1](#)[[↑]] the objectives of Section 209 differ significantly from those of Section 210. Section 210 provides for private suits seeking damages. Section 209 provides for Government action in which the Court may order restitution.

In Section 209, Congress gave the courts "equitable power . . . to set things right and order restitution." S.Rep. No. 92-507, 92nd Cong., 1st Sess. reprinted in 2, 1971 U.S. Code Cong. & Ad.News 2283, 2291, quoted in [Sauder v. Department of Energy](#), [648 F.2d 1341 \(Em.App.1981\)](#). In *Sauder*, TECA made clear that restitution, as provided in Section 209, is fundamentally an equitable concept. The Court quoted *Moore's Federal Practice* Vol. 5, para. 38.24[2], stating:

[HN2](#)[[↑]] "In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge illgotten gains or to restore the status quo or to accomplish both objectives." [648 F.2d at 1348](#).

[HN3](#)[[↑]] TECA approved an action which did not seek damages, "which may or may not be the amount of the overcharge," but sought restitution. TECA also made it [**21] clear that the Court's equitable power is broad: "There is no indication . . . that the section thereby attempts to limit the power of the courts or the agency to restitution or to a particularly strict interpretation of restitution."

[Sauder, 648 F.2d at 1348](#).

Restitution seeks to restore the status quo but, if that is not possible because the status quo has been permanently altered, restitution seeks to provide other kinds of compensation. See *Restatement of Restitution*, § 1, comment a (1937).

Thus, the restitutionary nature of Section 209 and of this action differ fundamentally from the damages remedy of Section 210 and of the Antitrust Laws. For this additional reason, the *Hanover Shoe* and *Illinois Brick* cases do not apply to this action. This was also recognized by the District Court in [Citronelle-Mobile Gathering, Inc. v. O'Leary](#), [499 F. Supp. 871 \(S.D.Ala.1980\)](#), *rev'd on other grounds*, [669 F.2d 717 \(Em.App.1982\)](#), which rejected attempts to bar consideration of pass-on consequences. [*594] Referring to *Hanover Shoe* and *Illinois Brick*, the Court stated:

"The policies underlying those cases are largely inapplicable [**22] to enforcement actions by the government, and restitutionary relief by its nature does not have some of the difficulties which arise in actions for damages.

"In an enforcement action, there is no danger that the incentive to enforce the law will be reduced by permitting indirect purchasers to recover."

[499 F. Supp. at 884](#).

The Court would also note that the fundamental difference in and independence of the 209 and 210 remedies were recognized by TECA in [Bulzan v. Atlantic Richfield Co.](#), [620 F.2d 278 \(Em.App.1980\)](#).

The first purchasers have also raised the spectre of potential double liability if pass through is allowed and they are then subject to a private enforcement action under Section 210. It has been recognized, however, that both private and public remedies may be applied to the same violation. [Bulzan v. Atlantic Richfield Co., supra](#). In *Bulzan*, TECA noted a number of solutions to the multiple liability problem, stating that one solution is adjudication of a liability action under Section 210 "to take into account a prior or subsequent" restitution award. [Bulzan, at 283-284](#). The spectre of double liability was similarly dispelled in *U.S.* [**23] [Oil Co., Inc. v. Koch Refining](#), [518 F. Supp. 957](#)

(E.D.Wis.1981); Martin Service v. Koch Refining Co., Unpub. No. 81-1844 (E.D.Ill., Oct. 18, 1982); Ray L. Hunt v. Department of Energy, Unpub. No. CA-3-78-02440-W (N.D.Tex. July 25, 1983).

Since considerations of equity are so vital in restitution, the Court must note that allowing first purchasers to retain all of the overcharges, particularly in the absence of a factual showing that they did not pass on some or all of the overcharges, would not be an equitable result. This is particularly true when the first purchasers' proposed remedy would result in most of the overcharges being returned to plaintiffs in this action, who were the parties responsible for and who attempted to benefit from the overcharges in the first place. At this stage of the proceedings, there are no facts to show that this would not be an inequitable windfall to the first purchasers or indicated refiners.

Having concluded that recovery is not limited to first purchasers or the participants in the Entitlements Program, the Court must now consider whether it is clearly impossible to ascertain with particularity the parties that bore the burden of the **[**24]** overcharges. The States argue that such a task is clearly impossible and, relying on Judge Flannery's opinion in *United States v. Exxon, supra*, contend that the States should receive the escrow fund for use in programs aiding energy consumers.

The Court tends to agree with the States and with Judge Flannery that it is likely that the ultimate consumers of petroleum products bore the brunt of these overcharges and that it will be impossible to determine otherwise. If this is the case, the Court believes that the equitable goals of restitution would mandate distribution to either the state governments or the federal government for use in programs designed to aid energy consumers. Such a distribution would be akin to HN4 the *cy pres* doctrine in the legal field of charitable trusts where, when it is impossible to carry out the specific intent of the testator, courts dispose of the funds in the "next best" manner. Such a doctrine has been extended to the distribution of funds in class action and overcharge cases and, where it is impossible to specifically identify the proper claimants, allows the funds to be used in a manner designed to benefit the claimants as a class. See **[**25]** *Note, Collecting Overcharges from the Oil Companies: The Department of Energy's Restitutionary Obligation*, 32 Stan.L.Rev. 1039 (1980).

This approach was most notably applied in *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y.1970), aff'd., 440 F.2d 1079 (2nd Cir.1970), cert. denied, 404 U.S. 871, 92 S. Ct. 81, 30 L. Ed. 2d 115 (1971). This was a nationwide antitrust class action against drug companies accused of price **[*595]** fixing brought by 37 states on behalf of consumers. Pursuant to a court-approved settlement, a fund of 37 million dollars was administered for refunds to individual consumers, but application of a claim procedure still left 32 million dollars in the fund. This was distributed to states for use in public health programs. A similar rationale underlay Judge Flannery's remedial action in *United States v. Exxon, supra*, in which the overcharges were placed in an escrow account for distribution to the states for use in energy conservation programs.

Likewise, a direct refund to the United States treasury would serve equitable and restitutionary goals. While such a remedy would not aid energy consumers as directly as refund to **[**26]** the states for use in energy programs, it would have certain advantages. It would involve virtually no administrative expense and would benefit the public at large by increasing federal revenues. Since mobile transportation is an all-encompassing way of life in our nation, those injured may well be the public at large. Hence such a distribution would probably serve the purpose of aiding the injured party. It would also, of course, fulfill the restitutionary goal of requiring plaintiffs to disgorge their judicially-determined illegal gains. See *Note, Refunding Overcharges Under the Emergency Petroleum Allocation Act: The Evolution of a Compensatory Obligation*, 79 Mich.L.Rev. 1454, 1473 (1981).

The Court reaches no conclusion as to what remedy would be the most efficacious or equitable, but merely points out that equitable remedies do exist in the absence of proof as to the particulars of the burden of the overcharges. The Court believes, however, that an attempt must be made to determine if particular harm can be shown and that Judge Flannery's resolution in *Exxon* was premature. The Court believes this approach is required by TECA in light of *Citronelle-Mobile Gathering* **[**27]** Co. v. Edwards, supra, where the Court concluded:

"The Government has a *duty* to try to ascertain those overcharges, and refund them, with interest, from the restitutionary funds."

669 F.2d at 723.

The Court would note that it has before it no facts at this time which could establish that it is impossible to identify at least some of the injuries caused by the overcharges. For the Court to conclude that impossibility at this time would be a too-hurried retreat from the objective of restitution to most nearly restore the status quo and return to those overcharged the amount of their loss.

Having reached that conclusion, the Court must reject the request of the States for immediate distribution to them. The Court has thus rejected various claims for immediate distribution and concluded that an attempt must be made to identify those harmed by the overcharges. The basic question remaining is whether this issue should be referred for fact-finding to the OHA of the DOE.

HN5 [↑] Where the claim before the Court requires the resolution of issues which, under a regulatory scheme, are placed within the purview of an administrative agency, the doctrine of primary jurisdiction [**28] may be applied to suspend the judicial process pending referral of such an issue to the administrative agency. [United States v. Western Pacific R.R. Co., 352 U.S. 59, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126 \(1956\)](#). In the *Western Pacific* case, the Supreme Court noted:

"in cases raising issues of fact not within the conventional expertise of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over."

77 S. Ct. at 165.

The Supreme Court has emphasized that **HN6** [↑] referral is useful when uniformity and consistency is important and where technical questions of fact within the expertise and the experience of the agency exist. [Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 1*596 96 S. Ct. 1978, 48 L. Ed. 2d 643 \(1976\)](#). Referral is also desirable when one compares the flexibility or agency procedures with the rigidity too often characteristic of court procedures. *Sunflower Electric Coop. v. Kansas Power & Light Co.*, 603 F.2d 791, 795 (10th Cir. 1979). The doctrine is best summarized in fn. 14 of [Columbia Gas Transmission v. Allied Chemical Corp., 652 F.2d 1*291 503 \(5th Cir. 1981\)](#), wherein it is stated at 519:

"It is a discretionary tool of the courts, a flexible concept to integrate the regulatory functions of agencies into the judicial decision making process by having agencies pass in the first instance on technical questions of fact uniquely within the agency's expertise and experience, or in cases where referral is necessary to secure uniformity and consistency in the regulation of business, such as issues requiring the exercise of administrative discretion."

In the Court's view, the tracing of overcharges involves complicated and technical questions of fact, compounded by the impact of regulatory phenomena such as the Entitlements Program and the "banking" of costs. The OHA has developed procedures for refund claims in overcharge cases and is better equipped than the Court to make preliminary findings concerning the particular impact of overcharges on various parties.

Opponents of referral have pointed to the rather rocky beginning OHA experienced in developing refund procedures, but it appears that OHA has now made significant progress in implementing such procedures. See *Office of Enforcement*, 9 DOE para. 82,521 [**30] (hereinafter Alkek); *Office of Enforcement*, 9 DOE para. 82,553 (hereinafter Adams), which show that OHA is progressing with large refund proceedings. The agency has established a mechanism for considering applications for refunds, known as Subpart V procedures.

The Court believes that the large number of technical questions involved in attempting to determine the allocation of the burden of overcharges in the thicket of the regulatory scheme could more efficiently be addressed before the OHA. The Court does share the concern of the parties who have noted that OHA has not been as efficient at handling claims as might be hoped. The Court will therefore retain jurisdiction over this case and require regular progress reports from the Department on its handling of the referred matters in this case.

The Court is also aware of the concern of some parties of DOE bias in this case, and notes that the Department has not taken a position on what the final disposition of the escrowed funds should be. Positions of the DOE in other actions concern some parties. The Court emphasizes that he is referring to the DOE only the factual question concerning the particularized impact of the overcharges. **[**31]** The Court is specifically retaining jurisdiction and will make the final determination of the disposition of the funds. The Court, not the DOE, will decide where the funds go. The Court does believe, however, that the OHA's claim process and DOE's acquired expertise, will assist the Court in developing the facts needed for an equitable disposition of the funds.

HN7 The Court notes that it can retain jurisdiction of this matter while referring only limited factual questions to the agency. See *Israel v. Baxter Laboratories*, 151 U.S. App. D.C. 101, 466 F.2d 272 (D.C.Cir.1972); *Danville Tobacco Assoc. v. Bryant-Buckner Associates, Inc.*, 333 F.2d 202 (4th Cir.1964). The Court is retaining jurisdiction of this action, and is merely suspending its consideration of the issues in this case in order to allow OHA to attempt to determine with particularity the tracing and impact of the overcharges or any portion of them in this case.

The Court is therefore referring to the Office of Hearing and Appeals of the Department of Energy the task of attempting to determine what parties bore the cost of the overcharges and in what amounts. The Court will also welcome the views of the OHA on **[**32]** how restitution can best be achieved in this case. The Court, however, is retaining jurisdiction over both this action and the escrow fund. No determination **[*597]** of restitution nor payout from the escrow fund may be ordered by the OHA, as such matters remain within the province of this Court.

The Court also orders OHA to make an interim report to the Court within six months of the date of this order, and a final report to the Court within one year from the date of this order, regarding the extent of its progress in determining the questions referred. The Court realizes that these matters are complex and that considerable time may well be needed for OHA to complete its assigned task. Nevertheless, the Court would expect substantial progress in one year, and emphasizes that this is MDL litigation deserving the utmost expedition. If substantial progress is not made, OHA is ordered to provide detailed explanation of why progress has been lacking. A lack of progress and the reasons therefore may indicate to the Court that the process is futile and may require the Court to take equitable action as noted elsewhere in this opinion. On the other hand, the Court may determine **[**33]** that more time and a greater effort on the part of OHA is all that is required. These issues will be explored by the Court after receipt of OHA's reports.

IT IS THEREFORE ORDERED AND ADJUDGED that the Department of Energy's motion to refer is granted, with the following conditions:

1. This Court retains jurisdiction over this action and over the escrow fund. All decisions concerning restitution and payout from the fund are reserved to this Court for judicial resolution.
2. The Department of Energy's Office of Hearings and Appeals is ordered to conduct factfinding pursuant to its regulatory process concerning the particularized tracing and impact of the overcharges at issue in this case. The DOE is ordered to make an interim report to this Court within six months of the filing of this order, and a final report within one year from the date of this order, concerning its progress in such factfinding.
3. All parties with claims on the escrow fund in this case shall submit specific proof thereof to the OHA consistent with the regulatory process established by that agency.
4. The Court will suspend its consideration of this action, pending OHA's reports to this **[**34]** Court, or until further order of the Court. The Court will hold in abeyance all pending motions until that time, including motions to intervene or to certify class actions.

IT IS FURTHER ORDERED, for the reasons set forth in the foregoing memorandum, that the motions of Total Petroleum and Farmland Industries for immediate distribution from the escrow fund are hereby denied.

On Motion to Certify Constitutional Issues

On September 13, 1983, this Court referred the issue of the appropriate remedy in this multidistrict litigation to the Office of Hearings and Appeals [OHA] of the Department of Energy [DOE], with instructions to the OHA to report in March and September of 1984 on its progress. The relief afforded to the Court by this referral has, however, been

short-lived. The case is once more before the Court on a hotly contested and heavily briefed motion. The plaintiffs, various oil producers, have moved this Court to certify three constitutional issues concerning one house legislative vetoes in the Emergency Petroleum Allocation Act [EPAA] and the Energy Policy and Conservation Act [EPCA] to the Temporary Emergency Court of Appeals [TECA] for consideration [**35] in light of the United States Supreme Court's recent declaration that one-house legislative vetoes are unconstitutional, see *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983). Numerous parties, including the DOE, intervening states, and intervening purchasers, hereinafter collectively referred to as the defendants, are bitterly opposed to any certification. For the reasons that follow, this Court believes that substantial constitutional [*598] issues exist in this case, and that those constitutional issues must be certified to TECA, see § 211(c) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note.

I. Brief Factual and Procedural Background

This action was originally brought by an individual plaintiff to enjoin the DOE and its predecessor, the Federal Energy Administration, from enforcing Ruling 1974-29, which concerned low-production oil wells commonly referred to as "stripper wells." This Court enjoined enforcement of the Ruling, but required the plaintiffs to deposit into an escrow account the difference between the higher stripper well price the injunction permitted them to receive and the [**36] lower controlled crude oil price they would otherwise have received. This escrow fund currently contains approximately eight hundred million dollars.

Unfortunately, this litigation has tread a rocky road to arrive at the present motion. First, this Court concluded that Ruling 1974-29 was void, *Energy Reserves Group, Inc. v. Federal Energy Administration*, 447 F. Supp. 1135 (D.Kan.1978). This conclusion was reversed by TECA in a two-to-one decision, and the case was remanded for trial, *Energy Reserves Group, Inc. v. The Department of Energy*, 589 F.2d 1082 (Em.App.1978). Numerous other cases concerning the same issue were collected around the country and consolidated here as multidistrict litigation in June of 1979, *In re The Department of Energy Stripper Well Exemption Litigation*, 472 F. Supp. 1282 (Jud.Pan.Mult.Lit.1979). After a brief second sojourn at TECA in which the DOE unsuccessfully attempted to obtain a writ of mandamus against this Court, *Duncan v. Theis, Chief Judge*, 613 F.2d 305 (Em.App.1979), the case was finally tried in early 1981.

After the trial, this Court concluded that Rule 1974-29 was arbitrary, capricious, and contrary to the expressed intent [**37] of Congress, *In re The Department of Energy Stripper Well Exemption Litigation*, 520 F. Supp. 1232 (D.Kan.1981). The case was then taken to TECA for the third time, and TECA once again reversed, *In re the Department of Energy Stripper Well Exemption Litigation*, 690 F.2d 1375 (Em.App.1982), cert. denied, 459 U.S. 1127, 103 S. Ct. 763, 74 L. Ed. 2d 978 (1983). The final section of TECA's opinion reads as follows:

Conclusion

In summary, we find:

- 1) The legislative history of the stripper well exemption amply supports the DOE's position that injection wells were not intended by Congress to be included in the well count;
- 2) Ruling 1974-29 is not beyond the authority of the DOE granted by the controlling statutory provisions;
- 3) Our prior decision in *Energy Reserves I, Duncan v. Theis* and *Wiggins* have correctly decided that Ruling 1974-29 is a reasonable interpretation of the applicable statutes and regulations; and
- 4) The stripper well regulations, as interpreted by Ruling 1974-29, are neither arbitrary nor capricious.

For all these reasons, the decision of the district court is reversed, and these consolidated cases are remanded to the [**38] district court with instructions to enter judgment for the [defendants].

Id. at 1392. In accordance with TECA's instructions, judgment was entered for the DOE on February 14, 1983, see Dk. No. 282, in the following words:

IT IS THEREFORE ORDERED that judgment is hereby rendered in favor of defendants and against plaintiffs, in accordance with the mandate of the Temporary Emergency Court of Appeals filed herein on September 20, 1982.

Dk. No. 282, at 2. As the Court stated in its Order of September 13, 1983, Dk. No. 505.

The remaining task is the appropriate dispensation of the escrowed funds -- in [*599] effect a monumental interpleader action with potential classes and sub-classes.

Id. at 589.

After hearing from the various parties and intervenors at extraordinary length, this Court concluded that the most expeditious method of proceeding was for this Court to retain jurisdiction over both the case and the escrowed funds while referring the factfinding as to who bore the brunt of the overcharges to the OHA, *id.* at slip op. pp. 21-22.

On November 14, 1983, the plaintiffs moved to certify three constitutional issues to [**39] TECA, to vacate the referral of factfinding to the OHA, and to release the escrowed funds. The three constitutional issues are stated by the plaintiffs as follows:

- 1) Whether the Emergency Petroleum Allocation Act, as amended, must be declared unconstitutional, *ab initio*, because it contains an invalid and inseverable one-house legislative veto provision that was twice utilized to the detriment of plaintiffs.
- 2) Whether the Oil Pricing Policy added as section 8 to the Emergency Petroleum Allocation Act by section 401 of the Energy Policy and Conservation Act must be declared unconstitutional, *ab initio*, because it contains three invalid and inseverable one-house legislative veto provisions and imposed price controls to the detriment of plaintiffs.
- 3) Whether MDL No. 378 must be dismissed for lack of subject matter jurisdiction in view of the constitutional invalidity of the Emergency Petroleum Allocation Act, as amended, and section 401 of the Energy Policy and Conservation Act.

Memorandum in Support of Plaintiffs' Motion, Dk. No. 520, at 1-2. The Court heard extensive oral argument on the motions on Monday, January 16, 1984, and is now ready to [**40] rule.

II. Preliminary Issues

No one disputes that the *Chada* decision declared one-house legislative vetoes to be an unconstitutional infringement of the Article I requirements of bicameralism and presentment. Instead, the defendants present four essentially procedural arguments in support of their basic assumption that the plaintiffs cannot raise their constitutional challenge at this juncture. The defendants assert that: (1) the motion to certify the constitutional issues is inexcusably tardy; (2) the plaintiffs are without standing to raise the constitutional challenge; (3) the legislative vetoes in the EPAA and EPCA are, in any event, severable from the remainder of the acts; and (4) retroactive application of *Chada* would be inequitable. The Court will deal with these assertions in the order listed.

(1) Timeliness

The defendants first argue that the plaintiffs' motion is inexcusably tardy because judgment has already been entered in this case, see Dk. No. 282, and because [Rule 60 of the Federal Rules of Civil Procedure](#) provides no mechanism whereby that judgment may be modified. This argument proceeds from the erroneous assumption that a *final* judgment [**41] has been entered in this case.

HN8 [↑] [Rule 54\(b\) of the Federal Rules of Civil Procedure](#) explicitly states that

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

[*600] The judgment entered on February 14, 1983, Dk. No. 282, is on its face not a final order. The rights and liabilities of the plaintiffs, the defendants, and the numerous intervenors simply [**42] were not finally adjudicated by that order. No disposition of the huge escrow fund was made, and all parties still maintain their entitlement to that fund. The Court, in fact, unequivocally expressed its understanding that no final judgment was entered when it expressly retained jurisdiction over the case and the escrow fund while referring the fact-finding mission to the OHA. Such retention would have been nonsensical had a final judgment adjudicating all the claims and the rights and liabilities of all of the parties been entered seven months earlier. Additionally, the substantial factfinding presently being conducted by the OHA and the difficult question remaining for the Court of who gets the money make any notion of finality in this case untenable at this time. Because the question of who gets the money is unresolved, and because a decision that the EPAA and EPCA are unconstitutional could have a major impact on the resolution of that question, this Court believes that the plaintiffs' motion to certify the constitutional issues is timely.

(2) Standing

The essence of the standing challenge is the supposed lack of injury from an exercise of the concededly unconstitutional [**43] one-house vetoes. The short answer to this argument is that the plaintiffs allege that the EPAA and EPCA must be declared void *ab initio* because of the one-house vetoes, and that the money presently in the escrow fund must, therefore, be restored to the plaintiffs because it was exacted from them under unconstitutional acts. Clearly, the exaction of large sums of money under unconstitutional acts is an injury, that injury is traceable to those acts, and that injury could be redressed by a declaration that the acts are unconstitutional and that the money should be returned to the plaintiffs, see e.g., [Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 \(1982\)](#). This Court believes that the plaintiffs have a sufficient "personal stake in the outcome of this controversy to warrant [their] invocation of federal court jurisdiction and to justify exercise of the Court's remedial powers on [their] behalf," [Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 260-61, 97 S. Ct. 555, 560-61, 50 L. Ed. 2d 450 \(1977\); Holly Sugar Corp. v. Goshen City Cooperative Beet Growers Association, 725 F.2d 564, 568](#) (10th Cir., 1984). The plaintiffs therefore have standing to assert their constitutional challenge.

(3) and (4) Severability and Retroactivity

The Court will consider these two assertions together because a similar analysis applies to both. As a preliminary matter, it must be remembered that this Court lacks jurisdiction to determine the constitutional validity of any provision of the EPAA or EPCA, or of the regulations under those Acts, inasmuch as exclusive jurisdiction over those issues is vested in TECA and the United States Supreme Court by way of appeal, see § 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note. If any substantial constitutional issue exists, it must be certified to TECA, see *id.* § 211(c).

These restrictions on this Court's jurisdiction and power are relevant to the defendants' final two assertions because those assertions invite this Court to reach the merits of the constitutional challenge, albeit indirectly. Were this Court to conclude that the concededly unconstitutional one-house vetoes are severable from the remainder of the Acts, the Court would also be concluding that the remainder [**45] of the Acts passes constitutional muster, despite the plaintiffs' vigorous assertion that the Acts must be declared void *ab initio*. Likewise, a decision that *Chada* will not be applied retroactively to this litigation would be tantamount to a declaration that the price controls are constitutionally sound [*601] enough to be enforced by the final judgment this Court must eventually enter

disbursing the escrowed funds. Both of these inquiries are so firmly intertwined with the merits of the constitutional challenge as to be inseverable from it and, therefore, outside this Court's jurisdiction and power to hear.

The parties have briefed these issues with their customary professionalism and attention to detail, and their lengthy citations to the case law and the legislative histories of the Acts have demonstrated that each side has a substantial argument and that the question is indeed a close one. This demonstration has helped to convince this Court that the constitutional issues raised by the plaintiffs are substantial, and that those issues must, therefore, be certified to TECA.

III. Certification

IT IS THEREFORE ORDERED that the three constitutional issues raised [**46] by the plaintiffs and set out verbatim in this Memorandum and Order, *supra* p. 599, be certified to the Temporary Emergency Court of Appeals.

IT IS FURTHER ORDERED that the plaintiffs' motions to vacate the referral of factfinding to the OHA and to release the escrowed funds be held in abeyance pending TECA's resolution of the constitutional issues.

IT IS FURTHER ORDERED that OHA continue uninterrupted with its factfinding mission.

IT IS FURTHER ORDERED that this Court retain jurisdiction over this case and over the escrowed fund to the maximum extent consistent with the certification of constitutional issues to TECA.

End of Document



R.D. Andersen Constr. Co. v. Hankamer Ready-Mix Concrete Co.

United States District Court for the District of Kansas.

September 13, 1983

Case No. 75-178-C5.

Reporter

1983 U.S. Dist. LEXIS 13822 *; 117 L.R.R.M. 2774; 100 Lab. Cas. (CCH) P10,927; 1984-1 Trade Cas. (CCH) P65,810

R. D. Andersen Construction Co., Inc. and Topeka Ready-Mix, Inc. v. Hankamer Ready-Mix Concrete Co., Inc., et al.

Core Terms

ready-mix, antitrust, unionized, deliveries, summary judgment, exemption, concrete, collective bargaining agreement, non-union

Counsel: [*1] Stewart L. Entz and Richard D. Andersen, of Colmery, McClure, Funk, Letourneau & Entz, Topeka, Kan., for plaintiffs

Steve A. J. Bukaty and Thomas H. Marshall, of Blake & Uhlig, P.A., Kansas City, Kan., John P. Hurley, of Jolley, Moran, Walsh, Hager & Gordon, Kansas City, Mo., for defendants

Opinion by: ROGERS

Opinion

Memorandum and Order

ROGERS, D.J.: This is an action brought by a non-union general contractor and a non-union ready-mix concrete supplier seeking compensatory damages for antitrust violations and for violations of the federal labor laws. This matter is presently before the court upon the motion for partial summary judgment on the antitrust violations filed by defendants Topeka Building and Construction Trades Council, Operating Engineers Local No. 101 (Operating Engineers) and Truckdrivers and Helpers Local No. 696 (Truckdrivers). The court has heard oral argument and is now prepared to rule.

In considering a motion for summary judgment, we must view the evidence in a light most favorable to the party opposing the motion. *Frito Lay, Inc. v. Retail Clerks Union Local No. 7*, 629 F. 2d 653, 656 (10th Cir. 1980). We cannot grant summary judgment unless we are persuaded [*2] beyond a reasonable doubt that there are not material issues of fact and that the defendants, in this case, are entitled to summary judgment as a matter of law. Id. Summary judgment is often inappropriate in antitrust actions where the litigations is complex, motive and intent play leading roles, proof is largely in the hands of the defendants, and hostile witnesses and secret agreements thicken the plot. *Natrona Service, Inc. v. Continental Oil Co.*, 435 F. Supp. 99, 106, aff'd, 598 F. 2d 1294 (10th Cir. 1979). This is not to say that summary judgment may never be granted in antitrust actions because such actions are clearly subject to the provisions of *Fed. R. Civ. P. 56*. *Holter v. Moore and Co.*, 702 F. 2d 854 (10th Cir. 1983); *Semke v. Enid Automobile Dealers Ass'n*, 456 F. 2d 1361 (10th Cir. 1972).

Plaintiffs' antitrust allegations are contained in Count II of their complaint. Plaintiffs allege that the defendants violated §§ 1 and 2, by conspiring to restrain interstate trade and by conspiring and attempting to monopolize the ready-mix concrete market in Topeka, Kansas. In the instant motion, defendants contend that they are entitled to summary judgment on plaintiffs' antitrust [*3] claim based on the judicially created immunity applied to labor activities in the antitrust context.

The discovery record in this case shows generally the following facts. R.D. Andersen Constructin Company (Andersen Construction) began offering contracting and construction services in the Topeka area in 1971. Andersen Construction operated as a non-union contractor in a predominantly unionized labor market. As a result, Andersen Construction was frequently picketed and encountered difficulties in getting delivery of ready-mix concrete, an essential building material. This occurred because all of the supplies of ready-mix concrete were unionized and had signed collective bargaining agreements with defendants Operating Engineers and Truckdrivers.

Andersen Construction thereafter purchased a concrete batch plant to fulfill its needs. In October, 1973, the batch plant was incorporated as Topeka Ready-Mix, Inc., and began offering ready-mix concrete for sale to the public. Unlike the unionized ready-mix companies, Topeka Ready-Mix delivered on Saturdays. Customers of the unionized ready-mix companies requested Saturday deliveries and threatened to take all of their business [*4] throughout the week to Topeka Ready-Mix if the other companies were unwilling to deliver on Saturdays.

The collective bargaining agreements entered into by the unionized ready-mix companies and the Operating Engineers and the Truckdrivers contained a provision which prohibited Saturday deliveries of concrete except in emergencies in which case the employees were to be paid double their usual rate of pay. As a result of this provision, the unionized companies rarely made Saturday deliveries and when they were made, the customer paid the increased labor cost. This provision had been in effect for a number of years and was included in the agreement, negotiated in March and April 1974, for April 1974 through March 1977. Shortly after the collective bargaining agreement was concluded, on or about June 15, 1974, the unionized companies began making Saturday deliveries. The evidence is conflicting as to how this began, but the end result was that the collective bargaining agreement's prohibition was unofficially waived and employees at each companywere voluntarily making Saturday deliveries for time and a half. There is some testimony that the changes were initiated by management [*5] of the unionized companies without notice to the unions' negotiators.

There was not, apparently, sufficient demand for Saturday deliveries to justify a full work crew. At the various companies, those with the highest seniority were first given the option of working Saturdays, continuing down the seniority list until an adequate number of workers agreed to work. Business was so slow on Saturdays that fewer than all of the unionized companies would work on any given Saturday. Thus, there is testimony that an order to one company for concrete might result in delivery by a different company. The plaintiff suggests that the unionized companies had agreed on which company would be working on a particular Saturday.

The record also shows some evidence that the unions and the other producers organized a surveillance system of Topeka Ready-Mix's activities. The drivers of one of the unionized companies were instructed to inform their dispatchers whenever they saw a Topeka Ready-Mix at a job site. Business representatives of the Truck drivers would monitor Topeka Ready-Mix operations. This surveillance, according to the plaintiff, was designed to identify customers of Topeka Ready-Mix [*6] and allow the unionized companies to offer to undercut Topeka Ready-Mix's prices.

The court notes that the complaint also sets forth a claimed violation of the National Labor Relations Act involving secondary boycotts. We do not set forth the facts of these claims presented in the present record except to note that they support the inference that there were hard feelings between the plaintiffs and the unions. There is at least some evidence, in a statement by a representative of the Operating Engineers, that they were "trying to get this non-union ready-mix out of business."

Based on the foregoing facts, it appears that the plaintiffs are alleging two types of anit-competitive conduct by the unions. The first is the employees working on Saturdays at less than double time while the unions did not attempt to enforce the terms of the collective bargaining agreement calling for double time. The second is the unions' role in

co-ordinating the surveillance of Topeka Ready-Mix operations to facilitate price cutting by the unionized companies.

[Antitrust Exemption]

As noted previously, defendants contend in the instant motion that the antitrust labor exemption applies here [*7] and required that judgment be entered in their favor. The motion also contains some argument that the record fails to reveal any violation on which antitrust liability could be based. We believe that the proper method of analysis is to first determine the issue of the labor exemption, then to move to the conventional antitrust scrutiny of the case. Larry Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council, 670 F. 2d 421, 425-26 (3d cir. 1982), cert. denied, U.S. (1982); Consolidated Express, Inc. v. New York Shipping Assoc., 602 F. 2d 494, 522 (3d Cir. 1979), vacated and remanded on other grounds, 448 U.S. 902 (1980). Here, we shall consider only the applicability of the labor exemption because the other question has not been sufficiently presented to the court by the defendants.

The court has carefully considered the leading cases on the antitrust labor exemption including Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); United States v. Hutcheson, 312 U.S. 219 (1941); Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers, 325 U.S. 797 (1945); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Local 189, Amalgamated Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676 (1965); and Connell Construction Co. v. Plumbers and Steamfitters Local No. 100, 421 U.S. 616 (1975). In addition, the court has examined a number of legal treatises and law reviews including 1 Areeda & Turner, Antitrust Law P229 (1978 and 1982 Supp.); 16E Von Kalinowski, Business Organizations -- Antitrust Laws and Trade Regulation § 48 (1983); Mann, Powers & Roberts, The Accommodation Between Antitrust and Labor: The Antitrust Labor Exemption, 9 Seton Hall L. Rev. 744 (1978); Handler & Zifchak, Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption, 81 Colum. L. Rev. 459 (1981); and Handler, Reforming the Antitrust Laws, 82 Colum. L. Rev. 1287 (1982). After a thorough review of these authorities, the court is convinced that this area of the law is confused. Furthermore, we are convinced that summary judgment should not be granted to the defendants.

Here, there is conflicting evidence and material issues of fact in dispute prohibiting the application of the labor exemption at this time. There is at least some evidence that the unions were aiding and abetting anticompetitive practices and conspiring [*9] with the unionized companies. A representative of the Operating Engineers had told an employee on a project that they were trying to "get this non-union ready-mix out of business." The claim of conspiracy and combination is also supported by the union's involvement in the surveillance of Topeka Ready-Mix vehicles to facilitate price cutting by the unionized employers. We are unable to say as a matter of law that there was no illegal combination in restraint of trade between the unions and the unionized companies. Direct evidence of a conspiracy is rarely available; instead, it is usually proven by circumstantial evidence and we should be reluctant to grant summary judgment in a case where an illegal combination can be inferred from the circumstances. Cf., Fisher v. Shamburg, 624 F. 2d 156, 162 (10th Cir. 1980).

We also have problems in saying that the unions' action in not enforcing the terms of the collective bargaining agreement as to double pay was, as a matter of law, in their own self-interest. The employees considered filing a grievance for violating the Saturday work provision and even considered going on strike. An argument can be made that the employees would not lose [*10] jobs even if Saturday deliveries were not made, as an inference from the fact that demand for Saturday deliveries was so meager that only a few workers would generally work and that the companies rotated Saturday delivery duties among themselves.

We therefore conclude that we cannot say, as a matter of law, that the unions' conduct falls within the antitrust exemption for labor organizations. Accordingly, we must deny the labor unions' motion for partial summary judgment.

It Is So Ordered.



Ralston v. Capper

United States District Court for the Eastern District of Michigan, Southern Division

September 14, 1983

Civil Action No. 82-74645

Reporter

569 F. Supp. 1575 *; 1983 U.S. Dist. LEXIS 13780 **

JAMES RALSTON and KIRK S. RADO, individually, and on behalf of other persons similarly situated, Plaintiffs, v. BRADFORD G. CAPPER, VIRGINIA B. CAPPER, ELIZABETH CAPPER, individually, ALEX FURDA and ZOYA FURDA, individually and d/b/a FURDA BIO-CHEMICAL BIOPSY; and BRADFORD G. CAPPER, D.O., P.C., a Michigan corporation, Defendants

Core Terms

organized crime, enterprise, provisions, courts, racketeering activity, legislative history, racketeering, antitrust, plaintiffs', predicate, remedies, mail, garden variety, civil penalty, interstate, commerce, notice

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN1 [+] Racketeer Influenced & Corrupt Organizations, Remedies

A civil remedy is provided in [18 U.S.C.S. § 1964\(c\)](#): Any person injured in his business or property by reason of a violation of [§ 1962](#) of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN2 [down] Private Actions, Racketeer Influenced & Corrupt Organizations

Section 1961 of the Racketeer Influenced and Corrupt Organizations Act of 1970, ([18 U.S.C.S. § 1961](#)), supplies the definitions of the elements necessary to prove a [§ 1962\(c\)](#) violation. A "pattern of racketeering activity" is defined in [§ 1961\(5\)](#) as follows: (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

Business & Corporate Compliance > ... > Governments > State & Territorial Governments > Gaming & Lotteries

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Penalties

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > Penalties

Criminal Law & Procedure > ... > Bribery > Public Officials > General Overview

Criminal Law & Procedure > ... > Miscellaneous Offenses > Gambling > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN3 [down] State & Territorial Government Licensing, Gaming & Lotteries

"Racketeering activity" is defined in [18 U.S.C.S. § 1961\(1\)](#) as follows: (1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title [18, United States Code, section 1341](#) (relating to mail fraud).

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN4 [down] Racketeer Influenced & Corrupt Organizations Act, Elements

In the criminal context, the Sixth Circuit has defined the elements constituting a violation of [18 U.S.C.S. § 1962\(c\)](#) as: 1) engaging in an enterprise, 2) affecting interstate commerce, 3) conducted through a pattern of racketeering, and 4) involving two or more statutorily-named racketeering crimes. The conspiracy provision of [§ 1962\(d\)](#) is a separate offense, and thus for criminal purposes is not violative of double jeopardy, since it involves proof of the additional element of an agreement to violate [§ 1962\(c\)](#).

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5 [down] Racketeering, Racketeer Influenced & Corrupt Organizations Act

569 F. Supp. 1575, *1575L 1983 U.S. Dist. LEXIS 13780, **13780

Criminal Racketeer Influenced and Corrupt Organizations Act decisions have uniformly held that RICO is not limited to a judicially-created definition of "organized crime."

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

International Trade Law > General Overview

HN6 Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S. § 1962(c) provides: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN7 Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S. § 1962(d), the Racketeer Influenced and Corrupt Organizations Act conspiracy provision provides: It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN8 Amendment of Pleadings, Leave of Court

Fed. R. Civ. P. 15(a) declares that leave to amend shall be freely given when justice so requires.

Counsel: **[**1]** Fieger, Fieger & Lamping, P.C., By: William J. Lamping, Southfield, Michigan, for Plaintiffs.

Virginia B. Capper, Dearborn, Michigan, In Pro Per.

Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen, P.C., BY: D. J. Watters, John P. Jacobs, Detroit, Michigan, for Defendants Bradford G. Capper and Bradford G. Capper, D.O., P.C.

Cass S. Jaros, Detroit, Michigan, for Defendants, Alex and Zoya Furda, individually, and d/b/a Furda Bio-Chemical Biopsy.

Judges: Horace W. Gilmore, District Judge.

Opinion by: GILMORE

Opinion

[*1576] By Judge Horace W. Gilmore

By Judge Horace W. Gilmore

This action is brought under the Racketeer Influenced and Corrupt Organizations Act of 1970, [18 U.S.C. 1961, et seq.](#) ("RICO"). [HN1](#) A civil remedy is provided in [§ 1964\(c\)](#):

Any person injured in his business or property by reason of a violation of [§ 1962](#) of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Plaintiffs charge defendants with fraudulent, illegal and corrupt activities in providing medical treatment and related medical services to patients. [*2] Bradford Capper, D.O., was a medical practitioner who operated a "Suburban Clinic" in Livonia, Michigan. His sister, Virginia Capper, was the attorney and secretary for Bradford Capper, D.O., P.C. Elizabeth Capper, his wife, [*1577] was the Vice-President and Treasurer of the Corporation, and Alex Furda and his wife Zoya operated Furda Bio-Chemical Biopsy, a blood-testing service located in Lansing, Michigan.

Plaintiffs in the instant case are former patients who received medical services from defendants.¹ They allege they have been injured monetarily and otherwise by the fraudulent activities of defendants.

It is plaintiffs' allegation that they were victims of a Medicaid fraud scheme. [*3] ² Plaintiffs allege that Dr. Capper, and those associated with him, billed them and Medicaid, as well as other insurance carriers, for work and tests that were never performed. They further allege that unnecessary tests were performed upon plaintiffs, inflicting physical and mental injury. The Furdas are alleged to have taken part in the scheme by performing unnecessary and fraudulent blood tests. Plaintiffs allege a scheme to defraud, and a conspiracy on the part of all defendants. In addition, they allege that defendants used the mails in furtherance of their scheme to defraud, in violation of [18 U.S.C. § 1341](#), the federal mail fraud statute. They further allege that each of the plaintiffs was injured in his or her business or property by reason of the acts and conduct of the defendants.

[*4] In their motions to dismiss, defendants essentially argue that, although their activities may literally fall within the words of the RICO Statute, they are not within its spirit or purpose. They argue that RICO was not intended to provide a federal treble-damage remedy for "garden variety" state fraud claims, and cite many U.S. district court cases which evince judicial hostility towards civil RICO claims.

RICO is part of Title IX of the Organized Crime Control Act of 1970, Public Law No. 91-452, 84 Stat 922 (1970). In the statement of findings and purposes, the Statute states:

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

[Section 1962\(a\)-\(d\)](#) of RICO contains the prohibited activities which are made subject to criminal penalties under § 1963 and civil penalties under [§ 1964](#). Although the criminal penalties have been widely employed in the last

¹ The complaint alleges that plaintiffs are bringing the case both individually and as part of a class of patients injured by the defendants, but, as of this date, no motion for class certification has been brought or granted. Thus, at this point, we are concerned only with allegations made by plaintiffs as individuals.

² Although not part of the pleadings, and thus not directly relevant to the motion presently before the Court, the Court notes that this allegation is not fanciful -- Dr. Capper pled guilty to Medicaid fraud in state court.

decade and are subject to many appellate decisions, [**5] until very recently the civil penalties were rarely used and there is a relative scarcity of appellate opinions dealing with civil penalties under RICO.

HN2  [Section 1961](#) of RICO supplies the definitions of the elements necessary to prove a [§ 1962\(c\)](#) violation. A "pattern of racketeering activity" is defined in [§ 1961\(5\)](#) as follows:

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

HN3  "Racketeering activity" is defined in [Section 1961\(1\)](#) as follows:

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title [18, United States Code, . . . section 1341](#) (relating to mail fraud), . . .

HN4  In the criminal context, the Sixth Circuit has [**6] defined the elements constituting a violation of [§ 1962\(c\)](#) as: 1) engaging in an enterprise, 2) affecting interstate commerce, 3) conducted through a pattern of racketeering, and 4) involving two or more statutorily-named racketeering crimes. *United States v. Sutton*, 642 F.2d 1001, 1008 (6th Cir. 1980) (en banc), cert. denied, 453 U.S. 912, 101 S. Ct. 3143, 69 L. Ed. 2d 995 (1981). The conspiracy provision of [§ 1962\(d\)](#) is a separate offense, and thus for criminal purposes is not violative of double jeopardy, since it involves proof of the additional element of an agreement to violate [§ 1962\(c\)](#).

[*1578] Many federal district courts have sustained a narrow reading of the RICO statute when civil penalties are at stake.³ [**8] This Court finds no basis, however, for sustaining a narrow reading of the RICO statute when civil penalties are at stake, nor is there any basis for establishing additional court-imposed requirements for civil RICO violations in face of the clear language of the RICO statute. To put it simply, courts "are without authority to restrict the application of the statute" beyond its statutory language. [United States v. Turkette](#), 452 U.S. 576, 587, [\[*71\] 69 L. Ed. 2d 246, 101 S. Ct. 2524 \(1981\)](#). This position is not only clearly mandated by the Supreme Court's holding in *Turkette*, but it is also reflected in a growing number of appellate decisions that reject narrow readings of civil RICO suits. See [USACO Coal Company v. Carbomin Energy, Inc.](#), 689 F.2d 94 (6th Cir. 1982), upholding an injunction in a civil RICO action founded on the corporate promoter's breach of fiduciary duty.⁴ See also [Bennett v. Berg](#), 685 F.2d 1053 (8th Cir. 1982), aff'd, [710 F.2d 1361 \(8th Cir. 1983\)](#) (en banc), and [Schacht v. Brown](#), 711 F.2d 1343 (7th Cir. 1983). This reasoning is also supported by the clear weight of recent commentary. See Tarlow, *RICO Revisited*, 17 Georgia L. Rev., 291, 305 (1983); Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 Am. Crim. L. Rev. 655 (1982); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101 (1982).

Defendants contend that the RICO statute was not intended by Congress to reach "garden variety" fraud or mere medical malpractice, and that Congress did not intend for [§ 1964\(c\)](#) to federalize already existing state common law remedies such as traditional common law fraud remedies. There is nothing in the plain language of RICO to support this contention. On the contrary, Title IX contains a clause stating: "The provisions of this title . . . shall be

³ See, e.g., [Moss v. Morgan Stanley, Inc.](#), 553 F. Supp. 1347 (S.D.N.Y. 1983); [Harper v. New Japan Securities](#), 545 F. Supp. 1002 (C.D. Cal. 1982); [Van Schaick v. Church of Scientology](#), 535 F. Supp. 1125 (D. Mass. 1982); [Adair v. Hunt International Resources Corp.](#), 526 F. Supp. 736 (1981); [Waterman Steamship Corp. v. Avondale Shipyards](#), 527 F. Supp. 256 (E.D. La. 1981); [North Barrington Development, Inc. v. Fanslow](#), 547 F. Supp. 207 (N.D. Ill. 1980). This includes cases in this district. See, e.g., [Barker v. Underwriters At Lloyd's, London](#), 564 F. Supp. 352 (E.D. Mich. 1983); [Landmark Savings & Loan v. Rhoades](#), 527 F. Supp. 206 (E.D. Mich. 1981).

⁴ That court noted that "Congress intended that RICO be liberally construed to effectuate its remedial purposes." [689 F.2d 95, n.1](#).

569 F. Supp. 1575, *1578-1983 U.S. Dist. LEXIS 13780, **7

liberally construed to effectuate its remedial purposes." The statement of findings and purpose of the statute speaks of "new remedies," clearly indicating an intent to add to already existing remedies.

Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983) is the most recent appellate case dealing with RICO's civil damage provisions. There the Illinois State Director of Insurance brought an action to recover for alleged RICO violations by officers, directors, and the parent corporation, who allegedly continued an [**9] insurer in business past the point of insolvency and looted the insurer of its most profitable and least risky business. A motion to dismiss was denied in the trial court, and on interlocutory appeal the court of appeals held that the state director's RICO complaint sufficiently alleged a causal nexus between RICO proscribed conduct and insurer's damage to meet the requirements of RICO's civil damage provisions. The court dealt at length with the defendant's contention that the injury which the Director alleged was not compensable under the civil damage provisions of RICO, and rejected such argument. The main argument of the defendant was that, even though RICO might literally apply to its situation, Congress did not intend the statute to reach so far. The defendant argued, as the defendants have argued here, that it would be unreasonable to federalize the common law of "garden variety" business frauds.

The court rejected the argument:

We agree that the civil sanctions provided under RICO are dramatic, and will have a vast impact upon the federal-state division of substantive responsibility for redressing illegal conduct, but, like most courts who have considered this [**10] issue, we believe that such dramatic consequences are necessary incidents of the deliberately broad swath Congress chose to cut in order to reach the evil it sought; we are therefore without authority to restrict the application of the statute . . . (citations omitted).

Id. at 1353.

After a lengthy analysis, the court said this:

[*1579] In short, while we are mindful of the jurisprudential maxim that statutes are not to be interpreted woodenly and without regard to their aim, we do not see how any legitimate or principled tailoring of RICO could be effected without impairing the broad strategy embodied in the act. If Congress wishes to avoid the inclusion under RICO's umbrella of "garden variety" fraud claims involving the operation of enterprises through mail and securities fraud, it may easily do so through removing mail and securities fraud from the list of predicate acts enumerated in § 1961. That is not, however, a program which may be undertaken by this court.

...

Id. at 1356.

Defendants further point to the legislative history of RICO, which establishes that Congress was concerned with "organized crime," and enacted RICO as a weapon in [**11] the combat against organized crime, especially the infiltration of legitimate businesses by organized crime elements. No one can quarrel with this analysis of the legislative history. What one quarrels with is the conclusion, uniformly rejected in the criminal RICO case law, that, because of this, RICO is to be read as creating a "status" offense, limited to a judicially-created definition of what constitutes "organized crime." No court has accepted this analysis.

HN5 [↑] Criminal RICO decisions have uniformly held that RICO is not limited to a judicially-created definition of "organized crime." United States v. Martino, 648 F.2d 367 (5th Cir. 1981); United States v. Uni Oil, Inc., 646 F.2d 946 (5th Cir. 1981); United States v. Aleman, 609 F.2d 298 (7th Cir. 1979); United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977). RICO criminal prosecutions have been upheld against members of the Hell's Angels Motorcycle Club, an attorney charged with investing money derived from a client's drug dealing, a large Japanese corporation, state legislators, union leaders, oil companies, and state prosecuting attorneys' offices. See *Tarlow, supra*, at 299-300, and cases cited therein. [**12] The Sixth Circuit has held that the office of the Governor of the State of Tennessee could be charged as a RICO "enterprise." United States v. Thompson, 685 F.2d 993 (6th Cir. 1982) (en banc), cert. denied, 459 U.S. 1072, 103 S. Ct. 494 (1982).

569 F. Supp. 1575, *1579 (1983 U.S. Dist. LEXIS 13780, **12

In the face of this overwhelming authority in the criminal context, there simply is no basis to conclude that civil RICO suits should be construed more narrowly.

There are good reasons for not reading into RICO a definition of "organized crime." First, Congress explicitly rejected an attempt to restrict the scope of RICO to "the Mafia" or "La Cosa Nostra." This rejection was based on well-grounded fears of the unconstitutionality of the creation of a "status offense," which would limit the application of the statute to a specified group in society.

Secondly, Congress feared that a narrow definition of the groups Congress was trying to reach through RICO would unnecessarily limit the scope of the statute and weaken the ability of Congress to combat organized crime. See Note, *Civil RICO, supra*, at 1106-1109.

In light of all of this, it seems clear that RICO creates a functional offense rather than a status offense. It [**13] is aimed at conduct, and if the conduct meets the definitions provided in the statute, then the conduct is within the meaning of the statute. To hold otherwise would simply create too much judicial discretion in defining what constitutes "organized crime." Where the RICO statute itself defines the offense, there is no reason to allow courts to impose additional definitions according to their own conceptions of what "organized crime" is or is not.

Similarly, there is no basis in the statute itself, or in the legislative history, for concluding Congress could not have intended the civil RICO provisions to possibly intrude on areas of state law. The Supreme Court noted in *Turkette, supra*:

The language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions There is no argument that Congress acted beyond its power in so doing. That being the case, the courts are without authority to restrict the application of the statute.

[**14] *Id. at 586-87.*

Although *Turkette* was a criminal prosecution, there is nothing in the statute to indicate that this rationale should not apply to RICO civil remedies. Defendants [*1580] "floodgates" argument that federal courts will be overwhelmed with state "garden variety" fraud claims has no basis in fact. Nor is it true that a RICO "fraud" claim is identical to a state common law fraud claim. There must be an enterprise, there must be an effect upon interstate commerce before RICO can come into effect, and there must also be two predicate offenses. All of the separate elements of a 1962(c) or 1962(d) claim must be proven by plaintiffs, including the predicate racketeering acts, their impact on interstate commerce, and the existence of an enterprise. These requirements will be strictly adhered to.

An additional argument made by defendants, and accepted by some district courts, is that in order to establish standing to bring a claim under § 1964(c) plaintiffs must establish some kind of "competitive injury," see *North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207 (N.D. Ill. 1980); "commercial harm," *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125 (D.Mass. 1982); or "racketeering enterprise injury", *Landmark Savings & Loan v. Rhoades*, 527 F. Supp. 206 (E.D. Mich. 1981). This Court has great difficulty in understanding the precise meaning of these requirements, which are never defined, and even more difficulty finding a statutory source for these requirements.

These additional standing requirements appear to be based on a strained analogy to antitrust law, based upon references in RICO's legislative history to antitrust precedent, particularly as a basis for treble damage provisions. However, analogies to limitations on standing in the antitrust context are entirely inappropriate here. The antitrust laws are designed to promote competition in the marketplace, and courts have been concerned that the use of treble damage provisions in antitrust cases could threaten a company with economic ruin and thus reach a result contrary to the very purpose of the antitrust laws and reduce competition in the market place.

RICO has the opposite purpose. It is precisely designed to *ruin* those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from insolvency. [**16] Thus, the rationale behind the antitrust standing concerns have no applicability here. See *Schact v. Brown, supra at 1357-58.*

Finally, given the ample record in the legislative history concerning Congress's recognition that the victims of organized crime extend to all social categories, including workers, consumers and the poor,⁵ there is simply no basis for imposing a judicially-created standing requirement limiting recovery under [§ 1964\(c\)](#) to businessmen, or those suffering from an undefined "racketeering enterprise" injury, since nothing in the statute or legislative history authorizes such a limitation. Obviously, there is no rationale for excluding Medicaid fraud victims from the scope of civil RICO.

[**17] Although [§ 1964\(c\)](#) requires a specific violation of [§ 1962](#) in order to have a claim for civil relief, nowhere do plaintiffs plead a specific violation of [§ 1962](#). Liberally construing plaintiffs' claims, as the Court is required to do in considering a Rule 12(b)(6) motion, *Conley v. Gibson, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*, it is clear that the violations of [§ 1962](#) most applicable to plaintiffs' claims are [HN6](#) [↑] [§ 1962\(c\)](#):

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[HN7](#) [↑] and [§ 1962\(d\)](#), the RICO conspiracy provision:

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section. Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.

Further, although plaintiffs plead a violation of [18 U.S.C. § 1341](#), mail fraud, in their complaint, the Court notes that they do not plead [**18] the two predicate acts within 10 years necessary to sustain a claim of "pattern of racketeering" activity under [§ 1961\(5\)](#).

It is thus clear that there are some deficiencies in plaintiffs' pleadings. The Court [*1581] has held it is without authority to narrow the application of [§ 1964\(c\)](#) or impose additional requirements in face of the clear language of the statute. By the same token, this Court must insist that the statutory language be strictly adhered to. It necessarily follows that the Court must also insist that plaintiffs adhere to statutory requirements in pleading their claim.

The technical requirements for a RICO [§ 1964\(c\)](#) claim must be strictly adhered to because the statute is a relatively specific one, designed to accomplish certain Congressional intent. In face of the difficulties courts have had in interpreting the provisions of RICO, and also in face of the treble damage liability which defendants are subject to, it is imperative that the court and the defendants be placed on clear notice as to what is being alleged, and what the substance of the claim is, in order to facilitate a decision on the merits of the case. It is also in keeping with the policies [**19] of the Federal Rules of Civil Procedure where allegations of fraud are involved. See [F.R.C.P. 9\(b\)](#) (allegations of fraud to be stated with particularity).

As noted earlier, there are several deficiencies in plaintiffs' complaint. Although [§ 1964\(c\)](#) requires a specific violation of [§ 1962](#) in order to bring a claim for civil relief, plaintiffs have not pled any specific violation of [§ 1962](#). Defendants are clearly entitled to have notice of which specific provisions of [§ 1962](#) plaintiffs are relying on. If plaintiffs are also relying on a conspiracy theory, in addition to a substantive violation, this must be pled separately as well.

⁵ "Business competitors suffer unfair competition. Workers are the victim of sweetheart labor contracts. And consumers are victims of inferior products and services, price fixing and . . . other predatory practices." 116 Cong. Rec. 35201 (Oct. 6, 1970, remarks of Rep. McCulloch). The President's Commission on Law Enforcement also noted: "In all of these illicit operations the 'customers' -- in reality the victims -- are the people least able to afford criminal exploitation. They are the poor, the uneducated, and the culturally deprived. . ." 113 Con. Rec. 18004 (Report, "Organized Crime -- Challenge to a Free Society").

Looking further at the test for a § 1962 violation established in *United States v. Sutton, supra*, the plaintiffs have not pled a "pattern of racketeering activity" which must consist of two or more predicate acts within the last 10 years. Defendants have an absolute right to know which predicate acts plaintiffs rely upon that they must defend against. In addition, plaintiffs must plead an effect on interstate commerce under § 1962(c).

Finally, plaintiffs have not pled an "enterprise" within the meaning of § 1961(4), a required element **[**20]** in a § 1964(c) claim. Defendants are entitled to have notice of the type of "enterprise" that they as "persons" were "employed by" or "associated with". The plaintiffs' complaint does not give them that notice.

HN8 [↑] F.R.C.P. 15(a) declares that leave to amend "shall be freely given when justice so requires." The purpose of pleading is to facilitate a decision on the merits of a lawsuit. There will be no substantial prejudice to defendants if plaintiffs are granted a reasonable time to amend their complaint to comply with the RICO statute and the views expressed in this opinion.

The Court will give plaintiffs 30 days from the date of this opinion to amend its complaint. If the complaint is not amended within that time, defendants' motion to dismiss will be granted. If the complaint is amended by that time, defendants will have 30 days to raise any questions about the sufficiency of the complaint by motion. If such amended complaint is filed and defendants do not raise the questions as to the sufficiency of the amendment within 30 days, defendants' motion to dismiss will be denied. If defendants raise questions of the sufficiency of the amended complaint, the matter will be noticed **[**21]** on for hearing before the Court to determine if the amended pleading does comply with the requirements of RICO.

An order in accordance with this opinion may be presented.

End of Document



Wilk v. American Medical Asso.

United States Court of Appeals for the Seventh Circuit

January 20, 1982, Argued ; September 19, 1983, Decided

No. 81-1331

Reporter

719 F.2d 207 *; 1983 U.S. App. LEXIS 16798 **; 1983-2 Trade Cas. (CCH) P65,617

CHESTER A. WILK, D.C., JAMES W. BRYDEN, D.C., PATRICIA A. ARTHUR, D.C., STEVEN G. LUMSDEN, D.C., and MICHAEL D. PEDIGO, D.C., Plaintiffs-Appellants, v. AMERICAN MEDICAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, AMERICAN COLLEGE OF SURGEONS, AMERICAN COLLEGE OF PHYSICIANS, JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, AMERICAN COLLEGE OF RADIOLOGY, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, ILLINOIS STATE MEDICAL SOCIETY, H. DOYL TAYLOR, JOSEPH A. SABATIER, M.D., H. THOMAS BALLANTINE, M.D., JAMES H. SAMMONS, M.D., Defendants-Appellees

Prior History: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 76 C 3777 -- Nicholas J. Bua, Judge.

Core Terms

chiropractors, medical doctor, chiropractic, instructions, motive, defendants', rule of reason, Principles, patients, ethical, boycott, Quackery, facilities, profession, district court, Sherman Act, per se violation, public interest, accreditation, plaintiffs', patient care, conspiracy, questions, genuineness, medical ethics, promotes, suppress, coercive, anticompetitive, antitrust

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Penalties

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

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

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

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

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

719 F.2d 207, *207L^A1983 U.S. App. LEXIS 16798, **1

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

HN1 Sherman Act, Penalties

Section 1 of the Sherman Act, [15 U.S.C.S. § 1 \(1979\)](#), declares illegal every contract, combination or conspiracy in restraint of trade or commerce. Sherman Act, [15 U.S.C.S. § 2 \(1979\)](#), prescribes penalties for 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.

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

HN2 Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

A boycott is nothing more than an agreement among a number of economic actors to sever or limit economic relations with another economic actor or actors.

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN3 Jury Trials, Jury Instructions

A court must look to the jury instructions as a whole, in a common sense manner, avoiding fastidiousness, in inquiring whether the correct message is conveyed to the jury reasonably well. Even if the court discerns error in one or more instructions, the court will not reverse a judgment unless it is persuaded the jury's understanding of the issues was seriously affected, to the prejudice of the plaintiffs.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Trials > Jury Trials > General Overview

719 F.2d 207, *207L^A1983 U.S. App. LEXIS 16798, **1

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

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

Before the jury is free to find a per se violation of the Sherman Act, [15 U.S.C.S. § 1 \(1979\)](#), the trial court must determine that there is evidence from which the jury may find that the defendants engaged in certain conduct -- for example, a horizontal agreement among competitors to fix prices charged to consumers -- which conduct, the court (not the jury) must decide, constitutes a per se violation. In such a case, the court must explain to the jury that its function is to decide whether certain conduct, described with precision in the instruction, did or did not occur. It must be explained, also, that if the jury finds that the described conduct did occur, it must also find, without further factual inquiry, that [§ 1](#) was violated. In this important respect, the verdict as to a per se violation must be controlled by the court.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN5 [↓] Regulated Practices, Price Fixing & Restraints of Trade

The members of learned professions and their professional associations are within the terms of the Sherman Act, [15 U.S.C.S. § 1 \(1979\)](#).

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

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

HN6 [↓] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se -- for example price-fixing agreements.

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

HN7 [↓] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

719 F.2d 207, *207L^A1983 U.S. App. LEXIS 16798, **1

The inquiry mandated by the "Rule of Reason" is whether the challenged agreement is one that promotes competition or one that suppresses competition.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Regulated Industries, Higher Education & Professional Associations

The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act, [15 U.S.C.S. §§ 1 et seq. \(1979\)](#), in another context, be treated differently.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Antitrust & Trade Law, Sherman Act

Private persons and entities may not presume to function as an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN10[] Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine extends protection to businesses and other associations when they join together to petition legislative bodies, administrative agencies, or courts for action that may have anticompetitive effects.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Regulated Industries, Higher Education & Professional Associations

It is not essential to a conspiracy under the Sherman Act that the conspirators possess or demonstrate their power to carry out their anticompetitive plan.

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

719 F.2d 207, *207L^A 1983 U.S. App. LEXIS 16798, **1

[HN12](#) [blue download icon] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Even without coercive enforcement, a court may find that members of an association promulgating guidelines sanctioning conduct in violation of the Sherman Act, [15 U.S.C.S. § 1 \(1979\)](#), have participated in an agreement to engage in an illegal refusal to deal.

Business & Corporate Compliance > ... > Healthcare Law > Business Administration & Organization > Accreditation

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

[HN13](#) [blue download icon] Business Administration & Organization, Accreditation

Apparent authority of an employee is sufficient to support civil antitrust liability on the part of a standard-setting organization.

Antitrust & Trade Law > Clayton Act > Defenses

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > Unclean Hands

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN14](#) [blue download icon] Clayton Act, Defenses

Where admission of evidence creates such a danger of unfair prejudice and confusion of issues, it is an abuse of discretion not to exclude it under [Fed. R. Evid. 403](#).

Counsel: Attorneys for Plaintiffs, Chester A. Wilk, D.C.; James W. Bryden, D.C.; Patricia B. Arthur, D.C.; Steven G. Lumsden, D.C.; and Michael D. Pedigo, D.C.

George P. McAndrews, Timothy J. Malloy, Robert C. Ryan Allegretti, Newitt, Witcoff & McAndrews, Chicago, Illinois.

Paul E. Slater, Sperling, Slater & Spitz, Chicago, Illinois.

Gerald D. Hosier, Hosier, Niro & Daleiden, Ltd., Chicago, Illinois.

Attorneys for Defendants, American Medical Association, H. Doyl Taylor, Dr. Joseph A. Sabatier, Jr., M.D., Dr. H. Thomas Ballantine, Jr., M.D., & Dr. James H. Sammons, M.D.

Max Wildman, Douglas R. Carlson, Michael L. McCluggage, Ann C. Petersen, Dean S. Daskal, Wildman, Harrold, Allen & Dixon, One IBM Plaza, Chicago, Illinois.

Newton N. Minow, Jack R. Bierig, Sidley & Austin, One First National Plaza, Chicago, Illinois.

Bernard D. Hirsh, B.J. Anderson, American Medical Association, Chicago, Illinois.

Attorneys for the American Hospital Association

Dennis C. Waldon, W. Thomas Huyck, Roan & Grossman, Chicago, Illinois.

[**2] Jay H. Hedgepeth, American Hospital Association, Chicago, Illinois.

Attorneys for the American College of Surgeons.

Paul G. Gebhard, Allen E. Lapidus, Douglas J. Polk, Vedder, Price, Kaufman & Kammholz, Chicago, Illinois.

Attorneys for the American College of Physicians.

Phil C. Neal, Stephen C. Shamborg, Rowe W. Snider, Friedman & Koven, Chicago, Illinois.

Attorneys for the Joint Commission on Accreditation of Hospitals.

Daniel M. Schuyler, Bruce K. Roberts, James L. Simon, Schuyler, Ballard & Cowen, Chicago, Illinois.

Attorneys for the American College of Radiology.

Reuben L. Hedlund, James A. Cherney, John R. McCambridge, Hedlund, Hunter & Lynch, Chicago, Illinois.

Attorneys for the American Academy of Orthopaedic Surgeons.

Perry L. Fuller, D. Kendall Griffith, Robert E. Nord, Hinshaw, Culbertson, Moelmann.

Hoban & Fuller, Chicago, Illinois.

Attorneys for the Illinois State Medical Society.

Logan T. Johnston III, Neil E. Holmen, Winston & Strawn, One First National Plaza, Chicago, Illinois.

Judges: Swygert, Senior Circuit Judge, Sprecher, * Circuit Judge, and Doyle, Senior District Judge. ** [**3]

Opinion by: DOYLE

Opinion

[*211] DOYLE, Senior District Judge.

Plaintiffs appeal from a judgment entered on a jury verdict in favor of defendants-appellees. Plaintiffs, five licensed chiropractors, charged defendants-appellees ¹ [**4] with violating [sections 1 and 2](#) of the Sherman Act, [15 U.S.C. §§ 1 and 2 \(1979\)](#).² Plaintiffs alleged that defendants engaged in a combination and conspiracy to eliminate the chiropractic profession through refusing to deal with plaintiffs and other chiropractors. Plaintiffs alleged defendants implemented the group boycott by agreeing to induce individual medical doctors to forego any form of professional, research, or educational association with chiropractors, to induce hospital and other health care facilities to deny access to chiropractors, and to induce actual and prospective patients of chiropractors to avoid seeking chiropractic

* Judge Sprecher heard oral argument and participated in the conference which followed. He died May 15, 1982, and did not participate in the preparation or approval of this opinion.

** James E. Doyle, a Senior United States District Judge for the Western District of Wisconsin, is sitting by designation.

¹ Two defendant medical organizations settled prior to trial and thus were not parties to the judgment. Plaintiffs have not appealed from the judgment in favor of one defendant, the Chicago Medical Society. Plaintiffs' complaint named individual members of the defendant associations as co-conspirators but not as defendants.

² [Section 1](#) of the Sherman Act [HN1](#) [↑] declares illegal "every contract, combination . . . , or conspiracy in restraint of trade or commerce. . . ." [15 U.S.C. § 1 \(1970\)](#). [Section 2](#) prescribes penalties for "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. . . ." [15 U.S.C. § 2 \(1970\)](#).

services. Plaintiffs also alleged that through this agreement, defendants attempted to monopolize and conspired to monopolize certain health care markets.³

[**5] I. GROUNDS OF APPEAL

Plaintiffs' principal ground of appeal is that the court's instructions gave the jury to understand, incorrectly, that a boycott by defendants, resulting in a diminution of competition between chiropractors and medical doctors, was lawful if the boycott was the product of a genuine belief by medical doctors that chiropractic is dangerous quackery. Because the district court embraced this incorrect view of the law, plaintiffs contend, it received in evidence, erroneously and over objection, much prejudicial material concerning the alleged evils of chiropractic. Plaintiffs contend also that the jury was incorrectly instructed on the application of the [first amendment](#) in the circumstances.

The remaining grounds of appeal relate to: jury instructions on coercive enforcement of ethical canons as an essential element of a conspiracy of the type alleged; jury instructions relating to apparent authority of agents; the trial court's handling of the "unclean hands" concept; and the trial court's refusal to permit reopened discovery into settlement negotiations.

Defendants-appellees dispute all of these contentions, of course. Five of the organization defendants [**6] (JCAH, AHA, ACP, ACS, and ISMS) raise a further argument. Each claims that its motion for a directed verdict was erroneously denied by the district court. Each asserts that the evidence was insufficient to support a jury finding that it was a member of a conspiracy. Thus, each contends, the judgment they won should be affirmed even if the judgment in favor of the other defendants were to be reversed on one ground or another.

In the following section headed "Facts," we set forth those propositions which a reasonable jury might have found as fact and which might arguably have prompted a verdict in plaintiffs' favor, had the jury been instructed as plaintiffs contend it should have been and had the jury been [*212] protected from the allegedly prejudicial evidence. We set forth, also, those facts concerning the involvement of JCAH, AHA, ACP, ACS, and ISMS in the alleged conspiracy which a reasonable jury might have found from the evidence, viewed most favorably to the plaintiffs.

II. FACTS

The American Medical Association (AMA) is a nonprofit corporation with a membership of over 200,000 medical doctors, which is nearly half the total number of medical doctors in the United [**7] States. AMA is a federation of independent state and territorial medical societies, each of which appoints representatives to the House of Delegates of the national organization. The House of Delegates elects the AMA Board of Trustees. AMA is heavily involved in this country's professional and public medical education programs. AMA also publishes numerous professional journals, receives and responds to questions from the public on medical subjects, and engages in legislative lobbying. AMA promulgates the Principles of Medical Ethics, which are interpreted by its Judicial Council.

The American Hospital Association (AHA) is a nonprofit corporation composed of 7,000 organization members and 30,000 individual members. Approximately 6,000 of the 7,000 hospitals in the United States belong to AHA. AHA publishes several periodicals and manuals on various topics related to hospital operations. It also collects statistics on hospitals, sponsors educational programs, and reviews and responds to governmental activities relevant to hospital operations.

³ On appeal, plaintiffs raise no claim based solely on § 2. They assert conclusorily that the trial court erred with regard to those claims in its jury instructions on conspiracy, its failure to instruct the jury that good motives do not constitute a defense to either § 1 or § 2 violations, and its admission of evidence on defendants' public health and welfare motives. They do not present specific argument on these issues. Since we treat each of these points in light of plaintiffs' § 1 claims, and since plaintiffs failed to raise the § 2 claims in any meaningful fashion on appeal, we do not address separately their general assertion of claims based solely on § 2.

The American College of Surgeons (ACS) is a nonprofit corporation having as its members about 40,000 of the 100,000 American physicians [**8] who identify themselves as surgeons. ACS takes public positions on relevant issues and sometimes expresses those positions to legislative and administrative bodies.

The American College of Physicians (ACP) is a nonprofit corporation composed mainly of physicians who specialize in internal medicine. Its chief function is to conduct continuing education programs for members and nonmembers.

The Joint Committee on Accreditation of Hospitals (JCAH) is a nonprofit corporation having AMA, AHA, ACS, ACP, and the American Dental Association as its members. The member organizations appoint representatives to the JCAH Board of Commissioners, the policy-making body of JCAH. JCAH operates a health care facilities accreditation program, in which it establishes standards for accreditation and conducts surveys of individual institutions when they so request. If a facility meets JCAH standards, that facility is accredited.

The American College of Radiology (ACR) is a nonprofit corporation with approximately 13,000 members, most of whom are medical doctors specializing in radiology. It is active in education and research, and it furnishes advice and information to government, private industry, [**9] and health care professionals concerning radiation protection and the practice of radiology.

The American Academy of Orthopaedic Surgeons (AAOS) is a nonprofit corporation composed of about 9,000 medical doctors who specialize in orthopaedic surgery. More than 75 percent of the total number of board-certified orthopaedic surgeons in the United States belong to AAOS. AAOS conducts continuing medical education courses for practicing orthopaedic surgeons and persons working in related areas, including orthopaedic nursing, occupational therapy, physical therapy, and manufacturing braces and artificial limbs.

The Illinois State Medical Society (ISMS) is a state medical society with approximately 14,000 medical doctors as members. ISMS is one of the fifty state medical societies that comprise AMA.

Doyl Taylor was employed by AMA and served as director of the AMA Department of Investigation and as secretary to the AMA Committee on Quackery. Joseph A. Sabatier, Jr., M.D., and H. Thomas Ballantine, Jr., M.D., both served on the AMA [*213] Committee on Quackery as members and chairmen. James H. Sammons, M.D., was a member of the AMA Board of Trustees.

Chiropractic is a health [**10] care service. Its primary therapeutic tool is spinal manipulation.⁴ Chiropractors and medical doctors treat some of the same medical problems. Chiropractors would treat some patients in health care facilities and would use hospital X-ray and laboratory services if such treatment and use were permitted.

In Illinois, Michigan, California, Colorado, and Missouri, five states where plaintiffs have practiced, there were no laws in effect during the time relevant to this lawsuit that prohibited chiropractors from furnishing care in a hospital under the supervision of a medical staff member, nor were there laws preventing hospitals from providing X-ray or laboratory services to chiropractors or preventing hospital X-ray departments or radiologists from making X-ray films or copies of X-rays available to chiropractors at the request of their patients.

Principle 3 of the AMA Principles [**11] of Medical Ethics in effect during the alleged boycott provided: "A physician should practice a method of healing founded on a scientific basis; and he should not voluntarily professionally associate with anyone who violates this principle."

At its meeting on November 2 and 3, 1963, the AMA Board of Trustees voted to establish a "Committee on Quackery" (Committee). The Committee was active from that time until 1974. It considered "its prime mission to be, first, the containment of chiropractic and ultimately, the elimination of chiropractic." Memorandum to AMA Board of Trustees from Committee on Quackery, January 4, 1971. During these years, the AMA also operated a

⁴ Spinal manipulation also is practiced by osteopathic physicians, physical therapists, and a small number of medical doctors.

Department of Investigation (Department), a clearing-house for information on healing methods AMA deemed unscientific.

In December of 1966, upon the recommendation of the Committee and the AMA Board of Trustees, the AMA House of Delegates adopted a resolution asserting: "It is the position of the medical profession that chiropractic is an unscientific cult whose practitioners lack the necessary training and background to diagnose and treat human disease." This resolution, together with Section 3 of the Principles [**12] of Medical Ethics, was incorporated into the Opinions and Reports of the Judicial Council.

The Committee characterized this policy statement as follows:

This was the necessary tool with which your Committee has been able to widen the base of its chiropractic campaign. With it, other health-related groups were asked and did adopt the AMA policy statement or individually-phrased versions of it. These, in turn led to even wider acceptance of the AMA position.

...

The hoped-for effect of this widened base of support was and is to minimize the chiropractic argument that the campaign is simply one of economics, dictated and manipulated by the AMA.

Memorandum, *supra*, at 2.⁵

[**13] The Committee and the Department prepared numerous publications critical of chiropractic for distribution to medical professionals and laypersons. The Committee was extensively involved in legislative work at state and national levels on such matters as chiropractic licensing and Medicaid and Medicare reimbursement for chiropractic services. Among its other activities were sending letters warning medical boards and associations that professional cooperation and association between chiropractors and physicians were unethical and attempting to discourage colleges, universities, and faculty [*214] members from cooperating with chiropractic schools.

Codefendant organizations AHA, ACS, ACP, JCAH, ACR, AAOS, and ISMS communicated in various ways with defendant AMA and its Committee on Quackery. Some codefendant staff members attended meetings and a conference of chiropractic sponsored by the Committee. Codefendant staff members also discussed with Committee members ways of responding to inquiries from individual physicians and hospitals concerning possible professional cooperation with chiropractors. Representatives of three codefendant associations joined with AMA to form defendant [**14] JCAH and to determine requirements for JCAH accreditation. The JCAH accreditation manual asserted that a hospital permitting chiropractors to use its facilities would "very probably" lose its accreditation. Some codefendant organizations adopted the AMA Principles of Medical Ethics, including Principle 3.

Through such mechanisms, individual physicians were discouraged from cooperating with chiropractors in: patient treatment, because referrals were inhibited by defendants' activities; research; and educational activities, such as sharing clinical experience and research results. Chiropractors were denied access to the hospital facilities they considered necessary to practice their professions. Medical doctors were discouraged from aiding chiropractors in interpreting electrocardiograms. Requests by individual plaintiffs to use laboratory and X-ray facilities were not granted; requests for hospital in-patient privileges were similarly denied. Referrals from medical doctors were reduced. Public demand for chiropractic services was negatively affected.

JCAH. JCAH was comprised of twenty-one members, seven appointed by AMA, seven by AHA, three by ACS, three by ACP, and one [*15] by the American Dental Association. JCAH exercised considerable power over hospitals through the mechanism of accreditation. JCAH staff members replied to letters from hospitals on chiropractors by asserting that a hospital permitting chiropractors to use its services, such as laboratory testing and X-rays, would endanger its status as an accredited institution, even if a state passed a law requiring hospitals to

⁵ This memorandum was characterized as a report of the Committee's activities during the previous seven years.

The memorandum said: "The Committee has not submitted such a report [earlier] because it believes that to make public some of its activities would have been and continues to be unwise. Thus this report is intended only for the information of the Board of Trustees."

allow chiropractors to be staff members. These letters at times referred to the AMA Principles of Medical Ethics and to an AMA publication on chiropractic. JCAH jointly published with AHA a widely distributed manual, *Hospital Accreditation References*, setting forth standards and criteria for JCAH accreditation. The manual was written by the director of JCAH. The manual contained the following statements: "The Commission looks on chiropractors as cultists. A hospital that encourages cultists to use its facilities in any way would very probably be severely criticized and lose its accreditation." The same statements appeared in a column written by the JCAH director, published in the Journal of the American Hospital Association. In its Accreditation Manual for Hospitals, **[**16]** JCAH incorporated the AMA Principles of Medical Ethics, and asserted: "Failure by the medical staff and the governing body to take all reasonable steps to ensure adherence to these ethical principles shall constitute grounds for nonaccreditation." In denying plaintiff Lumsden staff privileges, one hospital cited its unwillingness to jeopardize its JCAH accreditation.

AHA. AHA appointed commissioners to JCAH. AHA and JCAH collaborated to publish *Hospital Accreditation References*. AHA also published that material in the AHA professional journal. Dr. Shu, an AHA employee who responded on behalf of AHA to inquiries from individual hospitals concerning use of facilities by chiropractors, answered those inquiries by citing the JCAH view that accreditation would be jeopardized if such use were permitted. At the AMA "National Conference on Health Quackery -- Chiropractic," Dr. Shu attended a presentation of the "right and duty" of hospitals to exclude chiropractors. He also met informally with AMA and JCAH employees to discuss ways of answering questions from hospitals concerning chiropractors. Persons attending this meeting discussed the ethical prohibition on physicians' association **[**17]** with chiropractors. Dr. Shu had **[*215]** telephone conversations with AMA and JCAH personnel on the subject of chiropractors using hospital facilities.

ACP. ACP appointed commissioners to JCAH. Minutes from an ACP board of governors meeting in 1978 described activities of the ACP's "Ad Hoc Committee on Chiropractic."⁶ The committee was named "to suggest what might be done at the Chapter or regional level to promote the College's policy toward chiropractic." Although part of the committee's purpose was simply to inform ACP members of pending lawsuits by chiropractors against ACP, the committee also recommended that:

the Governors should remain alert to efforts of chiropractors to gain access to radiographic and clinical laboratory diagnostic facilities in their regions and keep ACP headquarters informed of such developments;
the Governors should alert colleagues in other disciplines to the efforts of chiropractors to gain access to radiographic and clinical pathology diagnostic facilities; and

the Governors and the College members in their regions should discuss these matters with their county and state medical societies and with their representatives to the **[**18]** House of Delegates of the AMA.

The ACP board of governors unanimously voted to approve the committee's report and to distribute it immediately.

ACS. ACS appointed three commissioners to JCAH. The ACS "Statement on principles" endorsed the Principles of Medical Ethics and suggested that infraction of those principles would result in disciplinary action by ACS. An ACS director attended the National Conference on Health Quackery sponsored by the AMA Committee on Quackery. A former ACS director responded **[**19]** to a request from a state medical society for the ACS position on the relationship between physicians and chiropractors by asserting: "The College has never taken an official position in regard to relationships between M.D.s and chiropractors. We have followed the lead of the AMA, which is not always entirely clear." The letter notes that this director called the AMA legal department for an answer to the inquiry, and the letter suggests the AMA be consulted for an "authoritative" opinion.

ISMS. ISMS adopted the Principles of Medical Ethics, and ISMS members are bound by the principles. ISMS appointed its own Committee on Quackery. AMA Committee on Quackery staff member Doyl Taylor spoke to the ISMS committee on AMA activities and formal positions concerning chiropractic. ISMS committee members

⁶ Defendant ACP argues that the trial court erred in admitting this exhibit, or alternatively, that the exhibit could not be the basis of an antitrust violation, because the activities it described were protected by the *Noerr-Pennington* doctrine. Some of the committee's recommendations were directed toward protected activities. But others were not. That some activities of a particular organization are protected by the [first amendment](#) does not shield all its activities, under *Noerr-Pennington*.

attended an AMA-sponsored meeting on quackery at which chiropractic was a major item of discussion. The ISMS committee endorsed the AMA House of Delegates statement labeling chiropractic an "unscientific cult." The ISMS Board of Trustees subsequently adopted this statement. The ISMS Board of Trustees had jurisdiction over all ethical questions. Doyl Taylor wrote the chair of the ISMS [**20] Committee on Quackery to suggest various meetings, referring to ISMS as "an active partner in the fight to head off chiropractic." The "Policy Manual of the Illinois State Medical Society," May, 1967, included the following statement: "The Judicial Council of the American Medical Association has ruled that it is unethical to associate VOLUNTARILY with an individual who practices as a member of a 'cult.'" (emphasis in original) In 1975, the AMA named Dr. Lees, former chairman of the ISMS Board of Trustees, to the AMA Committee on Quackery. A letter written by an ISMS staff member in 1966, complained to Doyl Taylor about the AMA position on chiropractic, but took no action to dissociate itself from that position.

[*216] III. OPINION

Plaintiffs alleged and undertook to prove that each of the defendants- appellants had done certain things at certain times, with the result that chiropractors' ability to compete with medical doctors for patient fees had been impaired. In their affirmative case, plaintiffs presented themselves and chiropractors generally as serious, unpretentious, governmentally-licensed practitioners in competition with medical doctors only within the narrow band [**21] of health services to which chiropractors limited themselves. Plaintiffs presented evidence intended to prove when and how the defendants came to a decision to trim and eventually perforate chiropractors' sails and when and how they chose and employed the means to that end. This evidence came largely from various officers and employees of the defendant organizations, called adversely, and from documents obtained from defendants' files. There was no way in which it could have been presented without revealing the low opinion of chiropractic entertained by medical doctors generally and the reasons for that opinion as stated from time to time by the medical doctors.

In plaintiffs' view of the Sherman Act, it was irrelevant whether the stated reasons, namely, ethical considerations springing from belief that chiropractic is dangerous quackery, were the true reasons or whether the true reasons were economic. But nothing was to be lost by plaintiffs, so far as the jury was concerned, by innuendo that money and not ethics spurred on the medical doctors.

In mild degree, there was dispute whether particular defendants had done the things plaintiffs alleged; in higher degree, whether [**22] there was competition between chiropractors and medical doctors; and in yet higher degree, whether defendants' conduct had in fact impaired chiropractors' ability to compete.⁷ But in the district court, before and during trial, defendants were insistent that under the Sherman Act, available defenses were that their conduct had been undertaken in the interest of public health, safety, and welfare and that their conduct had been non-commercial. The trial was dominated by defendants' efforts to persuade the jury that they had acted in the good faith belief that chiropractic is dangerous quackery. Evidence intended to show that chiropractic is indeed dangerous quackery was introduced to support the proposition that defendants' belief was genuine.

[**23] The upshot of all this was that much of the trial, and virtually all of the parties' arguments to the jury were a free-for-all between chiropractors and medical doctors, in which the scientific legitimacy of chiropractic was hotly debated and the comparative intensity of the adversaries was explored.

During the pretrial stages and the trial, the able and experienced district judge suffered from the uncertainty which marks the law of boycotts by professionals: specifically, what legal justification, if any, exists for such boycotts when their effect is to restrain competition. From time to time, understandably, he described this core issue as "unique," "new waters," and "close." On the eve of trial, he embraced plaintiffs' contention that it was irrelevant whether defendants' conduct had been undertaken in the interest of public health, safety and welfare (the "public interest defense") and whether that conduct had been non-commercial, and he struck those attempted affirmative defenses. He agreed that a trial on the validity of chiropractic should not be allowed to develop; that it was for legislatures and not defendants to decide whether chiropractic should be [**24] permitted to exist; and that even if defendants could

⁷ In part II, above, we have set forth those facts concerning what defendants actually did and with what effect, that a reasonable jury could have found from the evidence when viewed most favorably to plaintiffs. In all that follows, we will assume that the jury did make such findings. In this manner, the significance of error in the conduct of the trial, if any, can be tested.

prove that their sole motivation was a sincere and well founded belief in the dangers of chiropractic, they could not escape liability for [*217] an otherwise unlawful boycott. But simultaneously he denied a broad motion by plaintiffs, *in limine*, to exclude evidence bearing on public health, safety or welfare. He expressed the opinion that evidence pertaining to defendants' "public interest" beliefs might bear on how to view and weigh evidence that defendants did or did not conspire; that such evidence might be necessary to determine whether a *per se* violation of the Sherman Act had occurred; and, if significant in amount, such evidence might be relevant to rule of reason analysis. He also observed that such evidence would necessarily bear on the nature and availability of the equitable relief plaintiffs were seeking (in addition to money damages). So he decided that defendants' "public interest" evidence should be allowed "if it is shown that such evidence is relevant, probative, and not cumulative." From the moment of their opening statements on through the trial, defendants pressed for the admission of their "public" [**25] "interest" evidence and over repeated objection the district court received it.

Whether the district judge enjoyed discretion to receive or not to receive this evidence is a question we will address in a moment. However, it is obvious that because it was received in such abundance, the significance of the jury instructions and the form of the verdict was sharply enhanced.

Although the verdict form requested by plaintiffs, acquiesced in by defendants, and used by the district court was "special" in the sense that the questions of causation and of the amount of the damages were separated from the other questions, it was general in that question 1 was simply whether each defendant "conspired to restrain trade within the meaning of Section 1 of the Sherman Act" (and question 2, whether each defendant conspired to monopolize or attempted to monopolize within the meaning of Section 2). That is, the liability issue (apart from the question of causation) was not broken down into a series of questions, from the answers to which the judge might have determined the judgment. Thus the district court found it necessary, in a bundle of instructions, to explain to the jury its duty, for example, [**26] first to address whether there had been a *per se* violation and, only if the jury decided that question negatively, then to address whether there had been a violation under the rule of reason.

We commend the use of more precise questions in an antitrust case of this kind.

Once the decision had been made to permit the jury to entertain the *per se* theory, it would surely have been helpful to the jury had the special verdict form embodied a set of fact questions bearing on the *per se* rule and another set bearing on the rule of reason, with a portion of the instructions expressly directed to the *per se* questions, and with an explanation in the verdict form itself that the jury's answers to the *per se* questions would determine whether the jury would be required to answer the rule of reason questions. If so required, the jury could have been told to answer them in the light of another portion of the instructions relating expressly to the rule of reason.

We do not consider it error to have submitted the case in the form of a single all-inclusive question on Section 1 of the Act. But because it was submitted in this manner, we are obliged to examine the instructions [**27] with particular care to determine whether they explained the law not only correctly, but reasonably understandably.

A. *Jury Instructions*

The case presents difficulties, both theoretical and what may be called forensic or rhetorical. It was important that the court's instructions help the jury through both sets of difficulties.

On the theoretical side, the "boycott" which plaintiffs alleged and undertook to prove is surely not within any of the more familiar contexts. However, "boycotts are not a unitary phenomenon." P. Areeda, *Antitrust Analysis* 381 (2d ed. 1974). "In its simplest aspects, HN2[] a boycott . . . is nothing more than an agreement among a number of economic actors to sever or limit [*218] economic relations with another economic actor or actors." Bird, *Sherman Act Limitations on Noncommercial Concurred Refusals to Deal*, 1970 Duke L. J. 247, 248.

Here, the jury was free to find that the services of one medical doctor were interchangeable with the services of other medical doctors; they competed with one another. The services of one chiropractor [**28] were interchangeable with the services of other chiropractors; they competed with one another. The services of a relatively small number of medical doctors were interchangeable with the services of all or nearly all chiropractors; they competed with one another. Superficially at least, the benefits to consumers arising from unrestrained

competition could have been realized without any cooperation between any two medical doctors, between any two chiropractors, between any medical doctor and any chiropractor, or between an enclave of medical doctors and an enclave of chiropractors. The medical doctors, generally, were more than content with the absence of cooperation between two enclaves; the plaintiffs and chiropractors, generally, were not. The chiropractors contend that they would have gained economically had medical doctors referred patients to them, which seems accurate. The chiropractors seem also to contend that they would have gained economically had medical doctors accepted referrals from them, with the professional courtesies of exchanging reports and opinions, so as to permit the chiropractors better to serve their patients; this seems accurate because in the long run [**29] more persons will seek out chiropractors if chiropractic services are perceived to be beneficial. The chiropractors contend that those medical doctors who controlled the defendant medical associations influenced their colleagues to keep the medical doctor enclave intact.

The chiropractors contend that they would have gained economically had there been available to them: hospital facilities, laboratory facilities, X-ray-taking facilities, and the services of radiologists trained in reading X-rays. The chiropractors seem to contend that these facilities and resources were not available to them within their own enclave; that these facilities and resources are to be viewed as standing free of both enclaves; and that it is the members of the medical doctor enclave who caused these otherwise independent facilities and resources to be unavailable to the chiropractors, to the economic disadvantage of the latter.

This is not a case in which it is alleged or shown that the medical doctors, competitors of one another, have combined, for example, to fix the prices they will receive from consumers, and that they have agreed to ostracize or boycott those among them who fail to go along. It [**30] is not a case in which the medical doctors are alleged to have combined to boycott chiropractors in an attempt to coerce the chiropractors to behave in a certain economic manner, such as pricing.

What the antitrust law implications of all this may be for consumers of health care services, as distinguished from chiropractors as a group of health care providers, is difficult to discern. See Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1495-1496 (7th Cir. 1983). In any event, in the absence of partial or plenary summary judgment or directions of verdict, they are implications which arise from facts which it was for the jury to have found, combined with law which it was for the judge to have explained in the instructions.

On the forensic or rhetorical side, as we have already observed, the opening statements, the evidence, and the closing arguments which the jury had heard and seen must have come through as if the jury was being called upon to decide whether in our society it is the medical doctors who are the heroes and the chiropractors the villains, or vice versa.

It is familiar law that [**31] HN3[] we must look to the instructions as a whole, in a common sense manner, avoiding fastidiousness, inquiring whether the correct message was conveyed to the jury reasonably well. Even if we should discern error in one or more instructions, we will not reverse a judgment -- especially after eight weeks of trial [*219] -- unless we are persuaded the jury's understanding of the issues was seriously affected, to the prejudice of the plaintiffs. See, e.g., Beard v. Mitchell, 604 F.2d 485, 498 (7th Cir. 1979).

We are persuaded that from the evidence, the statements of counsel, and the court's instructions, several basic points must have been well understood by the jury. The jury very likely understood that it was called upon to decide whether each of the defendants had agreed with others that the medical doctors would not refer patients to chiropractors and would not themselves consult or cooperate with chiropractors, and that hospitals and X-ray facilities would be placed off limits to chiropractors. If the jury made this finding, it very likely found as well that the boycotters: acted voluntarily and intended to do these things; intended the natural consequence [**32] that significantly fewer persons would consult chiropractors about certain health problems, such as back and neck pains; and were not displeased by the anticipation of this consequence.

But what this jury needed badly to know was whether "within the meaning of Section 1" it made a difference why the defendants had behaved in this intentional manner with this intended consequence. The jury could certainly have found that defendants had behaved in this manner: (1) because they believed that it would permit them to make

more money than they would make if they did not do it; or (2) because they believed they were performing a public service in applying economic pressure to diminish or eliminate the general threat posed by chiropractic to public health, safety and welfare; or (3) because defendants respected scientific method as the basis for diagnosis and treatment and were unwilling to risk the health and lives of their patients by associating professionally in the care of patients with persons who (so defendants thought) do not share respect for scientific method; or (4) because of some combination of (1), (2) and (3). For brevity and convenience, we will refer to (1) as a money [**33] motive, (2) as a public interest motive, and (3) as a patient care motive.

The jury needed to know whether it should answer the verdict question yes or no if it found that a defendant's motive had been money alone, public interest alone, or patient care alone. It needed to know whether to answer yes or no if it found that a defendant had entertained two or all three motives, and, if so, whether it is legally significant that one motive was more powerful than another.

1. *Per se instructions*

Over defendants' objection, the court granted plaintiffs' request that the jury be permitted to decide whether there had been a *per se* violation of [Section 1](#) and, if not, then to apply the rule of reason in determining whether a violation had occurred. We have sustained a judgment for a plaintiff based upon a verdict by a jury which was permitted to proceed in this manner. [Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 827 \(7th Cir. 1978\)](#), cert. denied 440 U.S. 930, 59 L. Ed. 2d 486, 99 S. Ct. 1267 (1979). However, [HN4](#)[] before the jury is freed [**34] to find a *per se* violation, the trial court must determine that there is evidence from which the jury may find that the defendants engaged in certain conduct -- for example, a horizontal agreement among competitors to fix prices charged to consumers -- which conduct, the court (not the jury) must decide, constitutes a *per se* violation. In such a case, it must be explained to the jury that its function is to decide whether certain conduct, described with precision in the instruction, did or did not occur. It must be explained, also, that if the jury finds that the described conduct did occur, it must also find, without further factual inquiry, that [section 1](#) was violated. In this important respect, the verdict as to a *per se* violation must be controlled by the court.

We will assume for a moment that in the present case there was evidence of conduct which constituted a *per se* violation of [section 1](#) and, on that assumption, inquire whether the jury was properly instructed as to its function.

The jury was instructed that:

[*220] (1) To establish *per se* unlawfulness, plaintiffs were obliged to show: (a) that defendants entered into "a concerted refusal [**35] to deal, engaged in by the participants primarily or in large part for the purpose of excluding competitors from the market"; and (b) "that the primary motivations for this refusal to deal were essentially commercial or economic in nature."

(2) Not all concerted refusals to deal are group boycotts of the kind the law deems *per se* unlawful. Those "that are of a noncommercial nature or character, ones that do not include among their principal aims the economic purpose of excluding competitors, may be lawful or unlawful depending on their reasonableness."

(3) "If you find that any of the boycott conspiracies which plaintiffs have alleged were entered into to contain or eliminate chiropractors or to injure them in their ability to compete, . . . you may not consider whether the resulting restraint of trade was reasonable or unreasonable. Conspiracies are illegal. However, if you find that the conspiracies existed, but not for the specific purpose of excluding chiropractors from the market or injuring them in their ability to compete, then you must determine whether the agreements imposed an unreasonable restraint on trade." ⁸

⁸ "Conspiracies are illegal" is taken from the reporter's transcript of the instructions as read by the trial judge. It is clear from the joint appendix that the judge intended to say: "The conspiracies are illegal." Whether the error was his or the reporter's, we are sure that the jury understood the reference to be to the kind of conspiracies described in the immediately preceding sentence.

[**36] The third of these instructions, including the use of the word "purpose" rather than "intent," resembles closely an instruction requested by the plaintiffs themselves, but the first and second were inconsistent with plaintiffs' requests.

Still assuming that from the evidence the jury could have distilled conduct on the part of one or more of the defendants which did indeed constitute *per se* violation, the instructions were faulty in two major respects. First, unfairly to the defendants, the instruction failed to describe with sufficient precision the conduct which, if the jury found it to have occurred, constituted a *per se* violation. Second, unfairly to the plaintiffs, the instruction created a strong impression that conduct which would otherwise constitute a *per se* violation escapes that categorization if the "public interest motive" was the "primary" or "principal" motive.

As to the first point, the active role imposed upon the trial judge with respect to the concept of *per se* violations demanded that the jury be instructed that only if it found that a particular defendant had done A, B, C, and D, could it proceed to find that such conduct constituted a [**37] *per se* violation. But the only descriptions provided this jury were "a concerted refusal to deal" and "any of the boycott conspiracies which plaintiffs have alleged." We appreciate that elsewhere in the instructions, the elements of the alleged concerted refusal to deal were described (for example, refusal to refer patients, denial of access to hospitals, closing doors of educational programs). But the *per se* rule is extraordinarily severe and it was necessary for the jury to know whether it became operative only if the jury found that a particular defendant participated in all of the alleged misconduct or if it found participation in some but not all of the alleged misconduct. No guidance was provided in this respect.

As to the second point, taken together and taken in the context of all of the instructions, the jury was plainly led to believe that if the money motive was present but was not "primary" or "principal," even the most classical anti-competitive conduct would not constitute a *per se* violation. The jury may well have found that a generalized public interest motive was dominant with one defendant or another. If so, the jury was required by the [*221] [**38] instructions to withhold the *per se* violation label even from conduct -- comparable to horizontal price-fixing, for example -- to which the label would otherwise clearly attach. This was error. [Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 \(1982\)](#); [National Society of Professional Engineers v. United States, 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 \(1978\)](#).

It can fairly be said that the Supreme Court of the United States has been persistent and firm in its support of the *per se* doctrine. Since the trial of the case before us, the Court has pointedly described and endorsed its virtues. [Arizona v. Maricopa County Medical Soc., 457 U.S. at 342-348](#). Also, it is now firmly established that the [HN5](#)[↑] members of learned professions and their professional associations are within the terms of [Section 1](#) of the Sherman Act. [Id. at 348-349](#); [Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 \(1975\)](#). Nor are the duration and depth of the [**39] judiciary's experience with the health care industry too little to permit application of the *per se* rule to a particular device, such as price-fixing, the anti-competitive effects of which have long been recognized. [Arizona v. Maricopa County Medical Soc., 457 U.S. at 349-351](#). Moreover, as recently as in [Arizona v. Maricopa County Medical Soc.](#), a price-fixing case, the Court quoted approvingly this language from [Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#): "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." [457 U.S. at 344, n. 15](#).

Nevertheless, we conclude that in the present case, the trial court should not have acceded, over defendants' objection, to plaintiffs' request that the jury be afforded the option to find a *per se* violation. It follows that any error in the *per se* instructions which was disadvantageous to plaintiffs was not prejudicial.

We reach this conclusion because we reject the assumption, in which we have indulged for the purpose [**40] of analysis, that facts could have been distilled by the jury from this record which would constitute a *per se* violation, and because the evidence of the "patient care motive" required that rule of reason analysis be applied.

This court has recently recognized in [United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 787-90 \(7th Cir. 1981\)](#) (*en banc*), "that [HN6](#)[↑] boycotts are illegal *per se* only if used to enforce agreements that are themselves illegal *per se* -- for example price-fixing agreements." [Marrese v. American Academy, 706 F.2d at 1495](#).

As we have observed, one of the peculiarities of the boycott which plaintiffs alleged and undertook to prove was that it was not used to compel either medical doctors or chiropractors to engage in certain economic behavior vis-a-vis consumers, such as price-fixing. The evidence was that the compulsion to be exerted upon medical doctors, hospitals, X-ray facilities, and laboratories through the conspiracy, if the jury found there was such intended compulsion, was to engage in the boycott itself, and [**41] not to exert, through the boycott, compulsion upon any one to do or to refrain from doing anything else. Particularly when a conspiracy of this sort is alleged in the context of a profession, the nature and extent of its anticompetitive effect are too uncertain to be amenable to *per se* treatment, as contrasted with treatment under the rule of reason.

Moreover, assuming the case were otherwise amenable to *per se* treatment, the presence of substantial evidence of motive (3) -- the "patient care" motive -- rendered the case inappropriate for *per se* treatment. In discussing the instructions on the rule of reason, we will comment further on the legal significance of the patient care motive. For the present, we note that in *Goldfarb, 421 U.S. at 788, n. 17, National Society of Professional Engineers v. United States, 435 U.S. at 696 (1978)*, and *Arizona v. Maricopa County Medical Soc., 457 U.S. at 348-349, [*222]* the Court has taken pains to preserve the possibility that a particular practice which could be viewed as a violation of the Sherman Act in another context, should be viewed and treated differently in the [**42] circumstances peculiar to a learned profession. We know from *Professional Engineers* and *Maricopa County* that an agreement to fix prices will not escape *per se* treatment simply because it is entered into by professionals and accompanied by ethical protestations. But a canon of medical ethics purporting, surely not frivolously, to address the importance of scientific method gives rise to questions of sufficient delicacy and novelty at least to escape *per se* treatment.

2. Rule of reason instructions

A famous articulation of the rule of reason appears in *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 [**43] 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.

In *National Society of Professional Engineers v. United States, 435 U.S. at 691*, referring to *Chicago Board of Trade*, the Court stated that for sixty years it had "adhered to the position that HN7[↑] the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."

Plaintiffs in the present case requested a rule of reason instruction which stated plainly that: the rule focuses directly on the challenged restraint's impact on competition; the question is whether the agreement merely regulates and thereby promotes competition or is such as may injure or suppress or even destroy competition; and a restraint is not illegal if on balance it promotes competition or [**44] has no effect upon competition, but is illegal if on balance it suppresses or injures competition. The trial court declined to give this instruction, and it gave the following instructions on the rule of reason as the jury was to apply it in this case:

One of the factors to be considered in determining whether any agreement in restraint of trade is unreasonable is whether it has or is likely to have unreasonable effects. The law is not concerned with restraints of trade that are not anticompetitive in purpose unless they also have a substantial adverse effect on the marketplace.

One of the factors you should consider in judging reasonableness is the effect of the defendants' practices on competition, if any, that exists between chiropractors generally and medical doctors. You have been instructed

as to the definition of the term "competition" in an antitrust case such as this, and you must keep that definition in mind when considering whether there was any effect on competition.

If you find from the evidence that defendants engaged in activities, meaning direct, private activities, as distinguished from governmental activities, which have had a substantial effect in preventing [*45] chiropractors from offering services which are reasonably interchangeable by consumers for the same purposes as the services offered by medical doctors, that would be an element weighing on the side of unreasonableness. If, on the other hand you find from the evidence that the defendants' activities did not have any substantial effect in preventing chiropractors [*223] from offering such services as licensure permits, that would be an element weighing on the side of the reasonableness of the defendants' activities.

If you find that the conduct complained of on the part of the defendants was not so motivated by economic considerations that it amounted to a per se violation of the antitrust statutes, you then must consider whether the actions of those defendants in agreeing to adopt and enforce certain ethical standards or principles as a means of eliminating or preventing associational activities between chiropractors and medical doctors had the effect of unreasonably restraining the trade of chiropractors.

In this regard, it is a proper function of professional associations to formulate and express principles concerning desirable standards of professional conduct and service. [*46] This is so because such principles may benefit the public by raising professional standards generally, and by helping to insure that the profession merits the trust that the public necessarily places in its members. Such principles also assist members of the profession by giving them guidance as to generally accepted standards of conduct in their profession.

In judging whether a particular professional standard in operation produces an unreasonable restraint of trade, it is necessary to consider the genuineness of the justification advanced in support of the standard, the reasonableness of the standard itself, the manner of its enforcement, and the effects of it on the relevant area of trade or commerce.

The fact that an ethical standard which affects the conduct of one profession, such as medical doctors, may also have an indirect effect on the activities of another profession, such as chiropractors, does not alone mean that it amounts to an unreasonable restraint of trade. Rather, the determination to be made is whether, as a consequence of the operation of that standard, there has been a cognizable adverse effect on the public interest in the sense that the opportunity of [*47] chiropractors to provide services they are licensed to provide and the opportunity of the public to receive those services has been unreasonably impaired or obstructed.

You are further instructed that chiropractors have been given the right by law to carry on their practice and to engage in the treatment of patients, subject to whatever legal limits are placed on their licenses. The question of whether chiropractic poses an impermissible hazard to the health and welfare of the public is one for the Congress and/or the state legislatures to resolve, not the defendants or other private persons or groups. Because those legislative entities alone have the authority to determine whether chiropractors should be permitted to offer their services to the general public, the law will not allow their decision to be overturned.

It is a different question, however, whether members of the medical profession may limit their own relationships with chiropractors for the purpose of practicing their own profession according to standards they consider necessary or desirable for the proper practice of medicine. As I have already instructed you, reasonable ethical principles having that objective [*48] and not aimed at barring the practice of chiropractic within the limits allowed by state licenses may be lawful if they do not, in operation, also have a significant and unnecessarily adverse effect on the chiropractors' ability to carry on their trade. You may, therefore, consider as bearing on the reasonableness of the defendants' purposes what the evidence shows to be the depth and sincerity of their beliefs that the sharing of responsibility by doctors with chiropractors poses substantial hazards to the welfare of patients and the public welfare.

Plainly the instructions as given failed to convey that the single standard is whether the challenged agreement is one that promotes competition or one that suppresses competition.

[*224] It is true, as defendants argue on appeal, that the instructions as given include the following points:

"One of the factors to be considered in determining whether any agreement in restraint of trade is unreasonable is whether it has or is likely to have unreasonable effects One of the factors you should consider in judging reasonableness is the effect of the defendants' practices on competition, if any, that exists between [**49] chiropractors generally and medical doctors." If the jury were to find that defendants' activities had had a substantial effect on the chiropractors' ability to compete, "that would be an element weighing on the side of unreasonableness." The determination to be made is whether "there has been a cognizable adverse effect on the public interest in the sense that the opportunity of chiropractors to provide services they are licensed to provide and the opportunity of the public to receive those services has been unreasonably impaired or obstructed." It is for legislative bodies alone to decide whether chiropractic should be permitted; they have decided that it should; "the law will not allow their decision to be overturned." Even ethical principles limiting the relationships of medical doctors with chiropractors for the purpose of protecting the medical doctors' own profession, and not aimed at barring the practice of chiropractic within the limits licensed by the state, are unlawful if, in operation, they "have a significant and unnecessarily adverse effect on the chiropractors' ability to carry on their trade."

The passages just summarized include every portion of the instructions [**50] which might be thought to approximate an instruction that the single standard is whether the challenged agreement merely regulates and perhaps thereby promotes competition or is such as may suppress or even destroy competition. In a case in which a "public interest motive" has not been made the centerpiece of the defense, an indulgent appellate court might conceivably decide that this portion of the instructions sufficiently approximated the single standard. But surely in the context of the present case, this is not possible. To instruct that "the effect of the defendants' practices on competition" is "one" of the factors in judging reasonableness and that "a substantial effect in preventing chiropractors from offering services" in competition with medical doctors is "an" element weighing on the side of unreasonableness is unmistakably to suggest that the jury was free, even obliged, to weigh factors unrelated to impact on competition. The expression "unnecessarily adverse" can mean only that an adverse effect on competition may be "reasonable," within the meaning of the rule of reason, if there is a necessity for it arising from some value unrelated to free competition.

Any [**51] possibility that the instructions as given sufficiently approximated the single standard of promoting or suppressing competition is dispelled by other portions of the instructions on the rule of reason. After being told of the importance of ethical canons in raising professional standards generally and in insuring that public trust in the members of the profession is merited, the jury was instructed that in judging whether a particular professional standard, in operation, produces an unreasonable restraint of trade, it was "necessary to consider the justification advanced in support of the standard, the reasonableness of the standard itself, the manner of its enforcement," as well as "the effects of it on the relevant area of trade or commerce." Again, the implication is unmistakable: the "reasonableness" of the standard, in terms of values unrelated to free competition (in this case, generally raising the standards of the medical profession and insuring that the public trust in that profession is merited), is a factor which it is "necessary" for the jury to consider in addition to its consideration of the standard's effects on competition.

We appreciate that in the classic exposition [**52] in *Chicago Board of Trade*, it was said that facts relevant to the test of promotion or suppression of competition include: "the history of the restraint, the evil believed to exist, the reason for adopting the [**225] particular remedy, [and] the purpose or end sought to be attained" 246 U.S. at 238. But the Court followed this observation immediately with the statement that "this is not because a good intention will save an otherwise objectionable regulation, . . . but because knowledge of intent may help the court to interpret facts and to predict consequences." *Id.* We understand this to mean that it is effect or consequence which controls, not intent or motive. In ascertaining effect or consequence, it is useful to determine the setting in which the restraint was adopted and the effect or consequence which its instigators anticipated. An anticipated effect on competition may be somewhat more likely to have emerged as the true effect than an unanticipated effect. But in a claim for damages (as contrasted with injunctive relief), the true effect, as it has emerged, is the critical and sole factor.

On this appeal, defendants stoutly insist that [**53] the references in the instructions to the "genuineness" of the justification advanced in support of the standard, the "reasonableness" of the standard itself, and the "depth and

sincerity" of defendants' beliefs about chiropractic, were all clearly subordinated to the inquiry blessed in *Chicago Board of Trade*. That is, as we understand the contention, defendants refrain, on this appeal, from disputing that the effect on competition is the single test. They contend that in determining that effect, it is useful to inquire into what the instigators anticipated the effect on competition would be; inquiry into that anticipation includes inquiry into the instigators' "reason for adopting the particular remedy" and the "purpose or end sought to be attained" by them; inquiry into what their true (as contrasted with pretextual) "reason," "purpose" or "end" may have been, in turn, may be affected by ascertaining their "genuineness," the "depth and sincerity" of their beliefs, and the "reasonableness" of the means they chose.

Conceivably, an instruction which explained this tortuous sequence might pass muster, but the instructions as given fail utterly to explain in understandable language [**54] the severely limited function of the inquiry, sanctioned by *Chicago Board of Trade*, into the reason for adopting the ethical canon and the purpose or end sought to be attained by it.⁹

[**55] In short, the instructions given cannot be defended successfully as an adequate approximation of a rule of reason test geared simply, clearly, and exclusively to the question whether the challenged conduct promoted or suppressed competition between medical doctors and chiropractors. We cannot escape the conclusion that in the district court, defendants flatly resisted the test geared exclusively to effect on competition and sought a modification which affords recognition to values other than those associated with unrestrained competition. The district court acceded to these urgings. From the jury's viewpoint, the result was ambiguity, an uncertain trumpet.

The judgment must be reversed unless: (1) the district court and we are free to modify the rule of reason test in this case involving Principle 3 of the AMA Principles of Medical Ethics; and (2) despite their ambiguity, the instructions adequately expressed the permissible modification, without prejudice to the plaintiffs' proper interests. We hold that the district court and [*226] we are free to modify the rule of reason test in a case involving a certain kind of question of ethics for the medical profession, but that [**56] the instructions as given failed to express a permissible modification and that prejudice to the plaintiffs resulted.

As we have noted, in the course of its relatively recent application of the Sherman Act to the professions, including the medical profession, the Supreme Court has been markedly careful to preserve the courts' freedom to discriminate between nonprofessional and professional activities, in construing and applying the Act. [HN8](#) [↑] "The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently . . ." [*Goldfarb v. Virginia State Bar*, 421 U.S. at 787, n. 17](#). "By their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary." [*National Society of Professional Engineers v. United States*, 435 U.S. at 696](#). It is true that in *National Society of Professional Engineers*, the theme from *Goldfarb* was [**57] echoed in a context in which the Court was emphasizing the narrow limits of the theme and was making clear that even in the setting of the profession of engineering, even in the face of a possibly accurate contention that the consequence of competitive bidding would be corner-cutting dangerous to the users and consumers of products, "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* Moreover, in [*Arizona v. Maricopa County Medical Society*, 457 U.S. 332 \(1982\)](#), the Court held it not only a violation of the rule of reason, but a *per se* violation, for medical doctors to agree upon maximum fees that they might claim in full payment for health services provided to

⁹ Defendants explain that the phrases "genuineness of the defendants' justification" and "reasonableness of the standards themselves" were drawn from [*Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 \(5th Cir. 1978\)](#), cert. denied, 444 U.S. 924, 62 L. Ed. 2d 180, 100 S. Ct. 262 (1979). An abortion clinic claimed, among other things, that the defendant medical doctors had conspired to boycott it, and the district court granted defendants' motion for summary judgment. In reversing in part, the court of appeals commented that even if defendants' efforts to enforce professional standards were to be tested by the rule of reason, rather than the *per se* rule, factual issues remained "as to the genuineness of the defendants' justification, the reasonableness of the standards themselves, and the manner of their enforcement." *Id. at 547*. The Fifth Circuit's choice of words in its cryptic dealing with this summary judgment question cannot fairly be accorded the immense significance attributed to it by defendants in the context of the case before us.

policyholders of specified insurance plans, despite the doctors' contention that the agreement facilitated the successful marketing of an insurance plan in which the participating medical doctors had no financial interest and which apparently was beneficial to consumers.

Conscious of the narrowness of the range of the preserved opportunity for differential treatment of professions and nonprofessions under the Sherman Act, we believe that [**58] the considerations reflected in the AMA's Principle 3 fall within that range. In his concurrence in *National Society of Professional Engineers v. United States*, Justice Blackmun regretted the intimations he found in the Court's opinion that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden by the Act. He expressed the view that flexibility should remain, in the professional context, to "take account of benefits other than increased competition" and to recognize "that there may be ethical rules which have a more than de minimis anticompetitive effect and yet are important in a profession's proper ordering." [435 U.S. at 699-700](#).

In the case at hand, evidence of what we have referred to as the "patient care motive" was that when they enter into a doctor-patient relationship with specific persons, medical doctors believe it is essential to bring scientific method to bear upon diagnosis and treatment. There was evidence of their belief that to collaborate with chiropractors in the care of persons who are patients of the medical doctors is to compromise the application of scientific principles, to violate [**59] the oaths taken by the medical doctors, and to introduce risk to the health and lives of the patients for whom the medical doctors have accepted responsibility. Clearly, an individual medical doctor is free to act on this belief by declining to associate with a particular chiropractor in the care of a particular patient. It seems reasonable that two or three medical doctors, sharing this view and working as a team in the care of a particular patient, would be free to agree, and to act on the agreement, to decline to associate with a particular chiropractor in the care of that patient. The Sherman Act problem in the present case arises from the express embodiment of this viewpoint in a formal set of [*227] ethical principles promulgated by a large association of medical doctors, and by the alleged efforts of that association and kindred associations to give effect to the exclusionary attitude in the setting of hospitals staffed by medical doctors.

If it should be determined eventually in this case that the Sherman Act was violated, that determination should not rest on insistence that the Act is indifferent to, or even hostile to, the value of permitting medical doctors to honor [**60] in their practice what they perceive to be scientific method, or indifferent to or hostile to the value of encouragement, from within the profession, to its members to honor scientific method by declining to associate with those thought to dishonor it. A value independent of the values attributed to unrestrained competition must enter the equation. The reasonableness of any resulting restraint on competition must be determined by a reconciliation of values of differing kinds. Because Congress has for so long assigned such pronounced value to freedom of competition and the Supreme Court has for so long applied the rule of reason so as virtually to exclude other values (except, for example, the value of activity protected by the [first amendment](#)), the adaptation of the rule of reason in the Principle 3 setting should impose a heavy burden on those who would justify conduct having significant anticompetitive effect.

The jury should be instructed in appropriate language to the following effect: The burden of persuasion is on the plaintiffs to show that the effect of Principle 3 and the implementing conduct has been to restrict competition rather than to promote it. If the plaintiffs [**61] have met this burden, the burden of persuasion is on the defendants to show: (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.

We hold that this requirement does not constitute an affirmative defense which must be pleaded. [Fed.R.Civ.P. 8\(c\)](#). We hold, however, that if plaintiffs meet their burden to show that the effect has been to restrict competition, they make a *prima facie* showing that the restraint has been unreasonable, within the meaning of [Section 1](#) of the Sherman Act. Only if the defendants then meet their burden, as described, does their conduct escape condemnation as unreasonable. We commend the use of a special verdict to permit the jury to understand clearly

the nature and sequence of the questions [**62] it must answer, and where the burden of persuasion lies with respect to each question.

In *Silver v. New York Stock Exchange*, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963), the Court recognized a value in the absence of the use of fraudulent techniques within the New York Stock Exchange and recognized that vindication of this value was the dominant goal of the Exchange. Nevertheless, it found that the means chosen to vindicate the value was not the least restrictive available to achieve substantial vindication. Similarly, in *National Society of Professional Engineers v. United States*, the challenged rule of the Society was "grossly overbroad." [435 U.S. at 699-700](#) (Blackmun, J., concurring).

We appreciate that the last paragraph of that segment of the rule of reason instructions we have quoted above bears resemblance to the adaptation of the rule we have discussed. It refers to limitation of relationships with chiropractors for the purpose of practicing medicine according to standards deemed necessary or desirable; to principles having that objective and not the objective of barring chiropractic within its licensed limits; and to the [**63] absence of "a significant and unnecessarily adverse effect on the chiropractors' ability to carry on their trade." However, if any modification [*228] of the single-test rule of reason (promotion versus suppression of competition) is permissible, the modification must be explained to the jury forthrightly and precisely, and in particular the least restrictive means requirement must be set forth more understandably than by the use of the single word "unnecessarily" in the phrase "significant and unnecessarily adverse effect on the chiropractors' ability to carry on their trade."

There is another important respect in which the instructions were inadequate and prejudicial to plaintiffs: they failed to distinguish sharply enough between the "public interest motive" and the "patient care motive."

The patient care motive could explain nothing more than the refusal by the medical doctors, and the hospitals staffed by medical doctors, to associate with chiropractors in the treatment of patients. It could not explain, for example, defendants' efforts to persuade Congress, state legislatures, and federal and state agencies to enact laws and to promulgate rulings to contain or to eliminate [**64] chiropractic. The motive for this "political" activity, the jury must have found, was either the money motive or the generalized public interest motive, or a combination of the two. We will assume, for the moment, that the jury found the political activity to be entirely protected by the [first amendment](#) (see III A3, *infra*). A critical question for the jury was whether defendants conspired to contain and to eliminate chiropractic generally, not only by waging constitutionally protected political warfare, but by waging economic warfare; that is, by engaging in aspects of the alleged boycott not limited to a refusal to associate in the care of specific patients. If the jury found that defendants had indeed engaged in economic warfare against chiropractic generally, beyond a refusal to associate in the care of specific patients, it was important that the jury understand that a generalized public interest motive affords no legal excuse for such economic warfare.

Since at least as early as 1941 when *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703, was decided, it has been clear that [**65] [HNG](#) private persons and entities may not presume to function as "an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." [Id. at 465](#). It is true that medical doctors are better qualified than most members of the public to form an opinion whether chiropractic poses a threat to public health, safety and welfare. They are free to attempt to persuade legislatures and administrative agencies. But a generalized concern for the health, safety and welfare of members of the public as to whom a medical doctor has assumed no specific professional responsibility, however genuine and well-informed such a concern may be, affords no legal justification for economic measures to diminish competition with some medical doctors by chiropractors.

The jury was instructed that chiropractic was lawful within the limits imposed by Congress and state legislatures; that whether chiropractic poses an impermissible hazard to the health and welfare of the public is for Congress and state legislatures to resolve; and not for the defendants; and that the law will not allow the legislative decision [**66] to be overturned. The jury was then told that it is a different question whether medical doctors may limit their own relationships with chiropractors.

Had the jury been instructed that the sole test under the rule of reason was the effect of defendants' conduct on competition and that the jury must disregard evidence both of defendants' public interest motive and of their patient care motive, plaintiffs would have suffered no prejudice, of course. But when the district court ventured to instruct that defendants' concerns with the perceived threat of chiropractic were relevant to the jury's task, it was essential that a line be drawn sharply and unmistakably between evidence of the public interest motive and evidence of the patient care motive. We conclude that such a line was not drawn with sufficient emphasis and clarity.

[*229] We conclude that the instructions to the jury were prejudicially erroneous in two respects. The overriding question in the case was whether, in applying the rule of reason, the jury was to be allowed to consider any factor whatever beyond the effect of defendants' conduct on competition. The district court elected to permit the jury to go beyond [**67] that single test and to consider the defendants' motives. But it failed to confine that consideration sharply to defendants' patient care motive, as contrasted with their generalized public interest motive. And, with respect to the patient care motive, the court failed to convey clearly and understandably the manner in which the jury was to weigh it, particularly as to the least restrictive means requirement.

The verdict and the judgment cannot stand.

3. First amendment

There was evidence of considerable activity on the part of one or more of the defendants directed to winning or defeating bills in Congress and in state legislatures, and other activity directed to federal and state agencies responsible for administering laws in the health care field.

Plaintiffs assert that two instructions on freedom of speech and association labelled all speech and writing as protected by the Constitution, thus suggesting that defendant AMA's ethical canons could not be a basis for finding a Section 1 violation unless the canons were coercively enforced. The instructions at issue were general descriptions of first amendment rights, merely a part of the court's statements on the relationship [**68] between the first amendment and the Sherman Act. Subsequent instructions limited the general instructions on first amendment rights.

HN10 [↑] The *Noerr-Pennington* doctrine extends protection to businesses and other associations when they join together to petition legislative bodies, administrative agencies, or courts for action that may have anticompetitive effects. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961). In *California Transport*, the Court created the "sham" exception to the doctrine:

"[A] pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse [**69] of those processes produced an illegal result, *viz.*, effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

[404 U.S. at 513](#). See also [Otter Trail Power Co. v. United States](#), 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973) (antitrust liability attaches when repetitive lawsuits raising unsubstantial claims evidence goal of suppressing competition). The sham exception exposes fraudulent and illegitimate petitioning activities to Sherman Act prohibitions.

Plaintiffs complain that the court's explanation substantially distorted the *Noerr-Pennington* doctrine and the sham exception by instructing the jury that defendants' advocacy activity directed to legislative and administrative

agencies or bodies was protected if "the defendants undertook such efforts to influence governmental bodies with a sincere purpose to obtain the governmental actions that they sought."

Plaintiffs' contention is without merit. In *Noerr*, the defendants had [**70] conducted a publicity campaign which the plaintiffs claimed was distorted and directed to harming the plaintiffs' public image more than to obtaining legislative action. The Court agreed that the publicity campaign fell "far short of the ethical standards generally approved of in this country." [365 U.S. at 140, 1*230 81 S. Ct. at 531](#). But as long as the defendants "were making a genuine effort to influence legislation," their actions did not violate the Sherman Act. [*Id. at 144*](#). Thus, the trial court's statement in this case properly explained an important aspect of the *Noerr-Pennington* doctrine. See [Federal Prescription Service v. American Pharmaceutical Association, 214 U.S. App. D.C. 76, 663 F.2d 253 \(D.C. Cir. 1981\)](#), cert. denied, 455 U.S. 928, 71 L. Ed. 2d 472, 102 S. Ct. 1293 (1982).

4. Coercive enforcement

Plaintiffs contend the trial court incorrectly instructed the jury that it could not find the requisite agreement unless the ethical canons at issue were coercively enforced.

HN11[] It is not essential [**71] to a conspiracy under the Sherman Act that the conspirators possess or demonstrate their power to carry out their anticompetitive plan. [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224, n.59, 84 L. Ed. 1129, 60 S. Ct. 811](#), (1940). In *National Society of Professional Engineers v. United States*, a provision of the society's code of ethics prohibited members from providing price information to potential clients which would permit the latter to make price comparisons among those performing engineering services. The district court found the society had "actively pursued a course of policing adherence to the competitive bid ban through direct and indirect communication with members and prospective clients," and had "engaged in educational campaigns and personal admonitions to members and clients who were suspected of engaging in competitive bidding practices." [United States v. National Society of Professional Engineers, 389 F. Supp. 1193, 1200 \(D.D.C. 1974\)](#). In Supreme Court argument, the society claimed it had never enforced the ban on competitive bidding. The Court deemed the lower court's finding sufficient to fulfill the § 1 agreement [**72] criterion. [435 U.S. at 684, n. 5](#). In *Goldfarb v. Virginia State Bar*, the Court noted the power the state bar association's ethical opinions on minimum-fee schedules exerted over its members:

[The] opinions threatened professional discipline for habitual disregard of fee schedules, and thus attorneys knew their livelihood was in jeopardy if they did so. Even without that threat the opinions would have constituted substantial reason to adhere to the schedules because attorneys could be expected to comply in order to assure that they did not discredit themselves by departing from professional norms, and perhaps betraying their professional oaths.

[421 U.S. at 791, n. 21](#). Thus, **HN12**[] even without coercive enforcement, a court may find that members of an association promulgating guidelines sanctioning conduct in violation of § 1 participated in an agreement to engage in an illegal refusal to deal.

Plaintiffs' complaint is specifically addressed to two instructions as given. One stated in pertinent part:

In considering the first element [**73] [of a group boycott] -- that is, whether there was an agreement to engage in, or to coerce others to engage in, a concerted refusal to deal with chiropractors -- you should consider what the evidence shows to be the manner and extent of enforcement of the ethical standards involved in the case.

The effect of an ethical principle in restraining trade, if there is any such effect, depends upon the extent to which it actually operates to limit the freedom of persons to whom it is addressed. An ethical standard may serve as a guideline, advice or recommendation to medical doctors, leaving them free to evaluate the principle and to make their own decisions as to what constitutes sound ethical practice. On the other hand, such a rule may be regarded by doctors as a binding rule which they are required in all circumstances to follow. You must

determine, therefore, whether the ethical standards in this case operated only as guidelines or whether they were employed to, and/or [*231] had the effect of, controlling the actions of members of the medical profession.

Another instruction given concerned the liability of defendant AHA, and said: "You may not find the AHA liable [**74] for any action taken against the plaintiffs by individual hospitals in this case unless plaintiffs have proven that those hospitals are members of the AHA and that AHA intentionally coerced or induced that action."

The district court refused to instruct the jury that proof of coercive enforcement was not required, as requested by plaintiffs:

There need be no assurances among the conspirators, either oral or in writing, to the effect that they would adhere to the plan. Nor is it necessary that there exist a coercive mechanism by which the conspiracy may be enforced. It is enough that a mutual understanding was reached, and that the defendants in fact conformed to the arrangement.

The instructions as given were unfortunately ambiguous, but they did not state that coercive enforcement was required. One mentioned enforcement, but did not imply that coercive enforcement action was necessary. Another mentioned coercive enforcement only in the disjunctive: "coerced or induced." Although plaintiffs' proposed instruction correctly states the law, the court did instruct the jury that:

What the preponderance of the evidence in the case must show, in order to [**75] establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

Sufficiently to avoid the necessity of reversal on this ground, this instruction described the nature of the agreement plaintiffs had to prove.¹⁰

5. Apparent authority

Significant evidence bearing on the conspiratorial conduct of JCAH, AHA, and ISMS related to certain employee conduct, which witnesses testified was unauthorized by those organizations. [*236] The district court denied plaintiffs' request for a jury instruction to the effect that an association may be liable for the conduct of employees who have acted with apparent, but not actual, authority. The instruction given stated only that an association is responsible for acts done within the scope of an employee's authority, explaining that the existence of authority may be shown by circumstantial evidence. [American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 \(1982\)](#), decided subsequently to the trial in the case before us, holds flatly that HN13↑ apparent authority is sufficient to support civil antitrust liability on the part of a standard-setting organization. The evidence was sufficient to permit the jury to find that JCAH and AHA -- and ISMS in association with JCAH and AHA -- were standard-setting organizations. The factual record requires us to hold that with respect to defendants JCAH, AHA and ISMS, plaintiffs were prejudiced by the district court's erroneous refusal to instruct the jury on the significance [**77] of apparent authority of employees.

B. Admission of evidence

Even if reversal were not required by reason of error in the jury instructions, we would be obliged to reverse by reason of the ruling receiving in evidence the volume of evidence about the Parker School of Chiropractic and about the plaintiff Bryden's one-time arrangement with a furniture store on the sale of mattresses to Bryden's patients. We would do so with great reluctance, recognizing keenly the difficulties encountered by a trial judge in a trial of this length and complexity. The evidence [*232] was relevant to the genuineness of the defendants' belief that chiropractic is quackery. That is, evidence tending to show that chiropractic is in fact quackery is probative that

¹⁰ Plaintiffs contend, also, that the court failed to instruct on one of their conspiracy theories: namely, that the individual members of each defendant organization conspired among themselves. Although not explicit on the point, the instructions as given (e.g., "plaintiffs . . . have alleged that . . . the defendants and their members have agreed . . .") were sufficient to reveal to the jury that this was one of plaintiffs' theories.

defendants genuinely entertained the belief that it is quackery. But the genuineness of defendants' beliefs on that subject, whatever its proper legal significance in the trial, is a subject that could have been addressed with a less extravagant volume of evidence, and with far less emphasis upon alleged financial greed. The items we have specified created [**78] [HN14](#)[[↑]] such a danger of unfair prejudice and confusion of issues that it was an abuse of discretion not to exclude it under [Fed. R. Evid. 403](#).

C. Unclean hands

Before trial, the district court correctly granted plaintiffs' motion to strike the affirmative defense of unclean hands, thus barring evidence that plaintiffs had themselves violated the antitrust laws. See [Perma Life Mufflers, Inc. v. International Parts Corp.](#), 392 U.S. 134, 139, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968), and [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons](#), 340 U.S. 211, 214, 95 L. Ed. 219, 71 S. Ct. 259 (1951). As the cross-examination of plaintiff Bryden was about to commence, plaintiff's counsel moved for an order barring defendants from inquiring of him about an arrangement Bryden had had with a furniture store for a payment to Bryden when, upon his recommendation, a patient purchased a certain type of mattress. The district court denied the motion on the ground that such testimony would be relevant to the genuineness of defendants' belief that chiropractic is quackery.

On cross-examination, Bryden acknowledged that, without the knowledge of his patients, he had had [**79] such an arrangement with the store. Asked by defendants' counsel whether he considered it ethical, Bryden responded: "It is probably as ethical as MDs owning pharmacies . . ." Apparently to lessen the effect of Bryden's remark, examining defense counsel immediately referred, ambiguously, to a version of AMA's Principles of Ethics, already in evidence, and he suggested that it is unethical for medical doctors to own drug stores. From discussion out of the jury's hearing, it developed that such ownership is not unethical, if patients are not exploited.

Controversy developed with respect both to the mattresses and to the physician-owned drug stores, and eventually the court permitted the testimony about the mattresses to stand, instructed the jury to disregard defense counsel's attempt to describe what the AMA Principles say about physician-owned drug stores, and denied plaintiff's motion for a mistrial. In closing argument, defendants referred to Bryden's involvement in the arrangement "whereby in exchange for their endorsement and promotion of the firm's mattresses, the chiropractors would get a rake-off on each one sold." The trial court refused to give plaintiff's proposed [**80] instruction that unclean hands was not a defense in this case.

For reasons set forth in III B, above, we have concluded that plaintiffs were prejudiced by the volume and nature of the evidence which defendants were permitted to present, impugning the validity of chiropractic and the integrity of chiropractors. We believe that this prejudice could not have been overcome by an instruction to the effect that the clean hands defense was unavailable, and so we refrain from comment whether the failure to give such an instruction was error. Viewed in isolation, however, the episode concerning the mattresses and physician-owned drug stores did not require the district court to grant a mistrial.

D. Reopening of Discovery

Plaintiffs sought to reopen discovery to investigate whether some defendants had attempted to prevent unilateral settlements in this case, contending that such attempts could constitute an independent violation of the Sherman Act. Defendants were granted a protective order barring the discovery. The trial court did not abuse its discretion, especially when discovery had continued for nearly four years and trial was imminent.

[*233] E. Involvement [**81] of JCAH, AHA, ACP, ACS and ISMS

The evidence summarized under "Facts" in part II, above, clearly supports findings that there was considerable communication on the subject of chiropractic between the AMA, on the one hand, and, on the other, each of the five organizations which moved for a directed verdict; that this communication revealed acquiescence by all five organizations in the AMA view that chiropractic is quackery and cultism; that JCAH and AHA cooperated to give practical effect to this view by discouraging hospitals from permitting use of their facilities by chiropractors; that by their direct, formal and significant organizational participation in JCAH and by their own activities, ACP and ACS

endeavored both to discourage hospitals from permitting use of their facilities by chiropractors and to discourage medical doctors from professional association with chiropractors; and that by adopting the AMA Principles of Medical Ethics and by embodying the Principles in its own policy manual, ISMS endeavored to discourage medical doctors from professional association with chiropractors. Had a reasonable jury made these findings, as it would have been free to do, the findings [**82] were sufficient to permit, although not to require, a finding that JCAH, AHA, ACP, ACS and ISMS each knew that concerted action in a scheme was contemplated and invited and that each acquiesced and participated in that scheme. Such a finding would have provided sufficient footing for liability in this civil antitrust action. See *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540, 98 L. Ed. 273, 74 S. Ct. 257 (1954); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-227, 83 L. Ed. 610, 59 S. Ct. 467 (1939). The district court did not err in denying the motions for directed verdicts in favor of these five defendants.

F. *The Section 2 Claim*

The plaintiffs' asserted cause of action based on Section 2 of the Sherman Act was somewhat muted at trial and was virtually ignored on this appeal. Because of the rulings we have made on the Section 1 claim, relating to the admission of prejudicial evidence and to the legal significance of apparent authority, we reverse the judgment as to the Section 2 claim. We refrain from expressing an opinion with respect to any other matters as they bear on the Section 1 claim.¹¹

IV. ORDER

The judgment appealed from is reversed and the case is remanded for a new trial.¹¹

End of Document

¹¹ The motion by the Health Care Equalization Committee of the Iowa Chiropractic Society, pursuant to **Federal Rules of Appellate Procedure 27**, for the limited purpose of obtaining access to discovery, is denied.